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

I.T.A. NOS. 39, 40, 41, 42, 43, 44 & 45 OF 2022

ACIT, CIRCLE-1(2), BHUBANESWAR ……..Appellant

.V.

M/s. SERAJUDDIN & CO. KOLKATA ……..Respondent

INCOME TAX ACT, 1961 – Section 153 (D) – The approving authority granted approval U/s.153 (D) in a mechanical manner without application of mind – Whether such process of approval is sustainable? – Held, No – While approving, an elaborate reasons need not be given by the authority but there has to be some indication that the approving authority has examined the doubt orders and finds that it meets the requirement of the law – Mere rubber stamping of the letter seeking sanction by using similar words like 'see' or "approved" will not satisfy the requirements of the law. (Para 22)

Case Laws Relied on and Referred to :-

1. (2008) 14 SCC 151 : Sahara India (Firm,) Lucknow Vs. Commissioner of Income Tax.
2. (2007) 2 SCC 181 : Rajesh Kumar Vs. Deputy CIT.
3. (2021) SCC OnLine Del 3613 : ESS Advertising (Mauritius) Vs. Assistant Commissioner of Income Tax.
4. 2017 SCC OnLine Del 6533 : Principal Commissioner of Income Tax-6 Vs. M/s. N.C. Cables Ltd.
5. (2017) 397 ITR 665 : Yum ! Restaurants Asia Pte. Ltd. Vs. Deputy Director of Income Tax.
6. 2021 SCC OnLine Del 2692 : Syfonia Tradelinks Private Limited Vs. Income Tax Officer.
7. 2006 (1) Maharashtra Law Journal 517 : German Remedies Limited Vs. DCIT.
8. 2004 (165) E.L.T. 257 (S.C.) : Commissioner of Customs Vs. Indian Oil Corporation Ltd.

For Appellant (s) : Mr. Tushar Kanti Satapathy, Sr. Standing Counsel
Mr. A. Kedia, Jr. Standing Counsel

For Respondent (s) : Mr. S. Ganesh, Sr. Adv.
Mr. Gaurav Khanna (In ITA No.39 of 2022)

Mr. Ramesh Singh, Sr. Adv.
Mr. V. Mohapatra (In ITA No.45 of 2022)

Mr. A.K. Parija, Sr. Adv.
Mr. S. K. Sahu (in ITA Nos.40, 41, 42 and 43 of 2022)

Mr. Sidhartha Ray, Sr. Adv. (In ITA No.44 of 2022)

JUDGMENT Date of Judgment 15.03.2023

Dr. S. MURALIDHAR, C.J.

1. These appeals by the Revenue are directed against a common order dated 21st January 2022 passed by the Income Tax Appellate Tribunal (ITAT), Cuttack

Bench, Cuttack in the appeals filed by the Respondent-Assessee and the Revenue against separate orders of the Commissioner of Income Tax (Appeals) [CIT(A)], Bhubaneswar dated 28th February 2013 for the assessment years (AY) 2003-04 to 2006-07; dated 19th February 2013 for the AY 2007-08; dated 28th January 2013 for the AY 2008-09 and dated 5th February 2013 for the AY 2009-10, respectively, in the matter of assessment under Sections 143(3)/144/153A of the Income Tax Act, 1961 (Act).

2. While admitting the present appeals on 4th August 2022, the following question was framed for consideration:

> "Whether on the facts and circumstances of the case, the ITAT was correct in holding that the Approving Authority has not applied his mind for giving approval under Section 153D?"

3. The background facts are that a search and seizure operation under Section 132 of the Act was conducted in the case of the Assessee and various persons and concerns of the Assessee on 28th May, 2008. Notice dated 11th March 2010 under Section 153A of the Act was served on the Assessee. Notices under Section 142 (1) of the Act dated 19th May 2010 and reminders dated 1st July and 21st July 2010 were also issued. On 30th December 2010, the Assistant Commissioner of Income Tax (ACIT) Circle-1(2), Bhubaneswar (hereafter, the Assessing Officer-AO) passed assessment orders under Section 143(3)/144/153A of the Act making various additions/disallowances.

4. The Assessee then filed appeals before the CIT (A). One of the grounds for challenge was the non-compliance with Section 153D of the Act which requires prior approval of the Additional Commissioner of Income Tax (Additional CIT). The stand of the Revenue was that such approval had been sought by the AO and granted by the Additional CIT prior to the passing of the assessment order.

5. By an order dated 28th February 2013, the CIT (A) partly allowed the appeals. The CIT (A), however, held that it is not necessary that the fact of approval of the Additional CIT was required to be mentioned in the body of the assessment order. The CIT (A) observed that there was a consolidated approval order dated 30th December 2010 given by the Additional CIT for AYs 2003-04 and 2009-10 and therefore, this ground had no merit.

6. The Assessee filed further appeals before the ITAT contending that the guidelines contained in Circular No.3 of 2008 dated 12th March 2008 issued by the Central Board of Direct Taxes (CBDT) had not been followed. It was further contended by the Assessee that the so-called approval of the Additional CIT under Section 153D of the Act had been granted in a mechanical manner without application of mind. Reference was made to the letter dated 29th December 2010 of the AO addressed to the Additional CIT Range-1 seeking approval under Section 153D of the Act and the letter dated 30th December 2010 of the Additional CIT

addressed to the AO communicating the approval. Reference was also made to the decision dated 29th November 2019 of the ITAT in IT (SS) A Nos. 66 to 71/CTK/2018 (***Dillip Construction Pvt. Ltd. v. ACIT***) which held the guidelines contained in the aforementioned Circular to be mandatory and binding on the Department.

7. The ITAT has, in the impugned order, referred to the decision of the Bombay High Court in ***Akil Gulamali Somji*** and other decisions of the ITAT to come to the conclusion that the approving authority did not apply his mind to the relevant assessment records or to the draft assessment orders prior to granting approval to the AO under Sections 143(3)/144/153A. The assessment orders were accordingly set aside. As a result, the cross appeals of the Revenue were held to be infructuous and disposed of as such.

8. Mr. T.K. Satapathy, learned Senior Standing Counsel for the Revenue made the following submissions:

> (i) In the present case, prior approval had in fact been taken by the AO from the Additional CIT and there was no illegality in that regard.
>
> (ii) The approval of the superior officer was distinct from the assessment order. It was a mere administrative order and not open to challenge before a court of law. In other words, it was submitted that the approval granted by the Additional CIT was not justiciable and could not form the basis for challenging the assessment order.
>
> (iii) What could only be challenged is want of sanction. Reliance was placed on the decision of the ITAT, Mumbai in ITA No.3874/ Mumbai/2015 (***Pratibha Pipes & Structural Limited v. DCIT***).
>
> (iv) There was no requirement for any hearing to be given to the Assessee by the supervisory officer prior to giving approval although Clause-9 of the Manual of Office Procedure stipulates it. This, therefore, cannot be said to be mandatory. Reliance was placed on the decisions of the Karnataka High Court in ***Gopal S. Pandit v. CIT 96 taxmann.com 233*** and ***Rishab Chand Bhansali v. DCIT 267 ITR 577*** and of the Madras High Court in ***Sakthivel Bankers v. ACIT 255 ITR 144*** which were all in the context of Section 158 BG of the Act.
>
> (v) The mere irregularity in granting approval in the context of Section 158BG of the Act was held not to be fatal to the assessment order. Reliance was placed on the orders of the Kolkata ITAT in ***Shaw Wallace & Co. Ltd. v. ACIT, 68 ITD 148*** and of the Delhi ITAT in ***Kailash Moudgil v. DCIT, 72 ITD 97***. Reliance was also placed on the decision of the Karnataka High Court in ***Gayathri Textiles v. CIT, 111 taxman 123*** where it was held that for the purpose of Section 271 (1) (c) of the Act, the failure to obtain prior permission from the IAC for imposing penalty was only a procedural error and not fatal to the order of penalty.
>
> (vi) Since the entire documents were already available to the Additional CIT in the file sent for approval, there was no need for exchange of the said documents prior to the grant of formal approval under Section 153D of the Act.
>
> (vii) Lastly, it was submitted that even if there had been a violation of the principles of natural justice, unless prejudice were shown by the Assessee, no interference with the assessment orders was warranted. Reliance was placed on the decisions in ***Dharampal***

Satyapal Limited v. Deputy Commissioner of Central Excise Gauhati (2015) 8 SCC 519; Managing Director, ECIL v. B. Karunakar (1993) 4 SCC 727; Haryana Financial Corporation v. Kailash Chandra Ahuja (2008) 9 SCC 31; State Bank of Patiala v. S.K. Sharma (1996) 3 SCC 364; P.D. Agrawal v. State of Bank of India (2006) 8 SCC 776 and ***State of U.P. v. Sudhir Kumar Singh.*** It was then submitted that where initiation was valid but completion was not correct, the order may not be invalid but only irregular because the intervening irregularity is a curable one. Reliance was placed on the decision of the Kerala High Court in ***Panicker (CGG) v. CIT, (1999) 237 ITR 443*** and ***CIT v. M. Krishnan (N) (1999) 235 ITR 386.*** It was submitted that mere technicality should not defeat justice.

9. On behalf of the Assessee submissions were made by Mr. Ramesh Singh, Senior Advocate; Mr. Sidhartha Ray, Senior Advocate; Mr. Ashok Kumar Parija, Senior Advocate as well as Mr. S. Ganesh, Senior Advocate. They drew attention of the Court to the relevant clauses of the CBDT Circular dated 12th March 2008 and the decisions in ***Sahara India (Firm,) Lucknow v. Commissioner of Income Tax (2008) 14 SCC 151; Rajesh Kumar v. Deputy CIT, (2007) 2 SCC 181*** and the decisions of the Delhi High Court in ***ESS Advertising (Mauritius) v. Assistant Commissioner of Income Tax, (2021) SCC OnLine Del 3613; Principal Commissioner of Income Tax-6 v. M/s. N.C. Cables Ltd., 2017 SCC OnLine Del 6533***; ***Yum ! Restaurants Asia Pte. Ltd. v. Deputy Director of Income Tax, (2017) 397 ITR 665; Syfonia Tradelinks Private Limited v. Income Tax Officer; 2021 SCC OnLine Del 2692*** and ***German Remedies Limited v. DCIT 2006 (1) Maharashtra Law Journal 517.***

10. At the outset, it requires to be noticed that many of the decisions referred to both on the side of the Revenue as well as the Assessee do not directly refer to Section 153D of the Act which was inserted with effect from 1st June, 2007. There is no doubt about the applicability of the said provision since the proceedings under Section 153A of the Act was initiated in the present case after that date.

11. Among the changes brought about by the Finance Act 2007 was the insertion of Section 153D of the Act. The CBDT circular dated 12th March 2008 refers to the various changes and *inter alia* also to the change brought about by the insertion of a new Section 153D of the Act. Paragraph 50 of the said circular is relevant and reads as under:

"50. Assessment of search cases—Orders of assessment and reassessment to be approved by the Joint Commissioner.

50.1 The existing provisions of making assessment and reassessment in cases where search has been conducted under section 132 or requisition is made under section 132A, does not provide for any approval for such assessment.

50.2 A new section 153D has been inserted to provide that no order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner except with the previous approval of the Joint Commissioner. Such provision has been made applicable to orders of assessment or reassessment passed under clause (b) of section 153A in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted under section

> 132 or requisition is made under section 132A. The provision has also been made applicable to orders of assessment passed under clause (b) of section 153B in respect of the assessment year relevant to the previous year in which search is conducted under section 132 or requisitioned is made under section 132A.
>
> **50.3** ***Applicability-*** These amendments will take effect from the 1st day of June, 2007."

12. It must be noted at this stage that even prior to the introduction of Section 153D in the Act, there was a requirement under Section 158BG of the Act, which was substituted by a Finance Act 14 of 1997 with retrospective effect from 1st January 1997, of the AO having to obtain a previous approval of the JCIT/Additional CIT by submitting a draft assessment order following a search and seizure operation.

13. The CBDT issued the Manual of Office Procedure in February 2003 in exercise of the powers under Section 109 of the Act. Para 9 of Chapter 3 of Volume-II (Technical) of the Manual reads as under:

> **"9. Approval for assessment:** An assessment order under Chapter XIV-B can be passed only with the previous approval of the range JCIT/ADDL.CIT (For the period from 30-6-1995 to 31-12-1996 the approving authority was the CIT.). The Assessing Officer should submit the draft assessment order for such approval well in time. The submission of the draft order must be docketed in the order-sheet and a copy of the draft order and covering letter filed in the relevant miscellaneous records folder. Due opportunity of being heard should be given to the assessee by the supervisory officer giving approval to the proposed block assessment, at least one month before the time barring date. Finally once such approval is granted, it must be in writing and filed in the relevant folder indicated above after making a due entry in the order-sheet. The assessment order can be passed only after the receipt of such approval. The fact that such approval has been obtained should also be mentioned in the body of the assessment order itself."

14. The requirement of prior approval under Section 153D of the Act is comparable with a similar requirement under Section 158BG of the Act. The only difference being that the latter provision occurs in Chapter-XIV-B relating to "special procedure for assessment of search cases" whereas Section 153D is part of Chapter-XIV.

15. A plain reading of Section 153D itself makes it abundantly clear that the legislative intent was to be obtaining of "prior approval" by the AO when he is below the rank of a Joint Commissioner, before he passes an assessment order or reassessment order under Section 153A(1)(b) or 153B(2)(b) of the Act.

16. That such an approval of a superior officer cannot be a mechanical exercise has been emphasized in several decisions. Illustratively, in the context of Section 142 (2-A) which empowers an AO to direct a special audit. The obtaining of the prior approval was held to be mandatory. The Supreme Court in ***Rajesh Kumar v. Dy. CIT (2007) 2 SCC 181*** observed as under:

> **"58.** An order of approval is also not to be mechanically granted. The same should be done having regard to the materials on record. The explanation given by the assessee, if any, would

> be a relevant factor. The approving authority was required to go through it. He could have arrived at a different opinion. He in a situation of this nature could have corrected the assessing officer if he was found to have adopted a wrong approach or posed a wrong question unto himself. He could have been asked to complete the process of the assessment within the specified time so as to save the Revenue from suffering any loss. The same purpose might have been achieved upon production of some materials for understanding the books of accounts and/ or the entries made therein. While exercising its power, the assessing officer has to form an opinion. It is final so far he is concerned albeit subject to approval of the Chief Commissioner or the Commissioner, as the case may be. It is only at that stage he is required to consider the matter and not at a subsequent stage, viz., after the approval is given."

17. It is therefore not correct on the part of the Revenue to contend that the approval itself is not justiciable. Where the approval is granted mechanically, it would vitiate the assessment order itself. In ***Sahara India (Firm) Lucknow v. Commissioner of Income Tax*** *(supra),* the Supreme Court explained as under:

> **"8.** There is no gainsaying that recourse to the said provision cannot be had by the Assessing Officer merely to shift his responsibility of scrutinizing the accounts of an assessee and pass on the buck to the special auditor. Similarly, the requirement of previous approval of the Chief Commissioner or the Commissioner in terms of the said provision being an inbuilt protection against any arbitrary or unjust exercise of power by the Assessing Officer, casts a very heavy duty on the said high ranking authority to see to it that the requirement of the previous approval, envisaged in the Section is not turned into an empty ritual. Needless to emphasise that before granting approval, the Chief Commissioner or the Commissioner, as the case may be, must have before him the material on the basis whereof an opinion in this behalf has been formed by the Assessing Officer. The approval must reflect the application of mind to the facts of the case."

18. The contention of the Revenue in those cases that the non-compliance of the said requirement does not entail civil consequences was negatived. Reiterating the view expressed in ***Rajesh Kumar*** *(supra)*, the Supreme Court in ***Sahara India (Firm) Lucknow v. Commissioner of Income Tax*** *(supra)* held as under:

> "**29.** In ***Rajesh Kumar (2007) 2 SCC 181*** it has been held that in view of Section 136 of the Act, proceedings before an Assessing Officer are deemed to be judicial proceedings. Section 136 of the Act, stipulates that any proceeding before an Income Tax Authority shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of Indian Penal Code, 1860 and also for the purpose of Section 196 of I.P.C. and every Income Tax Authority is a court for the purpose of Section 195 of Code of Criminal Procedure, 1973. Though having regard to the language of the provision, we have some reservations on the said view expressed in *Rajesh Kumar's case* (supra), but having held that when civil consequences ensue, no distinction between quasi judicial and administrative order survives, we deem it unnecessary to dilate on the scope of Section 136 of the Act. It is the civil consequence which obliterates the distinction between quasi judicial and administrative function. Moreover, with the growth of the administrative law, the old distinction between a judicial act and an administrative act has withered away. Therefore, it hardly needs reiteration that even a purely administrative order which entails civil consequences, must be consistent with the rules of natural justice. (Also see: *Maneka Gandhi v. Union of India (1978) 1 SCC 248 and S.L. Kapoor v. Jagmohan (1980) 4 SCC 379).*

> **30.** As already noted above, the expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. Anything which affects a citizen in his civil life comes under its wide umbrella. Accordingly, we reject the argument and hold that since an order under Section 142 (2A) does entail civil consequences, the rule audi alteram partem is required to be observed."

19. To the same effect, are the decisions of the Delhi High Court in ***Yum! Restaurants Asia Pte. Ltd. v. Deputy Director of Income Tax*** *(supra)* which dealt with the requirement under Section 151 (2) of the Act for initiating proceedings under Section 147 read with 148 of the Act. It was observed as under:

> **"11.** The purpose of Section 151 of the Act is to introduce a supervisory check over the work of the AO, particularly, in the context of reopening of assessment. The law expects the AO to exercise the power under Section 147 of the Act to reopen an assessment only after due application of mind. If for some reason, there is an error that creeps into this exercise by the AO, then the law expects the superior officer to be able to correct that error. This explains why Section 151 (1) requires an officer of the rank of the Joint Commissioner to oversee the decision of the AO where the return originally filed was assessed under Section 143 (3) of the Act. Further, where the reopening of an assessment is sought to be made after the expiry of four years from the end of the relevant AY, a further check by the further superior officer is contemplated."

20. The non-compliance of the requirement was held to have vitiated the notice for reopening of the assessment. Likewise, in ***Syfonia Tradelinks Private Limited v. Income Tax Officer*** *(supra)* the Delhi High Court disapproved of the rubber stamping by the superior officer of the reasons furnished by the AO for issuance of the sanction.

21. It is seen that in the present case, the AO wrote the following letter seeking approval of the Additional CIT:

> GOVERNMENT OF INDIA
> OFFICE OF THE ASST. COMMISSIONER OF INCOME TAX,
> CIRCLE-1(2), BHUBANESWAR
>
> No. ACIT/C-1(2)//Approval/2010-11/5293
> Dated, Bhubaneswar, the 27/29th December, 2010
>
> To
>
> The Addl. Commissioner of Income-tax, Range-1, Bhubaneswar.
>
> Sub: Approval of draft orders u/s 153D of the I.T. Act 1961 in the case of M/s. Serajuddin & Co. 19A, British India Street, Kolkata (in Serajuddin Group of Cases)-matter regarding.
>
> Sir,
>
> Enclosed herewith kindly find the draft orders u/s 153A of the I.T.Act, 1961 along with assessment records in the case of M/s Serajuddin & Co., 19A, British India Street, Kolkata for kind perusal and necessary approval u/s.153D.

Sl. No.	Name of the Assessee	Section under which order passed	Asst. year
1.	M/s. Serajuddin & Co., 19A, British India Street, Kolkata.	u/s 153A/143(3)/144/145(3)	2003-04
2.	-do-	-do-	2004-05
3.	-do-	-do-	2005-06
4.	-DO-	-DO-	2006-07
5.	-DO-	-DO-	2007-08
6.	-DO-	-DO-	2008-09
7.	-DO-	U/s.143(3)/144/153B(B)/145(3)	2009-10

The above cases will be barred by limitation on 31.12.2010.

Encl: As above

Yours faithfully,

Sd/-
Asst. Commissioner of Income-tax,
Circle-1(2), Bhubaneswar

of the Tribunal itself Government of India
OFFICE OF THE ADDL. COMMISSIONER OF INCOME TAX,
3 Floor, Range-1, Bhubaneswar

No. Addl. CIT/R-1/BBSR/SD/2010-11/5350
Dated, Bhubaneswar, the 30th December, 2010

To

The Assistant Commissioner of Income Tax,
Circle-1(2), Bhubaneswar.

Sub: Approval u/s 153D-in the case of M/s Serajuddin & Co., 19A, British India Street, Kolkata-Matter regarding.

Ref: Draft Orders u/s 153A/143(3)/144 for the A.Y. 2003-04 to 2008-09 u/s.143(3)/153B (b)/144 of the A.Y.2009-10 in the case of above mentioned assessee.

Please refer to the above

The draft orders u/s 153A/143(3)/144 for the A.Y. 2003-04 to 2008-09 and u/s. 143(3)/153B(b)/144 for the A.Y. 2009-10 submitted by you in the above case for the following assessment years are hereby approved:

Assessment Year	Income Determined (Rs)
2003-04	11,66,22,771
2004-05	36,46,80,016
2005-06	65,70,12,805
2006-07	60,02,65,791
2007-08	130,03,13,307
2008-09	274,68.87,069
2009-10	301,17,05,952

> You are requested to serve these orders expeditiously on the assessee, submit a copy of final order to this office for record.
>
> Sd/-
> Addl. Commissioner of Income Tax,
> Range-1, Bhubaneswar

22. As rightly pointed out by learned counsel for the Assessee there is not even a token mention of the draft orders having been perused by the Additional CIT. The letter simply grants an approval. In other words, even the bare minimum requirement of the approving authority having to indicate what the thought process involved was is missing in the aforementioned approval order. While elaborate reasons need not be given, there has to be some indication that the approving authority has examined the draft orders and finds that it meets the requirement of the law. As explained in the above cases, the mere repeating of the words of the statute, or mere "rubber stamping" of the letter seeking sanction by using similar words like 'see' or 'approved' will not satisfy the requirement of the law. This is where the Technical Manual of Office Procedure becomes important. Although, it was in the context of Section 158BG of the Act, it would equally apply to Section 153D of the Act. There are three or four requirements that are mandated therein, (i) the AO should submit the draft assessment order "well in time". Here it was submitted just two days prior to the deadline thereby putting the approving authority under great pressure and not giving him sufficient time to apply his mind; (ii) the final approval must be in writing; (iii) The fact that approval has been obtained, should be mentioned in the body of the assessment order.

23. In the present case, it is an admitted position that the assessment orders are totally silent about the AO having written to the Additional CIT seeking his approval or of the Additional CIT having granted such approval. Interestingly, the assessment orders were passed on 30th December 2010 without mentioning the above fact. These two orders were therefore not in compliance with the requirement spelt out in para 9 of the Manual of Official Procedure.

24. The above manual is meant as a guideline to the AOs. Since it was issued by the CBDT, the powers for issuing such guidelines can be traced to Section 119 of the Act. It has been held in a series of judgments that the instructions under Section 119 of the Act are certainly binding on the Department. In ***Commissioner of Customs v. Indian Oil Corporation Ltd. 2004 (165) E.L.T. 257 (S.C.)*** the Supreme Court observed as under:

> "Despite the categorical language of the clarification by the Constitution Bench, the issue was again sought to be raised before a Bench of three Judges in *Central Board of Central Excise, Vadodara v. Dhiren Chemicals Industries: 2002 (143) ELT 19* where the view of the Constitution Bench regarding the binding nature of circulars issued under Section 37B of the Central Excise Act, 1944 was reiterated after it was drawn to the attention of the Court by the Revenue that there were in fact circulars issued by the Central Board of Excise and Customs which gave a different interpretation to the phrase as interpreted by the Constitution Bench.

The same view has also been taken in *Simplex Castings Ltd. v. Commissioner of Customs, Vishakhapatnam 2003 (5) SCC 528*. The principles laid down by all these decisions are: (1) Although a circular is not binding on a Court or an assessee, it is not open to the Revenue to raise the contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statute.

(2) Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.

(3) A show cause notice and demand contrary to existing circulars of the Board are ab initio bad (4) It is not open to the Revenue to advance an argument or file an appeal contrary to the circulars."

25. For all of the aforementioned reasons, the Court finds that the ITAT has correctly set out the legal position while holding that the requirement of prior approval of the superior officer before an order of assessment or reassessment is passed pursuant to a search operation is a mandatory requirement of Section 153D of the Act and that such approval is not meant to be given mechanically. The Court also concurs with the finding of the ITAT that in the present cases such approval was granted mechanically without application of mind by the Additional CIT resulting in vitiating the assessment orders themselves.

26. The question of law framed is therefore answered in the affirmative i.e., in favour of the Assessee and against the Department.

27. The appeals are accordingly dismissed, but in the circumstances, with no order as to costs.

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2023 (II) ILR - CUT- 346

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

W.A. NOS.239 OF 2018 WITH BATCH
(W.A. NOS.356, 357, 358, 359, 360, 361, 363 & 364 OF 2018)

AZEEZ AHEMAD ……Appellant

.V.

THE TRANSPORT COMMISSIONER -CUM-CHAIRMAN,S.T. A, ODISHA, & ANR. ……..Respondents

ORISSA MOTOR VEHICLES TAXATION ACT, 1975 – Section 4A, as amended w.e.f. 21st November 2017 – Whether the amendment to section 4A of the Act w.e.f. 21.11.2017 applies to "Maxi Cabs" or the same would apply from 1st June1989 itself in the date when section 4A was first introduced ? – Held, there would be two classes of "Maxi

Cabs" one in respect of which the onetime tax will be compulsorily payable and other in respect of which it would be optional – Section 4A(3) of the Act would apply to 'Maxi Cabs' that are registered on or after 21st November 2017, the date of which they were brought within the fold of the OMVT Act – For those registered prior thereto, it would be optional. (Paras 11 &17)

Case Laws Relied on and Referred to :-

1. (1997) 3 SCC 472 : Allied Motors (P) Ltd. Vs. Commissioner of Income Tax.
2. (1997)5 SCC 482 : Commissioner of Income Tax Vs. Podar Cement (P) Ltd.
3. (1998)2 SCC 299 : Doypack Systems Pvt. Ltd. Vs. Union of India.

For Appellant(s) : Mr. Subash Chandra Pani

For Respondents : Mr. Pravakar Behera, Standing Counsel

JUDGMENT Date of Judgment : 15.03.2023

Dr. S. MURALIDHAR, C.J.

1. The present writ appeals are directed against a common judgment dated 20th April 2018 passed by the learned Single Judge dismissing the writ petitions filed by these Appellants.

2. By the impugned judgment, the learned Single Judge rejected the plea of the Appellants that Section 4A of the Orissa Motor Vehicles Taxation Act, 1975 (OMVT Act) as amended with effect from 21st November 2017, would have only prospective operation and the onetime tax payable thereunder would not apply to vehicles that were purchased prior to the date of the amendment. In other words, the learned Single Judge has held the amendment to be clarificatory and therefore, the Appellants would have to pay the onetime tax on the Maxi Cabs owned by them even though these such Maxi Cabs may have been purchased prior to 21st November, 2017.

3. While directing notice to issue in W.A. No.239 of 2018 on 17th May 2018, this Court directed that the impugned judgment shall remain stayed. That interim order has continued since.

4. The background facts are that each of the Appellants as the owner of Maxi Cab passenger vehicle which was registered with the Regional Transport Officer (RTO), Bhubaneswar on various dates between 3rd July 2012 and 21st November, 2017. The tax under the OMVT Act on such vehicles was payable monthly. According to the Appellants, the tax has been regularly paid on that basis.

5. With effect from 1st June 1989, Section 4A was inserted in the OMVT Act. It contains a provision for levy and payment of a one-time tax and read as under:

> "(1) Notwithstanding anything contained in Sections 3 and 4 of this Act, but subject to the other provisions of this section, there shall be levied and paid in respect of every vehicle of the descriptions specified in items 1 and 2 and every Motor Vehicle (being a motor car) covered by items 6 of Schedule-I which is used personally or kept for personal use, onetime tax at the rate equal to ten times the annual rate of tax in respect of thereof as specified in Schedule-I:
>
> Provided that in the case of a vehicle which-
>
> (i) is already on road in State of Orissa, prior to the appointed date; or
>
> (ii) has been purchased or acquired inside or outside Orissa, but brought to Orissa on or after the appointed date; or
>
> (iii) is altered after the appointed date to a motor car for which onetime tax is payable
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> the onetime tax shall be such as may remain after deducting from the usual onetime tax a specified above, one-fifteenth thereof for each completed period of twelve months commencing on the date of initial purchase or acquisition of the vehicle for which tax has been paid in respect thereof but in no case, such tax shall be less than one-tenth of such usual onetime tax.
>
> (2) The levy and payment of onetime tax shall be for the life time of the vehicle in respect of which such tax is paid.
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> (3) The levy and payment of one-time tax shall be compulsory in respect of vehicles registered on or after the appointed date and optional in respect of the vehicles registered prior to that date."

6. Under Section 4 of the OMVT Act, the taxes were to be paid on annual or monthly basis. Section 4A introduced the concept of a one-time tax. This was applicable to vehicles of the description specified in items1 and 2 and every motor vehicle (being motor car) covered by item 6 of Schedule-I which was used personally or kept for personal use. The one-time tax was to be ten times the annual rate of tax in respect of such vehicle. Where the vehicle was already on the road prior to the appointed date, the one-time tax was to be calculated after deducting from the usual one-time tax one fifteenth thereof for each completed period of twelve months commencing on the date of initial purchase or acquisition of the vehicle for which the tax has been paid, but such tax would not be less than one tenth of such usual one-time tax.

7. Section 4A was amended in 1990 by including a motorcar as part of the vehicles to which the one-time tax would be applicable. The list of vehicles was expanded by a further amendment with effect from 25th February, 2005.

8. The last amendment with effect from 21st November 2017 applied specifically to 'Maxi Cabs'. The question that arose before the learned Single Judge concerned the interpretation of the expression "appointed date". The question, in particular, was whether this appointed date would be 1st June 1989 i.e., the date of enactment of Section 4A or the date the amendment/addition made to Section 4A. Relying on the decision in ***Allied Motors (P) Ltd. v. Commissioner of Income Tax***

(1997) 3 SCC 472, the learned Single Judge held that the proviso had to be read as supplying an omission in the main provision and therefore was required to be held retrospective in operation. Reliance was also placed on the decision in ***Commissioner of Income Tax v. Podar Cement (P) Ltd. (1997)5 SCC 482*** which explained the nature of "clarificatory amendments".

9. This Court has heard the submissions of learned counsel for the parties. The short question that arises for consideration is whether the amendment to Section 4A of the OMVT Act with effect from 21st November 2017 in so far as it applies to 'Maxi Cabs' can be said to apply from 1st June 1989 itself i.e., the date when Section 4A was first introduced.

10. The wording of Section 4A (3) of the OMVT Act makes it clear that the levy and payment of the one-time tax was made compulsory only "in respect of the vehicles registered on or after the appointed date". It was 'optional' in respect of the vehicles registered "prior to that date" While it may be correct to contend that the amendment does not change the "appointed date" of the un-amended provision, it cannot be said to apply to vehicles already registered prior to the amendment to Section 4A thereby making it retrospective. It cannot apply to vehicles which were not even on the road on the original appointed date i.e., 1st June 1989.

11. With the legislative intent of creating two classes of vehicles i.e., vehicles registered on or after the "appointed date" and those "registered prior to that date" being clear, the classification has to hold good for every new set of vehicles brought within the ambit of Section 4A of the OMVT Act. Admittedly, 'Maxi Cabs' was bought within the ambit of Section 4A only with effect from 21st November, 2017. The expression "appointed date" has to, therefore, be understood in that context. When so understood, it is plain that there would be two classes of Maxi Cabs one in respect of which the one-time tax will be compulsorily payable and the other in respect of which it would be optional. Section 4A (3) of the OMVT Act would apply to 'Maxi Cabs' that are registered on or after 21st November 2017, the date on which they were brought within the fold of the OMVT Act. For those registered prior thereto, it would be optional.

12. The following observations of the Supreme Court of India in ***Doypack Systems Pvt. Ltd. v. Union of India (1998)2 SCC 299*** are instructive in this regard:

> "It has to be reiterated that the object of interpretation of a statute is to discover the intention of the Parliament as expressed in the Act. The dominant purpose in construing a statute is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context that intention, and therefore, the meaning of the statute, is primarily to be sought in the words used in the statute itself, which must, if they are plain and unambiguous, be applied as they stand."

13. It is also instructive that vis-à-vis 'Maxi Cabs', the authorities continued accepting the monthly tax up to 21st November 2017 as it was clear that the provision of Section 4A was not applicable to such Maxi Cabs. This being a taxing

statute, it admits of only a strict interpretation. Where in a taxing statute the legislative intent is that it should apply from an earlier date, then the words of the statute have themselves to expressly state so. If the plea of the Respondents is to be accepted, then the amendment which came into effect only on 21st November 2017 would have retrospective effect from 1st June 1989, which intention is not expressly reflected in the statute.

14. Clarificatory amendments are in the limited context where there is ambiguity as regards the true legislative intent. It is contrary to the mischief rule i.e., it is only where there is an omission that has sought to be rectified by way of an amendment the question of the amendment being 'clarificatory' would arise.

15. In the present case, there is no 'omission' which was being filled up by way of the amendment with effect from 21st November 2017. It was a conscious decision not to bring Maxi Cabs within the ambit of the one-time tax till the amendment which with effect from 21st November 2017 expanded the ambit of Section 4A (3) of the OMVT Act. The scope and ambit of Section 4A has, as its legislative history depicts, been progressively expanded. This was a conscious decision taken by the legislature and therefore, the amendment with effect from 21st November 2017 by which Maxi Cabs were brought within the ambit of the requirement of compulsory one-time tax in terms of the Section 4A of the OMVT Act, cannot be said to be merely clarificatory.

16. For the aforementioned reasons, the Court is unable to subscribe to the view taken by the learned Single Judge that the amendment to Section 4A of the OMVT Act with effect from 21st November 2017, was merely clarificatory and that the expression "the appointed date" should be taken to be 1st June, 1989.

17. Accordingly, the impugned judgment of the learned Single Judge is hereby set aside. It is made clear that vehicles that were registered prior to 21st November 2017 would fall under the "optional clause" and would not be required to compulsorily pay the one-time tax and would be required to pay the one-time tax only for the period from the date of their respective registrations by applying the optional clause.

18. The writ appeals are allowed in the above terms, but in the circumstances, with no order as to costs.

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2023 (II) ILR - CUT- 351

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

W.P.(C) NO. 13508 OF 2010

MARIA KADAISMA @ KADAISKA @ SALMINA .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 14, 21 & 22(1) to (3) – Aggrieved by the custodial death of the husband, a tribal woman belonging to Kandha tribe approached the Court seeking justice – The plea of Opp.Party that the deceased husband was a part of Maoist group which had planted landmines for which a P.S. case was registered under section 121/121A of IPC r/w section 25 & 27 of the Arms Act and section 3 & 4 of the ES Act/Section 17 of the Criminal Amendment Act – The Opp.Party has not given any convincing explanation in support of their stand that the petitioner's husband while in their custody died out of "natural causes" – Held, the Court is satisfied that the fundamental rights of the petitioner's husband under Articles 14, 21 & 22(1) to (3) of the Constitution have been violated – Consequently the Opp.parties are held liable to pay the family of the deceased for such violation of constitutional rights. (Paras 28-29)

Case Laws Relied on and Referred to :-

1. (1997) 1 SCC 416 : D.K. Basu Vs. State of West Bengal.
2. (1993) 2 SCC 746 : Nilabati Behera Vs. State of Orissa.
3. 2011 (5) AD (Del) 36 : Nina Ranjan Pillai Vs. Union of India.
4. (1987) 4 SCC 104 : Charles Sobraj Vs. Superintendent, Central Jail, Tihar

For Petitioner : Mr. Prasanta Kumar Jena

For Opp. Parties : Mr. Ishwar Mohanty , Addl. Standing Counsel
Mr. P.K. Parhi, Deputy Solicitor General
Mr. B.S. Rayaguru, CGC

JUDGMENT Date of Judgment : 15.03.2023

Dr. S. MURALIDHAR, C.J.

1. Aggrieved by the custodial death of her husband, a woman belonging to the Kandha tribe, a particularly vulnerable tribal group in Rayagada district in Odisha, has approached this Court seeking justice.

2. The incident is stated to have happened on 3rd June, 2010 when the dead body of Pidera Kadaiska, the husband of Petitioner was handed over to the Sarpanch Subash Majhi and Geroge Kadaiska of village Gerengaguda in Rayagada district where the burial took place. The background facts are that the family of the

Petitioner are under the Below Poverty Line (BPL) earning livelihood collecting firewood from forest. It is stated that about a fortnight prior to his death, the Petitioner's husband had gone to Kerala in search of employment and worked in different places in breaking stones and chips.

3. On returning to the village, the Petitioner's husband, accompanied by another tribal person Mandha Majhi of the nearby village of Sarikima, went in search of firewood carrying a country made 'desi gun' which is used to hunt birds, Rabbit and other small animals as was the usual practice of the tribal in the remote forest areas. It appears that when Pidera Kadaiska, the Petitioner's husband, and Mandha Majhi, were in the forest, the Central Reserve Police Force (CRPF) personnel led by Bhanu Shankar Yadav (Opposite Party No.5) of the CRPF Camp at Rayagada were coming from Gudari towards Chandrapur in course of 'naxal' combing operations. Both Pidera and Mandha were caught by them and brought to the Chandrapur Police Station (PS) (Camp). They are stated to have been mercilessly beaten there by the CRPF personnel with the butts of the guns, lathis and kicks.

4. After four days Mandha Majhi was let off as he possessed a valid licence for his *desi* gun. However, Pidera was not. The CRPF did not care to inform his family members or relatives nor was his detention recorded in any book, log, memo or anywhere. On 3rd June, 2010 the Sarpanch of Chandrapur, Subash Majhi, was sent a message by the Inspector-in-Charge (IIC) to come to Chandrapur P.S. urgently. Accompanied by George Kadaiska, a relative of the victim, Subash Majhi went by a bike up to Muniguda from where the IIC, Chandrapur P.S. arranged a jeep for them to be taken to the SP at Rayagada. There the Additional SP informed them at around 11 am of the death of Pidera Kadaiska. The post mortem of the body was conducted in Rayagada itself and the Addl. SP insisted that Subash and George should bury the dead body of the deceased in Rayagada itself and not take the dead body to the village. However, upon insistence of Subash and George, the Addl. SP finally handed over the dead body to them. They then brought Pidera's body to the village for burial as per the traditions of the Tribal-Christian community.

5. Reliance is placed by the Petitioner on a fact-finding report of the People's Union for Civil Liberties (PUCL) which was prepared after speaking to the victim's family members, the villagers, the local Sarpanch Subash, Mandha Majhi and the local media persons at Rayagada. The fact-finding team recorded in their report released on 19th June, 2010 that on the allegation that he was 'maoist', Pidera was caught by the CRPF Jawans on 1st June and brought to Rayagada on 2nd June, 2010. After he complained of stomach ache, he was taken to the hospital where he was received as dead. The PUCL team noted how the SP, Rayagada informed them that between 1st and 2nd June, 2010 Pidera was made to walk about 40 kilometers and that he might have died out of sheer exhaustion. The IIC, Rayagada is stated to have informed the team, on the basis of the post-mortem report, that both sides of the

heart were empty, black colour deposits were found in the lungs, the genitals were swollen and there was a mark of wound (6-7 days) old and 5cm x 2 cm in size on his buttock. At that stage, the immediate cause of death was kept reserved pending receipt of the histo-pathological test report of the viscera. The team was informed that a Magisterial inquiry had been conducted by the Rayagada Tahasildar and a report had been sent to the National Human Rights Commission (NHRC).

6. Pursuant to the notice issued in the present petition on 15th September, 2010 a counter affidavit has been filed by the DSP, Rayagada Sri Prakash Chandra Jena on 22nd September, 2010. It is stated *inter alia* therein that to curb extensive naxalite activities, two Special Operation Group (SOG) teams were deputed to carry out combing operations in Chandrapur and Gudari PS forest areas. During the combing operation near Tagapankal forest area under Chandrapur P.S. limits, some persons were found moving in a suspicious manner on the night of 1st June, 2010. The SOG party chased them in the jungle and were able to apprehend one person who was found armed with a country-made revolver with four rounds of live ammunition. He disclosed his identity as Pidera Kadaiska. On personal search, the operation party is stated to have recovered from Pidera a black haversack containing H.F. wireless set, two maoist banners, two bundles of wire, two detonators and two land mines. The other persons who accompanied him are stated to have escaped from the jungle. During interaction, Pidera is supposed to have confessed to being part of a maoist group which had planted land mines.

7. The SOG party is stated to have returned at 4.30 pm on 2nd June, 2010 to the Headquarters at Rayagada along with the arrested detained persons. The written complainant of OP No.5 was forwarded to the Rayagada PS and Rayagada PS Case No.109 of 2010 was registered under Section 121/121A IPC read with Sections 25 and 27 of the Arms Act and Section 3 and 4 of the ES Act/Section 17 of the Criminal Amendment Act.

8. Pidera is stated to have complained of 'chest pain and uneasiness' at 5 pm and was immediately shifted to the District Headquarter Hospital (DHH), Rayagada by an ambulance where he was declared by the MO as brought dead at 5.20 pm on 2nd June, 2010. An U.D. Case No.10 of 2010 was stated to have registered and was being enquired into by the IIC, Rayagada PS even as of the date of filing of the counter affidavit. An inquest was supposed to have been conducted in the presence of witnesses and the Sarpanch of Chandrapur GP and videographed as per NHRC guidelines. The final report of the doctors conducting the post-mortem (PM) is stated to have been received. After examining the visceral examination report of the F.S.L. Rasulgarh and of the Professor and Head of the Department of Pathology, the M.K.C.G. Medical, Berhampur, the doctors conducting the PM opined that Pidera Kadeska 'died of sudden cardiac arrest', a natural cause of death.

9. In the counter affidavit there is a denial that the Petitioner's husband was brutally tortured and killed while in custody. It is alleged that the deceased-husband of the Petitioner was actively associated with the CPI (Maoist) and involved in the criminal activities with 'top maoist cadres' and had conspired with them to blast the Government properties as well as other vital installations. It is denied that there was any SOG operation on 23rd May, 2010 or that the Petitioner's husband was detained and brutally beaten on that date. It is maintained that he was apprehended on the night of 1st June, 2010 and brought to Rayagada in the afternoon of 2nd June, 2010.

10. Enclosed with the counter affidavit is a copy of the FIR registered against the Petitioner's husband. The report submitted on 2nd June, 2010 by the IIC, Rayagada PS of the combing operation undertaken, the property seizure memo, the inquest report, the PM report, the report of Tahasildar, Rayagada of Magistrial enquiry have also been enclosed.

11. A separate affidavit has been filed by the Deputy Collector (OP No.2) denying that any compensation is payable and contending that such claim was 'misconceived'. It is stated that Rs.5,000/- had been paid on 3rd June, 2010 to the next of kin of the deceased out of the Red Cross Fund towards funeral expenses. It is claimed that there is no provision to provide appointment to a member of the family of the deceased.

12. In the rejoinder affidavit filed, the Petitioner stated that after her husband was brutally tortured and killed on 2nd June, 2010 in custody, she and her five minor children are in starvation. In the rejoinder affidavit, attention is drawn to the injury marks on the glottal region of the deceased as indicated in the PM report. It is pointed out how the PM report notes "abdomen and face scrotum and penis were swollen. Blisters were present in different parts of the body." Further it is also mentioned in column 7(C) of the P.M. report the remarks noted are: "passage of stool from Anus was present. Blood-tinged froth from both the nostrils was present. Tongue was protruded." Under the heading of External Injuries it has been recorded as old heal abrasion over right buttock more than 7 days old of size 5 cm into 2 cm was also found. Under 'internal examination' it was noted that blood-stained fluids were present in the nasal cavities. Further, under the heading 'abdomen-genital organ' it was recorded that "the penis and scrotum were swollen."

13. As regards the possession of cultivable land, the Petitioner states in the rejoinder that Pidera had another brother and two sisters, who are the legal heirs of his father and his share from the parental property is less than an acre. This was why he was forced to move to Kerala to work as a daily labourer in a crusher unit. It is submitted in the rejoinder that a false narrative has been created in the FIR lodged against the Petitioner's husband that he belonged to banned CPI (Maoist) organization and that he was involved in criminal activities.

14. It must be noted at the outset that after 27th June, 2011 the case was listed once on 22nd November, 2012 and thereafter listed only on 14th February, 2023. After hearing the submissions of learned counsel for the Petitioner Mr. Prasanta Kumar Jena and Mr. Ishwar Mohanty, learned Additional Standing Counsel for the OP-State and Mr. P.K. Parhi, learned Deputy Solicitor General along with Mr. B.S. Rayaguru, learned Central Govt. Counsel for the OP No.5 order/judgment was reserved by this Court on the said date.

15. The above narration of facts paints a disturbing scenario. A tribal person, with no means of survival and in search of firewood armed with just country made weapon used for hunting birds and animals, was 'caught' by the CRPF SOG on the presumption that he belonged to the CPI (Maoist) cadre. Except the FIR enclosed with the counter affidavit, and the version of the police, there is nothing which persuades the Court to conclude that there was sufficient material with the Police to infer that the Petitioner's husband belonged to the CPI (Maoist) group or that he was indulging in criminal activities.

16. Be that as it may, the fact remains that even on the showing of the OP No.5 the Petitioner's husband was in their custody from 1st June, 2010 onwards. For detaining a person for alleged criminal activities, the Cr PC provisions applied. This was in the year 2010 by which time the detailed guidelines set down by the Supreme Court in the judgment in ***D.K. Basu v. State of West Bengal (1997) 1 SCC 416*** applied. Nothing is stated in the counter affidavit which would indicate that any of those guidelines were followed. Although there have been numerous instances of custodial deaths which have been dealt with by this Court from time to time, it is as if those judgments have not persuaded the Police to change their habits.

17. ***In Nilabati Behera v. State of Orissa (1993) 2 SCC 746***, the Supreme Court reminded that:

> "It is axiomatic that convicts, prisoners or undertrials are not denuded of their fundamental rights under Article 21 and its is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen o life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the constitution of India cannot be denied to convicts, undertrials or other prisoners in custody, expect according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law."

18. In ***D.K. Basu*** *(supra),* the Supreme Court posed the following queries:

> "Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the

> spinal court of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicted undertrials, detenues and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law."

19. The undeniable facts in the present case are that from the time of his arrest on 1st June, 2010 till he is supposed to have died due to 'natural causes', the Petitioner's husband was in the custody of the CRPF and then the police to whom he was handed over. He was brought dead at the DHH Hospital in Rayagada. Therefore, the death must have happened some time between 1st and 2nd June, 2010, during which time he was very much in the custody of first the CRPF and then the police. The burden is on the police to show that he died due to 'natural causes'. Although the medical report finally submitted by the two doctors appears to support the version of the police, the PM report itself depicts something to the contrary. It reflects that there were injuries on the body of the deceased which required to be satisfactorily explained and which are not consistent with the theory of death due to 'natural causes'.

20. It is unfortunate that the two medical doctors working with the Government have certified the death to be due to 'natural causes' when even to a lay person the PM report indicates the contrary. In this context, the Court would like to refer to the 'The Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 18 December 1982, and particularly Principle 2, which states: "It is a gross contravention of medical ethics… for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment…".

21. It is not a mere coincidence that the deceased tribal person who was tortured to death while in custody after being labelled a maoist with not even an iota of evidence belonged to the poorer sections of the society. He had no one to represent his interests or to give him legal assistance while in custody. The legal system appears to have completely failed him. The mandatory fundamental rights available to an arrested person as spelt out in in Article 22 (1) and (2) of the Constitution of India were violated with impunity in this case first by the CRPF and then the police. Article 22 (1) to (3) which is relevant for this purpose reads as under:

> ***"22. Protection against arrest and detention in certain cases*** .— (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.
>
> (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary

for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention."

22. In ***D.K. Basu (supra)*** where the following detailed guidelines were set out:

"1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

3. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock- up, shall be entitled to have one friend or relative or other person know to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

4. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

5. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next fried of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

7. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

8. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a penal for all tehsils and districts as well.

9. Copies of all the documents including the memo of arrest, referred to above, should be sent to the Ilaka Magistrate for his record.

10. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

11. A police control room could be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be

communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

23. Further, in ***D.K. Basu*** (*supra*) the Supreme Court observed:

"The requirements mentioned above shall be forwarded to the Director General of every State/Union Territory and it shall be their obligation to circulate the same to every police station under their charge and get the same notified at every police station under their charge and get the same notified at every police station at a conspicuous place. It would also be useful and serve larger interest to broadcast the requirements on All India Radio besides being shown on the national Network of Doordarshan any by publishing and distributing pamphlets in the local language containing these requirements for information of the general public. Creating awareness about the lights of the arrestee would in our opinion be a step in the right direction to combat the evil of custodial crime and bring in transparency and accountability. It is hoped and accountability. It is hoped that thee requirements would help to curb, if not totally eliminate, the use of a questionable methods during interrogation and investigation leading to custodial commission of crimes."

24. Following the above decision, the Cr.P.C. was amended to formally incorporate into the statute as Sections 41-A to D the guidelines in ***D.K. Basu*** (supra) which in any event was binding on all authorities under Article 141 of the Constitution. Sections 41A, 41 B and 41 D of the Cr.P.C. read as under:

"***41A. Notice of appearance before police officer.***—(1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.

41B. Procedure of arrest and duties of officer making arrest.— Every police officer while making an arrest shall—

(a) bear an accurate, visible and clear identification of his name which will facilitate easy identification;

(b) prepare a memorandum of arrest which shall be— (i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made; (ii) countersigned by the person arrested; and

(c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest.

41D. Right of arrested person to meet an advocate of his choice during interrogation.— When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation."

25. There is no manner of doubt that irrespective of the Petitioner's husband being labelled as a 'maoist' by the Opposite Parties, and even if he belonged to a 'banned' organisation, his fundamental rights under Article 22 (1) to (3) of the Constitution cannot be said to have been denuded. It is trite that a person is presumed innocent till he is found guilty. The mere suspicion that a person happens to belong to CPI (Maoist) group will not clothe the police with impunity to deal with him in any which way they like.

26. The Delhi High Court in ***Nina Ranjan Pillai v. Union of India 2011 (5) AD (Del) 36*** held as under:

> "The basic minimum right to life and dignity should be available to every prisoner. When that non-derogable minimum standard is breached, the principle of strict liability should be invoked against the jail authorities making them answerable in law for the consequences of such breach."

27. Again in ***Re-Inhuman Conditions in 1382 Prisons (2017) 10 SCC 658***, the Supreme Court observed as under:

> "55. Over the last several years, there have been discussions on the rights of victims and one of the rights of victims and one of the rights of a victim of crime is to obtain compensation. Schemes for victim compensation have been framed by almost every State and that is a wholesome development. *But it is important for the Central Government and the State Governments to realize that persons who suffer an unnatural death in a prison are also victims - sometimes of a crime and sometimes of negligence and apathy or both.* There is no reason at all to exclude their next of kin from receiving compensation only because the victim of an unnatural death is a criminal. Human rights are not dependent on the status of a person but are universal in nature. Once the issue is looked at from this perspective, it will be appreciated that merely because a person is accused of a crime or is the perpetrator of a crime and in prison custody, that person could nevertheless be a victim of an unnatural death. Hence the need to compensate the next of kin."

28. In the present case no convincing explanation has been given this Court by the Opposite Parties in support of their stand that the Petitioner's husband while in their custody, died out of 'natural causes'. The PM injuries referred to hereinbefore remained unexplained. The OPs have not been able to discharge the burden of showing that Pidera, the Petitioner's husband who died in their custody, did not die at a result of custodial violence inflict upon him.

29. For the aforementioned reasons, the Court is satisfied that the fundamental rights of the Petitioner's husband under Articles 14, 21 and 22 (1) to (3) of the Constitution have been violated. Consequently, the Opposite Parties are held liable to pay the family of the deceased for such violation of his constitutional rights. As explained in ***Nilabati Behera*** *(supra):*

> "….'a claim in public law for compensation' for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the

> enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution."

30. In ***Charles Sobraj v. Superintendent, Central Jail, Tihar (1987) 4 SCC 104*** the Supreme Court reminded as under:

> "If a whole atmosphere of constant fear of violence frequent torture and denial of opportunity to improve oneself is created or if medical facilities and basic elements of care and comfort necessary to sustain life are refused then also the humane jurisdiction of the court will become operational based on Article 19. ... prisoners retain all rights enjoyed by free citizens except those lost necessarily as an incident of confinement. Moreover, the rights enjoyed by prisoners under Articles 14, 19 and 21, though limited, are not static and will rise to human heights when challenging situations arise."

31. In the present case, it is unfortunate that the qualified medical personnel have by submitting a questionable medical report attempted to help the State authorities in particular CRPF, the law enforcement agency in the present case, and the police in whose custody the Petitioner's husband died, to avoid their liability. The Court would urge the Opposite Parties and whose control and jurisdiction such government doctors have operated to institute a proper inquiry into such conduct and take to its logical conclusion.

32. The Court directs the CRPF and the Odisha State Police in whose service Opposite Party No.5 was at the relevant time to pay compensation of Rs.5,00,000/- (Rupees five Lakh) each (i.e. total of Rs 10 lakhs) to the Petitioner within a period of eight weeks from today, failing which the amount would be payable along with 6% simple interest for the period of delay.

33. A compliance affidavit be filed in this Court within nine weeks failing which the Registry would bring it to the attention of this Court for appropriate directions.

34. The writ petition is disposed of in the above terms. A copy of this judgment be sent to the Director General, CRPF as well as the Addl. Chief Secretary (Home), Government of Odisha forthwith for necessary and compliance.

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2023 (II) ILR - CUT- 361

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

W.A. NO. 805 OF 2021 AND BATCH OF WRIT APPEALS

STATE OF ODISHA & ANR. ……Appellants

.V.

JOSEPH BARIK …….Respondent

SERVICE LAW – Promotion – Whether during the pendency of a criminal case in the Court of the Special Judge (Vigilance) and without exoneration from the charges in the departmental proceeding,the government employee is entitled to either ad-hoc or regular promotion? – Held, No – There is no right of the government servant to be considered for promotion during the pendency of either departmental proceeding or criminal proceeding or both – But when the proceedings end in favour of the government servant, then notwithstanding the superannuation of such employee, the notional benefits attaching to the promotion that is due to the government servant would be calculated and the pension be fixed accordingly.

Case Laws Relied on and Referred to :-

1. (1991) 4 SCC 109 : Union of India Vs. K .V. Janaki Raman.
2. (1995) 2 SCC 570 : State of Punjab Vs. Chamanlal Goel.
3. W.P.(C) No.19909 of 2015 (Dated 5th October, 2016) : State of Odisha Vs. Somanath Sahoo.
4. W.P.(C) No.22393 of 2015 (Dated 26th April, 2017) : State of Odisha Vs. Anil Kumar Sethi

For Appellants : Mr. M.K. Khuntia, Addl. Govt. Adv.
Mr. A.P. Das, Addl. Standing Counsel
Mr. Rabi Narayan Mishra, Addl. Govt. Adv.

For Respondent(s) : Mr. Sarada Prasad Dash
Mr. Bigyan Sharma
Mr. T.K. Biswal
Mr. Tushar Kanta Nayak
Mr. S.K. Ojha
Mr. D.R. Bhokta
Mr. Manas Pati
Mr. Anjan Kumar Biswal
Mr. Upendra Kumar Samal

ORDER Date of Order : 11.05.2023

BY THE BENCH

1. In all these writ appeals by the State of Odisha against the corresponding orders of the learned Single Judge, a common question arises for consideration viz.

whether during the pendency of a criminal case against the government servant in the Court of the Special Judge (Vigilance), and notwithstanding exoneration of the said employee in the departmental proceedings, could the learned Single Judge have ordered grant of either ad hoc or regular promotion to the government servant subject to the outcome of the criminal proceedings?

2. One other common factor that requires to be noticed is that except in W.A. No.596 of 2023 where the impugned order under challenge was passed by the learned Single Judge after completion of pleadings in the writ petition, in all the other appeals the impugned order under challenge was passed by the learned Single Judge on the very first date of hearing of the writ petition without an opportunity to the State of Odisha to file its reply.

3. This Court has heard the learned counsel for the parties.

4. There is no dispute in that the criminal case involving the Respondents in the present appeals is still pending before the Court of the Special Judge (Vigilance) at various stages. In some cases, even a charge sheet is yet to be filed and in other charges may or may not have been framed; in certain other cases, trial is in progress.

5. Learned counsel appearing for the respective Respondents argue that on account of the long years of the pendency of the criminal case and with the impending prospect of many of the Respondents superannuating in the immediate future, one equitable solution would be for this Court to direct the Appellants (State of Odisha) to grant them 'ad hoc' promotions. In support of such plea, reliance placed on an interim order passed by this Court on 27th March, 2023 in W.A. No.321 of 2022.

6. However, it is pointed out by Mr. Khuntia, learned Additional Government Advocate (AGA) that in W.A. No.321 of 2022 the Respondent had been exonerated in the departmental proceedings and the report sent by the Special Judge, Vigilance to this Court showed that the trial in T.R. Case No.50 of 2014 was progressing very slowly with only three witnesses having been examined. Accordingly, this Court in the said case directed the trial Court to conclude the entire trial and deliver the judgment on or before 1st August, 2023. It is in those circumstances that no interim order was passed by the Diviion Bench staying the order of the learned Single Judge. The said writ appeal has been directed to be listed on 10th August, 2023.

7. Apart from the fact that the aformenetioned order is an interlocutory one peculiar to the facts noted, as far as the present batch of cases is concerned, departmental proceedings are still pending in some and in all the cases criminal proceedings are pending.

8. The Court has been shown a compilation of Office Memoranda (OMs) and Notifications issued by the Government of Odisha from time to time. These include

OM dated 18th February 1994, 4th July 1995, 1st November 1997, 28th January 1999, 28th May 2012, 29th April 2017 and 17th June 2021issued by the General Administration Department. None of them envisages or permits grant of promotion to a government servant either on regular or on ad hoc basis during the pendency of a criminal case involving such government servant.

9. Further in terms of the law explained by the Supreme Court in ***Union of India v. K.V. Janaki Raman (1991) 4 SCC 109***, ***State of Punjab v. Chamanlal Goel (1995) 2 SCC 570***, the judgment of this Court dated 5th October, 2016 in W.P.(C) No.19909 of 2015 (***State of Odisha v. Somanath Sahoo***) and the judgment dated 26th April, 2017 in W.P.(C) No.22393 of 2015 (***State of Odisha v. Anil Kumar Sethi***), there is no right of the government servant to be considered for promotion during the pendency of either departmental proceedings or criminal proceedings or both against such government servant.

10. The plea of the learned counsel appearing for the Respondents that they should be granted at least one 'ad hoc promotion' is also without any legal basis in light of the above OMs and the settled position in law.

11. It is clarified that as and when the criminal proceedings end in favour of the government servant by way of an acquittal and such government servant also stands exonerated from the departmental procewedings then notwithstanding the superannuation of such government servant, the notional benefits attaching to the promotion that is due to the government servant would be calculated and the pension fixed accordingly.

12. In the light of the above orders of the Government, it is not possible for this Court to sustain the impugned orders of the learned Single Judge in the present cases directing the Appellants to grant regular promotion to the Respondents even with the caveat that such promotion would be subject to the outcome of the criminal case against such government servant. The said impugned orders of the learned Single Judge are accordingly hereby set aside.

13. It will of course be open to the Respondents to request the criminal Courts concerned to expedite the proceedings and bring the trials to an early conclusion.

14. The writ appeals are accordingly allowed, but in the circumstances, with no order as to costs.

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2023 (II) ILR - CUT- 364

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

MATA NO.137 OF 2019

GANESH PRASAD KHATUA ……....Appellant

.V.

SMT. LAXMIRANI KHATUA …….Respondent

HINDU MARRIAGE ACT, 1955 – Section 13(1)(a) – Cruelty – Whether the allegation of extra-marital relationship constitutes cruelty within the ambit of Section 13(1)(a) ? – Held, Yes – Unless the allegation of extra-marital relationship is proved substantially and such allegation is left without proof, that may be treated as cruelty for granting divorce.

(Paras 29-34)

Case Laws Relied on and Referred to :-

1. (2013) 5 SCC 226 : K. Srinivas Rao Vs. D.A. Deepa.
2. (2016) 9 SCC 455 : Narendra Vs. K. Meena.
3. 2003(6) SCC 334 : Vijaykumar Ramchandra Bhate Vs. Neela Vijaykumar Bhate.

For Appellant : Mr. Gautam Mukherji, Sr. Adv.
Ms. K. Banerjee

For Respondent : Mr. G. Madani

JUDGMENT Date of Judgment : 03.04.2023

S. TALAPATRA, J.

The matrimonial suit was instituted by the appellant, being Civil Proceeding No.320 of 2016 seeking dissolution of marriage that subsists between him and the respondent by a decree of divorce on the ground of cruelty. The said suit has been dismissed by the judgment dated 31.08.2019, which is under challenge in this appeal under Section-19(1) of the Family Courts Act, 1984.

2. While dismissing the judgment, it has been observed by the Judge, Family Court, Bhadrak as follows:

> *"Instead of taking steps for restitution of conjugal rights, he (the appellant) straightway filed the present proceeding terming the alleged misconduct to be cruelty. The above approaches made by P.W.1 to resume conjugal life with the respondent clearly amounts to condonation of so-called cruelty in terms of Section-23(1)(b) of the Hindu Marriage Act, 1955. By this act, P.W.1 wanted to reconcile intending to forgive the respondent for her wrongs and to restore her to previous position. In this regard, the case of* ***Nirmala Devi vs. Ved Prakash: AIR 1993 Himachal Pradesh 1*** *may be referred. In this (sic) case, the petitioner-husband had sought a decree of divorce on the ground of cruelty and desertion. Prior to filing of the case, the petitioner had filed a petition for restitution of conjugal rights under Section-9 of the Hindu Marriage Act against the respondent-wife which was later on withdrawn. The trial court allowed the divorce proceeding holding the wife to have caused cruelty to the husband. The aggrieved wife approached the Hon'ble High Court challenging the said judgment.*

It is pertinent to note that the Judge, Family Court has extracted the following passage in order to support his analogy:

> *"Condonation has not been defined anywhere. 'Condonation' is a word of technical import, which means and implies wiping of all rights of injured spouse to take matrimonial proceedings. In a sense condonation is reconciliation, namely, the intention to remit the wrong and restore the offending spouse to the original status which in every case deserves to be gathered from the attending circumstances. The forgiveness in order to constitute condonation need not be express. It may be implied by husband of the wife's conduct and vice versa. Ordinarily, as a general rule, condonation of matrimonial offence deprives the condoning spouse of the right of seeking relief on the offending conduct. When a petition is filed claiming a decree for restitution of conjugal rights, it clearly stipulates that the person seeking relief has no grouse or cause of complaint against the other spouse and even if there was any cause or complaint, the same has either been condoned or forgiven. The intention being to resume normal cohabitation. As held in Dastane's case (AIR 1975 SC 1534 (supra), matrimonial offence is erased by condonation. In view of clear provisions contained in Clause (b) of sub-section (1) of Section-23 of the Act, it is always for the person who has approached the Court to satisfy that the act of cruelty has not been condoned."*

3. We would like to observe that the above observation as regards the condonation is absolutely out of context. As on scrutiny of the petition filed by the appellant under Section-13 of the Hindu Marriage Act, we do not find any averment relating to the institution of a matrimonial suit under Section-9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights. Even in the written statement filed by the respondent, no such reference has been made. But we would hasten to observe that the decision in **Nirmala Devi** *(supra)* is not a correct proposition of law. Section-23 (1) (b) clearly provides that, if the act complained of was condoned, that cannot form the legal basis for dissolving the marriage. Such condonation shall be by conduct. After the alleged conduct, the spouses should have restored their conjugal relationship even may be for a short while. Any attempt to reconcile cannot be treated as a conduct of condonation.

4. The appellant, represented by Mr. G. Mukherji, learned Senior Counsel, has challenged the impugned judgment on the ground that the evidence led by him was not duly appreciated, in as much as the appellant, while deposing as P.W.1 has given a catalogue of conducts of the respondent (RW-1), which, according to the appellant, adequately constitutes *cruelty* within the ambit of Section-13(1)(i-a) of the Hindu Marriage Act. It has been also asserted by Mr. Mukherji, learned Senior Counsel appearing for the appellant that the respondent No.1 has, in her deposition, alleged that the appellant was having extra- marital relation, but the said allegation has not been proved and has been left at that level. Such conduct itself constitutes cruelty.

5. In order to buttress his submission, Mr. Mukherji, learned Senior Counsel has relied on a decision of the Delhi High Court in **Jyoti Yadav vs. Neeraj Yadav** (Judgment dated 21.03.2022 delivered in MAT.APP.(F.C.) 111/2019). It has been held in **Jyoti Yadav**, *inter alia*, as follows:

> *"11.We consider that the Family Court has correctly appreciated the evidence and has rightly found that the appellant – by making unfounded allegations amounting to character assassination against the respondent and his father has inflicted mental cruelty upon the respondent-husband. In the appeal also, the appellant has failed to bring any credible material to suggest that the findings recorded by the trial court are incorrect. It has repeatedly been held that accusations of unchastity or extra marital relationship is a grave assault on character, status, reputation as well as health of the spouse against whom such allegations were made. It causes mental pain, agony, suffering and tantamount to cruelty. The allegations of extra marital affairs in relationship are serious allegations, which have to be made with all seriousness. The tendency of making false allegations has to be deprecated by the Courts. The mal-intent of the appellant is also evident from her admission of publicizing her allegations against her father-in-law. His reputation would have been tarnished by such irresponsible conduct of the appellant."* [Emphasis added]

6. Mr. Mukherji, learned Senior Counsel has highlighted the basic facts, pleaded and sought to be proved for dissolution of marriage.

7. In the petition filed before the Judge, Family Court, Bhadrak, the appellant has pleaded that on 13.03.2003, their marriage was solemnized following the Hindu rites and customs. After solemnization of the marriage, the appellant and the respondent started their conjugal life. In the wedlock, two female children, namely Dibyasa & Prayasa were born. When the appellant's father passed away and he wanted to observe obsequies, that was objected to by the respondent. As the appellant was discharging his responsibility towards the family left by his father, the respondent opposed the said decision and engaged herself in altercations on daily basis. She had pressed hard for separation of the joint family, but for financial reasons, that was not practicable. The respondent did never discharge her duty as a member of the family. She was always disrespectful to the appellant and the senior members of his family.

8. In the year 2009, the respondent filed a false case against the appellant in the Bhadrak Rural Police Station by giving a cock and bull story. Finally, no case was registered at the intervention by the well-wishers of the family. The petitioner was compelled to take transfer to Baitarani Road where he had worked as Railway Gang Coolie. Again, in the year 2011, the respondent had implicated the appellant in a Police case under Section-498A of the IPC leveling false allegations. During his stay at Baitarani Road, the respondent stayed most of the times at her father's place. At times, she used to visit the appellant with the children and stay for few days. As the respondent comes from a wealthy family, she used to whine all the tune that the petitioner's family does not have the standard to have her as a bride. Whenever she visited the appellant, she used to abuse him by terming him as *beggar*.

9. On 20.10.2013, the respondent assaulted the appellant and left the matrimonial home. As sequel, she lodged a complaint in the Police Station against the appellant under Section- 498A read with Section-4 of the Dowry Prohibition Act. The Police arrested the appellant and he remained inside the jail for some days. In the process, the appellant's dignity was badly affected. The respondent had

inflicted mental pains which constitute cruelty. The said case, being G.R. Case No.698/2014 is still pending in the court of the S.D.J.M., Bhadrak and the appellant is facing the trial. The allegations as brought in that case and in the subsequent case filed under Section-12 of the Protection of Women from the Domestic Violence Act, being Misc. Case No.238/2014 are, according to the appellant, false. An appeal being Criminal Appeal No.09/2014 is pending in the court of the Sessions Judge, Bhadrak challenging the order passed in Misc. Case No.238 of 2014. The respondent had last resided with the appellant on 21.10.2013 and on that day itself, she left for her father's place. According to the appellant, the respondent had left the house of the appellant voluntarily. The appellant has further asserted that he lost his faith completely on the respondent.

10. The respondent filed a written statement in C.P. No.320/2016 corresponding to the Matrimonial Suit No.699/2014 contending that the allegations as leveled against her are false and fabricated. It is the appellant who treated her with cruelty. In respect of filing of the Police cases, in para-8 of the written statement, it has been stated that due to severe mental and physical torture, the respondent was compelled to lodge an F.I.R. against the appellant and his family members on 13.04.2014. Even the children were not taken proper care by the appellant. In the written statement, it has been stated that the respondent used to do all the domestic work in her in-law's house, and also in the Government Quarters. The respondent also filed an additional written statement. In the said additional written statement, the respondent denied the allegations brought against her. She has made the counter- allegations against the respondent in the written statements.

11. In order to prove his pleadings, the appellant examined himself as P.W.1. In the cross-examination, he has stated that he had been paying maintenance to the respondent in terms of the order passed in the proceeding under the Protection of Women from Domestic Violence Act. He has further stated that in the year 2013, a written settlement had been entered between the appellant and the respondent over their marital dispute. After that, they had started living separately and the appellant had been paying a sum of Rs.4,500/- per month as maintenance. He had asserted that he had to shoulder the expenses of the joint family, out of the salary he used to get, which in the month of August, 2018, was Rs.46,039/-.

12. The respondent did not controvert the statement of the appellant that she had been living separately by virtue of a settlement since 2013. It reveals from the evidence that her mother was providing financial assistance to her. After her death in the year 2008, the respondent has been facing serious financial stringency. It may be noted that the settlement regarding the amount of maintenance was arrived at, in the year 2013.

In para- 6 of the evidence by affidavit, respondent has slapped a serious allegation against the appellant. It has been stated as follows:

"There I came to know that the petitioner has got extra marital relationship with other lady since long for which myself and my children are being tortured and neglected."

13. She has also deposed in order to explain further that due to severe mental and physical torture, and on failure of several conciliations, she was forced to file a complaint against the appellant and his family members in 2014. The statement of the appellant that they (the appellant and the respondent) were living separately from 2013 has not been controverted anywhere by the respondent.

14. We refrain ourselves from making further comments in this regard, as the criminal prosecution is still continuing and in the seisin of the S.D.J.M., Bhadrak.

15. Mr. Mukherji, learned Senior Counsel has laid serious emphasis on the allegations made in para-6 of the evidence by affidavit (under Order-18, Rule-4 of the CPC) by the respondent and contended that such unfounded statement in respect of the character of the appellant is enough to dissolve the marriage on the ground of cruelty.

16. We have scrutinized records. What we find further that in the cross-examination, the respondent (RW-1) has stated as follows:

"5. The alleged paramour of P.W.1 belongs to my in-laws village and I know her since the time of my marriage. Besides the lady mentioned in para 6 of my affidavit, P.W.1 has also extra marital illicit relationship with another 3 women, whom I know since long. I have seen physical relationship of P.W.1 with two of the above ladies many a times. I had seen such immoral acts for the first time a year after marriage. It is not a fact that I was not tortured by P.W.1 and his family in any manner as alleged by me and that P.W.1 was never having any extra marital relationship and that I voluntarily left P.W.1 on 20.10.2013 and that I mentally tortured P.W.1 during my stay with him and that I have claimed the alimony in this case and filed various cases against the P.W.1 at the instigation of my father to gain unlawfully."

17. The appellant was re-cross-examined by the respondent to prove that his net monthly pay is Rs.23,379/-.

18. It has been brought to our notice that on 16.05.2019, one Laxmidhar Sahoo filed one affidavit in Civil Proceeding No.320/2016 in the court of the Judge, Family Court, Bhadrak. The said person (not party in the proceeding) has made categorical allegation in para-3 of the said affidavit that he came to know that the appellant had extra marital relationship with other lady for long and for which the appellant had neglected the respondent and their children. In para-4 of the said affidavit, he has asserted as follows:

"4. That, when I learnt all these things, I tried a lot to settle up the matter between them. In the year 2013, I along with one Tapan Kumar Sethi and Manas Pati had sat on a meeting with the petitioner and tried to settle up the matter and after several conciliation, no rapproachment could be possible due to adamant and stubborn attitude of petitioner. Ultimately for torture and harassment my niece had to lodge F.I.R. against the petitioner and his family members in the year 2014."

19. It appears that the Judge, Family Court has not taken any cognizance of that affidavit. This was not treated as the examination-in-chief. As there had been no scope for the appellant to cross-examine the said person, no cognizance of such statement was taken.

20. It appears further that the respondent had realized that she had serious legal obligation to prove the allegation of extra marital affair as made by her against the appellant. But she has failed to discharge the said obligation, according to Mr. Mukherjee, learned Senior Counsel.

21. Mr. G. Madani, learned counsel appearing for the respondent has quite strenuously argued that despite the respondent's sincere efforts to re-construct the marriage, only for the stubborn attitude of the appellant, the marriage could not be reconstructed or restituted.

22. According to Mr. Madani, learned counsel, the allegations, as made by the appellant, are mostly unspecified. Those allegations have been strongly denied by the respondent. There is no evidence to believe the allegations on cruelty. Existence of the criminal proceeding would prima facie show that the appellant has done wrong to the respondent and now, the appellant cannot take advantage of his own wrongs.

23. In the above context, reference has been made to Section-23 (1) (a) of the Hindu Marriage Act, 1955. It has been provided by Section-23(1) (a) that, if any ground for granting relief exists and when the petitioner (except in the cases where the relief is sought by him on the ground specified in sub-section-(a), sub-clause-(b) & sub-clause-(c) of Clause-2 of Section-5) is not in any way taking advantage of his/her own wrong or disability for the purpose of such relief, the Court may grant any relief. But as the petitioner intends to take advantage of his own wrongs, no relief should be granted.

24. Mr. Madani, learned counsel has submitted that the Judge, Family Court was not satisfied that the appellant made out any ground for granting relief to him. Consequently, the suit has been rightly dismissed. Mr. Madani, learned counsel did not make any response so far the cruelty claimed to have been proved for raising the allegation of the extramarital relation without proof. He had fairly submitted that what is borne in the record, may be looked into by this Court. Alternatively, Mr. Madani, learned counsel has referred to the salary statement which the respondent has received from the Central Public Information Officer, East Coast Railway, Khurda Road Division, Annexure-X to the affidavit filed by the respondent in the appeal as per our order dated 26.10.2022. From the said information, it appears that in the month of July, 2022, the appellant's gross salary was Rs.70,051/-.

25. Mr. G. Mukherji, learned Senior Counsel has filed one salary statement, but not supported by any affidavit, but as the same is a computer generated PDF salary

statement of the appellant for the month of December, 2022, we have taken it on record without any objection from Mr. Madani, learned counsel, representing the respondent. It appears from the said salary statement that in the month of December, 2022 the petitioner's gross salary was Rs.66,336/-.

26. Having appreciated the submissions of learned counsel for the parties, we would observe at the outset that the appellant and the respondent started living separately on the terms of the written settlement, as they had realized that they could not lead a peaceful matrimonial life. It has also appeared that the appellant was arrested by the Police on the complaint of the respondent. If there were materials and the Police, having been satisfied thereof, had arrested the appellant in the interest of the investigation, this cannot be taken as the ground for seeking divorce. The said prosecution is still pending for final disposal. This position has been admitted by Mr. Mukherji, learned Senior Counsel. But, what has surprised us is that the appellant and the respondent have been living separately since 2013 accepting that they cannot live together. Even thereafter, the respondent has been resisting the petitioner's relief for dissolution of marriage.

27. That apart, all on a sudden, in the evidence under Order-18, Rule-4 of the CPC, the respondent has alleged that the appellant was having extra marital relation with the other ladies since long (see para-6 of the evidence filed by affidavit, by the respondent).

28. The respondent has stated in the cross-examination that a year after the separation by way of settlement, she had filed the Domestic Violence Case, even though she was getting the maintenance as agreed under the said settlement. In the cross-examination, she had further stated that the appellant had extra marital relationship with other three women whom she knew for long. It has been claimed by the respondent that she had seen the act of physical relation by the appellant with two of the above ladies many a times. She had seen such immoral act for the first time a year after the marriage, but there is no pleading in the written statement in this regard, nor in the additional written statement filed by the appellant subsequently. Thus, the respondent introduced the fact in such a manner so that the appellant cannot rebut or cannot raise interrogatories, seeking the names of the ladies. It may be noted further that none of those ladies has been named in the examination-in-chief or in the cross-examination.

29. The law in this regard is quite consolidated. Unless the allegation of extra-marital relationship is proved substantially and such allegation is left without proof that may be treated as cruelty for granting divorce.

30. In **K. Srinivas Rao vs. D.A. Deepa**: **(2013) 5 SCC 226**, the apex court has observed as follows:

> *"31. We are also satisfied that this marriage has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But,*

where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the Court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried up there is hardly any chance of their springing back to life on account of artificial reunion created by the court's decree."

31. As sequel, we may refer to a decision of the apex court in **Narendra vs. K. Meena: (2016) 9 SCC 455**. In **Narendra** *(supra)*, it has been held as under:

*"**15.** With regard to the allegations about an extra-marital affair with maid named Kamla, the re-appreciation of the evidence by the High Court does not appear to be correct. There is sufficient evidence to the effect that there was no maid named Kamla working at the residence of the Appellant. Some averment with regard to some relative has been relied upon by the High Court to come to a conclusion that there was a lady named Kamla but the High Court has ignored the fact that the respondent wife had leveled allegations with regard to an extra-marital affair of the appellant with the maid and not with someone else. Even if there was some relative named Kamla, who might have visited the appellant, there is nothing to substantiate the allegations leveled by the respondent with regard to an extra-marital affair. True, it is very difficult to establish such allegations but at the same time, it is equally true that to suffer an allegation pertaining to one's character of having an extra-marital affair is quite torturous for any person-be it a husband or a wife.*

***16.** We have carefully gone through the evidence but we could not find any reliable evidence to show that the appellant had an extra-marital affair with someone. Except for the baseless and reckless allegations, there is not even the slightest evidence that would suggest that there was something like an affair of the appellant with the maid named by the respondent. We consider leveling of absolutely false allegations and that too, with regard to an extra-marital life to be quite serious and that can surely be a cause for mental cruelty."*

[Emphasis added]

32. In an earlier decision, in **Vijaykumar Ramchandra Bhate vs. Neela Vijaykumar Bhate**: **2003(6) SCC 334**, it has been held by the apex court as follows:

*"**7.** The question that requires to be answered first is as to whether the averments, accusations and character assassination of the wife by the appellant husband in the written statement constitutes mental cruelty for sustaining the claim for divorce under Section 13(1) (i-a) of the Act. The position of law in this regard has come to be well settled and declared that leveling disgusting accusations of unchastity and indecent familiarity with a person outside wedlock and allegations of extramarital relationship is a grave assault on the character, honour, reputation, status as well as the health of the wife. Such aspersions of perfidiousness attributed to the wife, viewed in the context of an educated Indian wife and judged by Indian conditions and standards would amount to worst form of insult and cruelty, sufficient by itself to substantiate cruelty in law, warranting the claim of the wife being allowed. That such allegations made in the written statement or suggested in the course of examination and by way of cross-examination satisfy the requirement of law has also come to be firmly laid down by this Court. On going through the relevant portions of such allegations, we find that no exception could be taken to the findings recorded by the Family Court as well as the High Court. We find that they are of such quality, magnitude and consequence as to cause mental pain, agony and suffering amounting to the reformulated concept of cruelty in*

matrimonial law causing profound and lasting disruption and driving the wife to feel deeply hurt and reasonably apprehend that it would be dangerous for her to live with a husband who was taunting her like that and rendered the maintenance of matrimonial home impossible." [Emphasis added]

33. In the case in hand, we may notice that since the year 2013, the spouses are living separately, that too after entering into a written settlement. The appellant has stated that as they [the appellant and the respondent] had failed to live a peaceful conjugal life, they preferred to live separately. The appellant had been paying the maintenance at the rate as agreed in the said written settlement.

34. We have taken note of the conduct of the respondent that she has made the grave allegation of extra-marital relation, not in the written statement nor in the additional written statement. Such allegations have been abruptly made in her examination-in-chief and those allegations occupied further magnitude in the cross-examination. We have no hesitation to hold that those allegations come within the meaning of cruelty as those are bound to hurt the appellant enormously.

35. That apart, what has been revealed from the record is that the marriage is dead and there is no sign that it can be retrieved. Even after living separately, some conduct of the respondent, are not above board. Those are in the realm of mental cruelty and as such, it is improbable to believe that the appellant can live peacefully with the respondent, nor he is expected to live with her.

36. So far as the finding relating to condonation of the conduct of the respondent is concerned, it is totally without any foundation. The cumulative impact of the above observations is that the unsubstantiated allegations of extra-marital relations, without even naming any person is highly grave and in the context of irretrievable breakdown, as we have noted, it is not expected that the appellant and the respondent will be able to live a peaceful conjugal life.

37. Under these circumstances, we allow the appeal as well as the matrimonial suit being Civil Proceeding No.320/2016 by dissolving the marriage that was solemnized on 13.03.2003 between the appellant and the respondent.

38. Simultaneously, we direct the appellant to pay a sum to the extent of Rs.20,00,000/- (Rupees twenty lakhs) within a period of three months from the date of issue of the decree. For the purpose of determining the permanent alimony, we have taken inputs from the certificate, as produced by the appellant. It has transpired from the said certificate that the income of the appellant is around Rs.70,000/- per month without deduction.

39. It is made absolutely clear that, if the alimony is paid, the appellant will not be required to pay any further maintenance to the respondent. The appellant shall file a copy of this judgment/order in the appropriate court which had passed the order directing payment of the monthly maintenance.

40. If the amount of alimony is not paid within the time as stipulated above, the decree, as would be drawn up, shall be treated as the money decree for the purpose of realization of the said amount through the process of the court.

41. In the event of failure in making payment of the entire amount of alimony by the stipulated date, the said amount shall carry interest at the rate of 6% per annum from the date of the decree till the date of realization. We hope that such situation will not arise.

42. The Registry is directed to prepare the decree in accordance with law.

43. If the physical LCRs are still lying in the Registry, those shall be returned forthwith.

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2023 (II) ILR - CUT- 373

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

MATA NO. 20 OF 2017

KHAGENDRA SETHI .....Appellant

.V.

SMT. ARNAPURNA SETHI & ANR. .....Respondents

(A) CODE OF CIVIL PROCEDURE, 1908 – Order 12, Rule 6 – Power and Duty of the Court while disposing of the suit in exercise of power under Order 12, Rule 6 of CPC on the basis of "admission" – Discussed.

(B) CODE OF CIVIL PROCEDURE, 1908 – Order 12, Rule 6 – What would amount to "admission" so as to warrant exercise of power under Order 12, Rule 6 of the CPC? – Discussed. (Para 20)

Case Laws Relied on and Referred to :-

1. 2021 SCC OnLine SC 565: 2021 9 SCC 99 : Srihari Hanumandas Totala Vs Hemant Vithal Kamat.
2. (1977) 4 SCC 467 : AIR 1977 SC 2421 : T. Arivandandam Vs T.V. Satyapal & Anr.
3. (2015) 9 SCC 287 : S.M. Asif Vs. Virendar Kumar Bajaj.
4. (2011) 15 SCC 273 : Himani Alloys Ltd Vs. Tata Steel Ltd.
5. (2000) 7 SCC 120 : Uttam Singh Dugal & Co.Ltd Vs. Unied Bank Of India.
6. 2022 SCC 496 : Karan Kapoor Vs. Madhuri Kumar.

For Appellant : Mr. B. Bhuyan

For Respondents : Mr. H.B. Dash

JUDGMENT Date of Judgment :17.05.2023

SAVITRI RATHO, J.

The Appellant has challenged the order dated 26.12.2016 passed in Civil Proceeding No. 24 of 2015 (I) by the learned Judge, Family Court, Balasore. By the said order, the learned Judge has dismissed the suit filed by the Appellant as not maintainable holding that it was filed with frivolous motive and was barred by the law of estoppel.

In order to decide this appeal, we have to examine whether the learned trial Court was justified in dismissing the suit basing on the alleged admission of the Appellant in an earlier proceeding i.e. C.P. No.1056 of 2010 filed by him, by relying on Photostat copies of documents filed by the Respondents.

BACKGROUND FACTS

2. C.P. No. 24 of 2015 had been filed by the Appellant as Petitioner, for declaration and permanent injunction against the Respondents praying for the following reliefs :

> "*a.) Let, the Hon'ble Court pass a decree declaring that the petitioner is not the father of the respondent No.2, born to the respondent No.1and the respondent no.2 is not the legal heir of the petitioner.*
>
> *b.) Let the decree be passed against respondent No.1 including her agents, servants, legal representatives, associates and be permanently injuncted not to disturb with the petitioner's right and status and not to cause any damage to the status , house and property situated at his native village Nuaparhi of the petitioner in any manner.*
>
> *c) The costs of the suit or such other relief/reliefs which the petitioner is entitled to get under law, equity and justice be decreed/awarded to the petitioner.*"

3. In his plaint / petition the Appellant had made various allegations against the Respondent No.2. Paragraph 11 and 13 of the plaint / petition are relevant and extracted below:

> "*11. That the respondent No.1 did not allow the petitioner for co-habitation at any point of time and assaulted him. As a matter of fact, the spouses had / have never co-habited and the respondent No.1 had sexual intercourse with a person other than the petitioner and the respondent No.2 was born on 13.6.2004 at the time when the child could have not been conceived in the womb of her mother, the respondent No.1 through the petitioner.. The petitioner was /is not the father of the respondent No. 2 born to respondent No.1. The petitioner is seriously disputing the paternity of the respondent No.2. During that period, the petitioner was living at his service place at Govt. College. Phulbani District and Respondent No.1 was living at village at different districts .The petitioner had no existing opportunity to have any sexual relationship with respondent No.1 at the time when respondent No. 2 could have been begotten."*

12 xxx

"13. *That the respondent No.1 instituted C.T. No. 591/2014 and D.V. Misc Case No.: 93/2014 and maintenance before the S.D.J.M., Balasore and Cr.P. No. 76/2012 before Judge, Family Court, Balasore. Being noticed from the Court of the S.D.J.M., Balasore on dt. 26.3.12 and 23.4.2014 and every dates thereafter the petitioner came to know about the false claim made by the respondents which has disturbed the petitioner's status as father of the respondent No.2 and a cloud having been cast upon it for the first time for which petitioner constrained to file the suit for necessary declaration & permanent injunction against the respondents."*

Copy of the plaint in C.P. No. 24 of 2015 is annexed as **Annexure 1** to the MATA.

4. Having received the summons from the Court, the Respondents appeared in the case though their counsel on 27.02.2015. On 09.11.2105, the Respondents filed a detailed written statement alongwith a counter claim praying for a decree for award of Rupees Ten lakhs towards mental torture and agony and also a sum of Rupees Two lakhs towards litigation expenses to restrain the Appellant from vilifying the character of Respondent No.1 and paternity of the respondent No.2. Along with her written statement, she had also filed an application under Order -7 Rule 11 of the C.P.C. In the application under Order 7 Rule 11, it had been stated that in Guardian Misc. Case No. 136 of 2013, the Petitioner admitted the Respondent No.2 is his daughter and that she is born on 13.06.2004 out of the wed lock of the Petitioner and Respondent No.1 for which the reliefs claimed by the Petitioner in the case was not maintainable. It was stated at paragraph 2 of the counter claim as follows:

"2. That, the Petitioner has admitted the Respondent No.2 as his daughter who has taken birth on 13/06/2004, out of the wed lock between the Respondent No. 1 and the Petitioner, which is apparent from the C.P. No. 136/2013 pending in the Court of Family Judge, Baleshwar, filed by the present Petitioner. In that case the Petitioner has sought for the relief of custody of the girl child/ Respondent No.2 admitting to be his own offspring. But, while the Respondents filed the D.V. Misc. Case & Maintenance case the Petitioner apprehending the payment of the maintenance to the Respondents filed this false & vicious case against the Respondents, just to get rid of payment."

Copy of the petition under Order -7, Rule – 11 CPC is annexed as **Annexure 2** to the MATA.

5. In paragraphs 15 and 17 of their written - statement the Respondents have specifically denied the averments made in paragraphs 11 and 13 of the plaint. They have further stated that due to non fulfillment of dowry demand of Rupees Two lakhs, the Respondent No. 1 was tortured and the Petitioner (Appellant) wanted to finish her for which she had filed a case under Section – 498 – A and other allied offences against him and his other family members – CT No. 591 of 2014 pending in the Court of the SDJM Balasore and D.V Misc Case No. 93 of 2014 in the same Court. They have further stated that from 2003—4 while serving as lecturer in Govt.

College Phulbani, the Petitioner used to stay in rented accommodation and kept illicit relations with another woman and the two of them had assaulted her and attempted to compel her to terminate her pregnancy in 2003 when she was in an advanced stage and also threatened to murder her . Brother and father of Respondent No.1 on coming to learn of this stopped them, but the Petitioner continued to accelerate the torture and cruelty. She gave birth to their daughter on 13.06.2004. Birth of a daughter displeased the Petitioner and his family members and they did not take care of the Respondents. Respondent No. 1 was able to manage with the help of her parents and brother. Petitioner maintained distance from the child and. the latter has remained in the custody of Respondent No.1 and was prosecuting her studies in Baripada. and was studying in Class VI at that time. It was further stated that admitting that Respondent No.2 was his child, the Petitioner had made filed C.P. No. 136 of 2010 in the same Court with a prayer to take her custody. He had filed the false and vicious case to get rid of payment. She and her daughter were living in her matrimonial house in Nuaparhi and she had filed D.V Misc case No 93 of 2014 and a proceeding under Section 125 Cr.P.C. for their sustenance. In spite of order passed for payment of interim maintenance, he was not complying with the same.

At paragraph 2 of the counter claim, it has been stated that the Petitioner has admitted that Respondent No 2 is his daughter who was born on 13.06.2004 which is apparent from C.P.No. 136 of 2013 pending in the Court of the Family Judge, Baleswar and in that case he has sought for the relief of custody of the girl child / Respondent No.2 . Copy of the written statement containing the counter claim is annexed as **Annexure 3** to the MATA.

6. The order sheet containing order No.1 dated 12.01.2015 to order dated 26.12.2016 passed in C.P. No. 24 of 2015 –I by the learned Judge Family Court, Balasore has been annexed as **Annexure 8** to the MATA.

7. Perusal of the same reveals that petition dated 09.11.2025 under Order 7, Rule 11 C.P.C. was rejected as none moved. But the case was posted to 28.03.2016 for objection.

8. On 09.05.2016, the Petitioner – Appellant filed objection to petition dt.09.11.2015 filed by the Respondent. He also filed his written statement/ reply in the counter claim and a petition challenging the maintainability of the counter claim under Order 8 Rule 6 (c) of the C.P.C. praying to exclude the counter claim as that would change the nature of the civil proceeding and was vague and barred the law of limitation. Copy of the reply to the written statement is annexed as **Annexure 4** to the MATA. Copy of the petition under Order 8, Rule 6(c) CPC is annexed as **Annexure 6** to the MATA.

9. The respondent filed objection to the petition under Order 8, Rule 6 on 22.09.2016 stating inter alia that the questions required to be decided in the counter

claim are mixed questions of fact and law which cannot be decided at this stage. According to the respondent, the court has jurisdiction to entertain and decide the counter claim along with the original application for declaration. Copy of the objection has been annexed as **Annexure 5** to the MATA.

10. The Appellant Petitioner had filed an application on 25.10.2016 with a prayer for issue of a direction to the Petitioner and Respondent No.2 (Child) for undergoing D.N.A. test to prove the paternity of Respondent No.2. This application had been posted for filing of objection and hearing. Copy of the petition is annexed as **Annexure 7** to the MATA.

11. On 29.11.2016, the respondent was heard in the matter of admissibility of the counter claim was heard and the case was posted to 16.12.2016 for orders. On 16.12.2016, the respondent No. 1 filed copy of order dated 17.11.2015 passed in C.P. No. 136 of 2013 along with copy of petition and objection. The case was heard on that day and on 19.12.2016 and posted to 26.12.2016 for orders.

IMPUGNED ORDER

12. Relying on photocopies of the certified copies of order dated 17.11.2015 passed in C.P. No. 136 of 2013 (C.P. No. 1050/2010) and the copy of the petition under Order 6 (a) of the Hindu Minority and Guardianship Act read with Section 7 of the Family Court's Act instituted by the Appellant and the objection filed by the Respondents, the learned Judge Family Court relied on the admission of the Appellant Petitioner that Respondent No.2 is his daughter and is residing with Respondent No.1. He observed that although the Petitioner-Appellant in the earlier suit had clearly admitted that the Respondent No.2 is his own daughter born from his marriage with Respondent No.1, but for some ulterior motive wanted to disown the legitimacy of Respondent No.2 and as admission is the best evidence, though not conclusive, yet decisive and law leans in favour of legitimacy and frowns upon bastardity, referring to the decision of the Hon'ble Supreme Court in the case of ***Smt. Kamti Devi & Another vrs. Poshi Ram*** held that the case instituted by the Appellant -Petitioner was with frivolous motive and is barred by the law of estoppels and the continuance of the proceeding would be against the interest of justice and dismissed the same as not maintainable. Copy of the order dated 26.12.2016 in contained in **Annexure 8** to the MATA.

SUBMISSIONS

13. Mr. B. Bhuyan, learned counsel appearing for the Appellant submits that though the application had been filed by the Appellant for D.N.A. of Respondent No.2, but without considering the said application, the learned Judge, Family Court has dismissed the suit. He has further submitted that the Appellant on humanitarian ground had earlier filed the petition for custody of Respondent No.2 the child from Respondent No.1, but Respondent No.2 is not his child and the impugned has been

passed mechanically with utter disregard to the statute and the settled position of law and is therefore liable for interference.

14. Mr. H.B. Dash, learned counsel appearing for the Respondents has supported the portion of the order dismissing the suit holding that admission is the best piece of evidence and that the suit had been filed by the Appellant with the oblique motive of avoiding payment of payment to his daughter Respondent No 2. and he had done so by concealing relevant facts and his own admissions in earlier court proceedings. He had filed C.P. No. 252 of 2009 in the Court of The Judge, Family Court Cuttack where during evidence in his cross examination made on dated 21.12.2021 in paragraph 25, the Appellant has claimed that he had borne the expenditure towards her delivery. He had filed C.P. No.1056 of 2010 under Section – 6 (a) of the Hindu Minority and Guardianship Act 1956 read with Section 7 of the Family Courts Act 1984 in the Court of the Learned Family Judge, Cuttack for taking custody of the child in wherein he has pleaded that on 13.06.2004 the female child was born out of their wed lock and in paragraph 2 and 17 of the petition. In paragraph 15 of the petition he has referred to her as his daughter. In his objection filed in CrI.P. No 76 of 2012 filed by the Respondents before the Judge Family Court, Balasore claiming maintenance, he has admitted that the child was born out of their wed lock. In his objection filed in DV Misc case no 93/2014 before the SDJM, Balasore, in paragraph 9 of his objection, he has admitted / stated that the child was born out of the wed lock on 13.06.2014 and at paragraph 16 he has stated that he is ready to maintain the child along with her study expenses if the order is passed at the earliest. Order was passed in Cr. Proceeding No 76 of 2012 on 18.11.2014 for payment of interim maintenance to an extent of Rs 15,000/- to the Respondents (wife and daughter). Thereafter on 12.01.2015, the Appellant filed CP No 24 of 2015 before the Judge, Family Court Balasore for a declaration he is not the father of the child/respondent no-2 with oblique motive and in order to avoid payment of maintenance to her. He has relied on the decisions of the Hon'ble Supreme Court in the case of ***Srihari Hanumandas Totala vs Hemant Vithal Kamat*** reported in ***2021 SCC OnLine SC 565: 2021 9 SCC 99,*** and ***T. Arivandandam vs T.V. Satyapal & Another*** reported in ***: (1977) 4 SCC 467 : AIR 1977 SC 2421.*** Relying on the decision in ***T. Arivandandam*** (supra), Mr. Dash, learned counsel for the Respondent has submitted that when the Petitioner had admitted in his plaint in C.P. No. 1056 of 2010 supported by an affidavit that Respondent No.2 is his daughter, he was estopped from making a contrary claim in C.P. No. 24 of 2015 that she was not his daughter. The C.P. No. 24 of 2015 was therefore evidently a frivolous petition and did not have any merit and was therefore liable to be dismissed.

He has filed a note of submission on 18.11.2022, enclosing copies of the petition for divorce in C.P. No. 252 of 2009 and copy of his petition in C.P. No 1056 of 2010.

STATUTORY PROVISIONS

15. The relevant provisions which are relevant for deciding the case are Section 17, Section 58, Section 70 and Section 145 of the Indian Evidence Act and Order 7 Rule 11 and Order 12 Rule 6 of Code of Civil Procedure which are reproduced here for easy reference.

Indian Evidence Act

> ***Section 17 Admission defined.*** *An admission is a statement, oral or documentary or contained in electronic form , which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.*
>
> ***Section 58. Facts admitted need not be proved****. —No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.*
>
> ***Section 70. Admission of execution by party to attested document.****—The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.*
>
> ***Section 145. Cross-examination as to previous statements in writing.****—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.1145. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.*

Code of Civil Procedure

> ***Order 7 Rule 11. Rejection of plaint****- The plaint shall be rejected in the following cases:-*
>
> *(a) where it does not disclose a cause of action;*
>
> *(b) where the relief claimed is under-valued, and the plaintiff, on being required by the Court to so correct the valuation within a time to be fixed by the Court, fails to do so;*
>
> *(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;*
>
> *(d) where the suit appears from the statement in the plaint to be barred by any law;*
>
> *Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature form correcting the valuation or supplying the requisite stamp-papers, as the case may be, within*

the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

Order 12 Admissions

***1. Notice of admission of case**.—Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.*

***2. Notice to admit documents**.—Either party may call upon the other party to admit, within seven days from the date of service of the notice any document, saving all exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.*

***2A. Document to be deemed to be admitted if not denied after service of notice to admit documents**.—(1) Every document which a party is called upon to admit, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of that party or in his reply to the notice to admit documents, shall be deemed to be admitted except as against a person under a disability: Provided that the Court may, in its discretion and for reasons to be recorded, require any document so admitted to be proved otherwise than by such admission.*

(2) Where a party unreasonably neglects or refuses to admit a document after the service on him of the notice to admit documents, the Court may direct him to pay costs to the other party by way of compensation.

***3. Form of notice**.—A notice to admit documents shall be in Form No. 9 in Appendix C, with such variations as circumstances may require.*

***3A. Power of Court to record admission**.—Notwithstanding that no notice to admit documents has been given under rule 2, the Court may, at any stage of the proceeding before it, of its own motion, call upon any party to admit any document and shall, in such a case, record whether the party admits or refuses or neglects to admit such document.*

***4. Notice to admit acts**.—Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts, mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs:*

Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice.

***5. Form of admissions**. —A notice to admit facts shall be in Form No. 10 in Appendix C, and admissions of facts shall be in Form No. 11 in Appendix C, with such variations as circumstances may require.*

***6. Judgment on admissions**. —(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.*

(2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."

As per the provisions of Order 12 Rule 6, a suit can be dismissed on the basis of admitted facts, admitted documents and admitted pleadings.

CASE LAW

16. In the case of ***T. Arivandandam*** (supra), the Supreme Court inter alia stated that the father of the Petitioner has contested an eviction proceeding. After losing it he filed an appeal which was dismissed. Against his dismissal, he moved the revision, which was summarily rejected by the High Court but six months time had granted the time to vacate the premises. After enjoying the benefit of this order, he moved for further time to vacate. Thereafter, the Petitioner filed a suit before the Court of Munsif for a declaration that an order of eviction which has been confirmed by the High Court one obtained by fraud and injunction against its execution. When this was brought to the notice of the High Court during hearing of the prayer for extension of time for vacate, the learned Judge granted time to the Petitioner on the basis that the suit would be withdrawn by the Petitioner. But father and son did not withdraw the suit and they filed another suit before the Munsif which praying for an ex parte injunction. But the Respondent entered appearance and after hearing him the Munsif vacated the order of injunction. Thereafter the Petitioner came to the High Court in revision and obtained an order of injunction. The first Respondent applied for vacation. When the matter came up for hearing before the Hon'ble Single Judge, the Petitioner submitted that the Single Judge could not hear the matter. On the next date he heard the revision and dismissed it. The Supreme Court held as follows:

"5. *We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentantly resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now, pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints .The learned Munsif must remember that "if on a meaningful -not formal- reading of the plaint it is manifestly vexatious and meritless ,in the sense of not disclosing and does not disclose the clear right to sue, he should exercise power under Order VII Rule 11 of the C.P.C., taking care to see to see that the ground mentioned therein is fulfilled. And if clever drafting has created the illusion of a cause of action, nip it is the bud at the first hearing by examining the party searchingly under Order X C.P.C. An activist judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot-down at the earliest stage. The Penal Code is also resourceful enough to meet such men (Chapter XI) and must be triggered against them. In this case, the learned Judge to his cost realised what George Bernard Shaw remarked on the assassination of Mahatma Gandhi:*

"It is dangerous to be too good""…

In the case of ***Srihari Hanumandas Totala*** (supra), the Supreme Court inter alia stated that on the case of rejection of a plaint under Order 7 Rule 11 of the C.P.C., as follows :

> *"24. In a more recent decision of this Court in* ***Shakti Bhog Food Industries Ltd. v. Central Bank of India and Another: (2020) 17 SCC 260*** *, a three Judge bench of this Court, speaking though Justice A.M.Khanwilkar, was dealing with the rejection of a plaint under Order 7 Rule 11 by the trial court, on the ground that it was barred by limitation. The Court referred to the earlier decisions including in* ***Saleem Bhai v. State of Maharashtra : (2003) 1 SCC 557 , Church of Christ Charitable Trust vs Ponniaman Educational Trust : (2012) 8 SCC 706*** *(supra), and observed that .*
>
> *"11. It is clear that in order to consider Order 7 Rule 11, the court has to look into the averments in the plaint and the same can be exercised by the trial court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments/pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averment. These principles have been reiterated in* ***Raptakos Brett & Co. Ltd. v. Ganesh Property, (1998) 7 SCC 184 and Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express, (2006) 3 SCC 100****."*
>
> *25. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(d) can be summarized as follows:*
>
> *25.1 To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to;*
>
> *25.2 The defense made by the defendant in the suit must not be considered while deciding the merits of the application;*
>
> *25.3 To determine whether a suit is barred by res judicata, it is necessary that (i) the 'previous suit' is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit; and*
>
> *25.4 Since an adjudication of the plea of res judicata requires consideration of the pleadings, issues and decision in the 'previous suit', such a plea will be beyond the scope of Order 7 Rule 11 (d), where only the statements in the plaint will have to be perused.*

In the case of ***S.M. Asif vs Virendar Kumar Bajaj : (2015) 9*** **SCC 287**, the Supreme Court has held:

> "*8. The words in Order 12 Rule 6 CPC* ***"may"*** *and "****make such order****…" show that the power under Order 12 Rule 6 CPC is discretionary and cannot be claimed as a matter of right. Judgment on admission is not a matter of right and rather is a matter of discretion of the Court. Where the defendants have raised objections which go to the root of the case, it would not be appropriate to exercise the discretion under Order 12 Rule 6 CPC. The said rule is an enabling provision which confers discretion on the Court in delivering a quick judgment on admission and to the extent of the claim admitted by one of the parties of his opponent's claim.*
>
> *9. In the suit for eviction filed by the respondent-landlord, appellant-tenant has admitted the relationship of tenancy and the period of lease agreement; but resisted respondent-plaintiff's claim by setting up a defence plea of agreement to sale and that he paid an advance of*

Rs.82.50 lakhs, which of course is stoutly denied by the respondent-landlord. The appellant-defendant also filed the Suit for Specific Performance, which of course is contested by the respondent-landlord. When such issues arising between the parties ought to be decided, mere admission of relationship of landlord and tenant cannot be said to be an unequivocal admission to decree the suit under Order 12 Rule 6 CPC.

10. Having regard to the stand taken by the parties, in our view, an opportunity has to be afforded to the appellant to put forth his defence and contest the suit and therefore, the matter is to be remitted to the trial court for a fresh hearing, however, subject to the condition that the appellant should pay the arrears of rent at the rate of Rs.44,000/- per month within a period of eight weeks. Further the appellant shall pay Rs.1,00,000/- per month to the respondent-landlord as compensation for use and occupation of the suit premises with effect from 01.08.2015 and the respondent-landlord shall issue necessary receipt/acknowledgment for having received the same. The trial court vide its order dated 30.09.2013 while directing the payment of Rs. 44,000/- per month has stipulated a condition that in the event of the appellant succeeding, the said amount would be adjusted against the balance sale consideration amount under the agreement for sale dated 19.08.2011. Having regard to the said order passed by the trial court, payment of sum of Rs.1,00,000/- per month would also be subject to the final outcome of the eviction suit as well as the suit for specific performance. ***(emphasis supplied)***

In the case of ***Himani Alloys Ltd vs. Tata Steel Ltd. : (2011) 15 SCC 273***, the Supreme Court has held:

"It is true that a judgment can be given on an "admission"contained in the minutes of a meeting. But the admission should be categorical. It should be a conscious and deliberate act of the party making it, showing an intention to be bound by it. Order 12 Rule 6 being an enabling provision, it is neither mandatory nor peremptory but discretionary. The court, on examination of the facts and circumstances, has to exercise its judicial discretion, keeping in mind that a judgment on admission is a judgment without trial which permanently denies any remedy to the defendant, by way of an appeal on merits. Therefore unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim. In short the discretion should be used only when there is a clear "admission" which can be acted upon.

*(**See also Uttam Singh Duggal & Co. Ltd. vs. United Bank of India : (2000) 7 SCC 120; Karam Kapahi vs. Lal Chand Public Charitable Trust : (2010) 4 SCC 753 ; and Jeevan Diesels and Electricals Ltd. vs. Jasbir Singh Chadha :(2010) 6 SCC 601)** . There is no such admission in this case.*

11. In view of the above, we allow this appeal, set aside the orders of the learned Single Judge and the division bench of the High Court dated 22.2.2008 and 22.9.2008. We make it clear that we have not recorded any finding nor expressed any opinion in regard to the merits of the case or in regard to any part of the suit claim. It is possible that on evidence being led, the respondent is able to establish that Rs.47,06,775/70 was in fact due as on 31.3.1999 and that it continues to be due. We request the High Court to dispose of the suit expeditiously."

In the case of ***Uttam Singh Dugal & Co.Ltd vs. Unied Bank Of India***: (2000) 7 SCC 120, it has been held as follows:

"17. Learned counsel for the Petitioner contended that admissions referred to in Order XII, Rule 6 CPC should be of the same nature as other admissions referred to in other rule preceding this Rule. Admissions generally arise when a statement is made by a party in any

of the modes provided under Sections 18 *to* 23 *of the Evidence Act, 1872. Admissions are of many kinds : they may be considered as being on the record as actual if that is either in the pleadings or in answer to interrogatories or implied from the pleadings by non-traversal. Secondly as between parties by agreement or notice. Since we have considered that admission for passing the judgment is based on pleadings itself it is unnecessary to examine as to what kinds of admissions are covered by Order XII, Rule 6 CPC."*

In the case of ***Karan Kapoor vs. Madhuri Kumar : 2022 SCC 496,*** the Supreme Court held ***:***

"*16. Thus, legislative intent is clear by using the word 'may' and 'as it may think fit' to the nature of admission. The said power is discretionary which should be only exercised when specific, clear and categorical admission of facts and documents are on record, otherwise the Court can refuse to invoke the power of Order XII Rule 6. The said provision has been brought with intent that if admission of facts raised by one side is admitted by other, and the Court is satisfied to the nature of admission, then the parties are not compelled for full-fledged trial and the judgment and order can be directed without taking any evidence. Therefore, to save the time and money of the Court and respective parties, the said provision has been brought in the statute. As per above discussion, it is clear that to pass a judgment on admission, the Court if thinks fit may pass an order at any stage of the suit. In case the judgment is pronounced by the Court a decree be drawn accordingly and parties to the case is not required to go for trial*."

ANALYSIS

17. At the initial stage of the suit, the Court has the power to reject the plaint in exercise of power under Order 7 Rule 11 of the CPC on the grounds provided therein or dismiss the suit in exercise of power under Order 12 Rule 6 of the CPC on the basis of admitted facts or documents.

18. There can be no quarrel over the settled proposition of law that the admission which is clear, unequivocal and unconditional may entitle the plaintiff or defendant to a judgment based on such admission. But this admission has to be unequivocal. If this is so, the defendant should not be relegated to the rigors of a long drawn trial.

19. As per the provisions of Order 12 Rule 6 of the CPC , a suit can be dismissed on the basis of admitted facts, admitted documents and admitted pleadings. Order 12 Rule 6 of the CPC plays a vital role in minimizing litigation and enabling speedy disposal of cases especially frivolous cases. The Court can pass judgment on the basis of admitted facts. Order 12 Rule 6 of the CPC can therefore be resorted to by a defendant for the dismissal of the suit on the basis of admitted averments. The object of Order 12 Rule 6 of the CPC is not to relegate a party to an unnecessary trial where facts are admitted and the object of Order 7 Rule 11 of the CPC is not to hold a trial where the plaint does not make out any cause of action or the suit is barred by law.

20. But what would amount to admission so as to warrant exercise of power under Order-12 Rule-6 of the CPC? "*Admission*" has not been defined in the CPC but Section-17 of the Indian Evidence Act defines admission to be a statement made

in the oral, documentary or electronic form suggesting an inference to a fact-in-issue or relevant fact. Section 58 of the Indian Evidence Act provides that where a fact has been admitted by the parties or their agents, there would be no requirement to prove such facts. However it has to be proved before the Court that such fact has indeed been admitted and the proviso to the Section gives a discretionary power to the Court to require such admitted facts to be proved by other means.

21. Without calling for the original case record or the certified copies of the plaint and order, the learned Court on perusal of the photocopies of the plaint in the earlier case - C.P.No.1056 of 2010 / C.P.No.136 of 2013, has dismissed the suit. No opportunity has been provided to the Appellant (Petitioner) to scrutinize the documents or explain the admission allegedly attributed to him.

22. It cannot be disputed that admissions made either in the pleadings or before the Court at the time of hearing of the case are admissible under Section 58 of the Indian Evidence Act, but these admissions have to be proved in accordance with law in the subsequent suit/proceedings. Relying on photocopies of orders or documents without confronting them to the maker will lead to difficult situations and will give rise to multiplicity of litigation instead of minimizing it. The legislative intent behind providing such a discretionary power to the Court was for situations where certain admissions have been made by a party and the court is satisfied with the nature of such admission, it can pass a judgment or decree based on such admission. Power under Order 12 Rule 6 of the C.P.C should therefore be exercised only where the admission of documents or facts is clear, unambiguous and categorical. After examining the "admission", the Court should be satisfied that it can be attributed to the Petitioner. If there is any doubt in the mind of the Court as regards the acceptability of such admission after the same is confronted to the person who made it , the Court cannot dispose of the suit in exercise of power under Order 12 Rue 6 of the CPC on the basis of such admission.

CONCLUSION

23. In view of the above discussion, we are of the view that the impugned order dated 26.12.2016 passed in C.P. No. 24 of 2015 passed by the learned Judge, Family Court, Balasore is liable for interference. It is accordingly set aside. The matter is remanded to the Court of the learned Judge, Family Court, Balasore. The learned trial court shall proceed with the case expeditiously in accordance with law.

24. The MATA is allowed to the extent as indicated.

25. We make it clear that we have not expressed any opinion on the merit of the case.

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2023 (II) ILR - CUT- 386

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

W.P(C) NO. 22163 OF 2017

NTPC LTD. .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 19(1)(g) & 21 – The State Govt. exercising its eminent domain acquired land of petitioner in favour of NTPC – The authority denied the rehabilitation and employment as per LAP, SHP Scheme frame by NTPC – Effect of – Held, the right of occupation guaranteed under Article 19(1)(g) of the Constitution was taken away by acquiring the agricultural land of the petitioner – The right of occupation of the Petitioner is inter-related to Article 21 as his livelihood depends upon the agricultural income – The denial of employment cannot sustain as the right to life is being affected. (Paras 14-21)

Case Laws Relied on and Referred to :-

1. 2005 (2) AWC 1861 : Mohd. Aslam Vs. State of U.P & Ors.
2. JT 2002 (7) SC 425 : Union of India Vs. Joginder Sharma.
3. 2006 (5) SCC 766 : State of J & K and others Vs. Sajad Ahmed Mir.
4. JT (1995) 3 SC 428 : Butu Prasad Kumbhari and others Vs. SAIL.
5. 2011 (Supp.-II) OLR-267 : Govinda Chandra Naik Vs. Collector, Angul & Ors.
6. (2014) 5 SCC 438: AIR 2014 SC 1863 : National Legal Services Authority Vs. Union of India.
7. (1987) 1 All ER 940 : Bugdaycay Vs. Secretary of State.
8. AIR 2000 SC 2083 : State of A.P. Vs. Challa Ramakrishna Reddy.
9. AIR 2002 Chatt 14 : Kehar Singh Vs. State of Chattisgarh.
10. AIR 1983 SC 109 : (1983) 1 SCC 124 : Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni.
11. AIR 1996 SC 1051 : (1996) 2 SCC 549 : Chameli Singh Vs. State of Uttar Pradesh.

For petitioner : M/s. B.S. Tripathy-I & A.Tripathy

For opp. parties : Mr. P.K. Muduli, Addl. Govt. Adv. (O.Ps. 1 to 3)

M/s. Manoj Kumar Mohanty, T. Pradhan, Mithilesh Mohanty and A. Mohanty, (O.P. 04)

JUDGMENT Date of Hearing: 20.04.2023 : Date of Judgment: 25.04.2023

Dr. B.R. SARANGI, J.

National Thermal Power Corporation (NTPC) Limited, which is a company registered under the Companies Act, 1956 and a Government of India Enterprise

engaged in construction of super thermal power projects and generation of electricity in the interest of national power, has filed this writ petition seeking to quash the order dated 28.12.2016 passed under Annexure-6, whereby the Collector & District Magistrate, Angul, by observing that opposite party no.4, being a major married son of Late Dwari Behera, has been rightly included in the SAP list, has directed that as opposite party no.4 has exercised job option for his son, the name of the nominee of opposite party no.4 may be sponsored to NTPC for giving employment under the R&R Scheme applicable to him.

2. The factual matrix of the case, in brief, is that Late Dwari Behera of village Derang was the owner of the land measuring area of total Ac.2.37 decimal appertaining to khata nos.287 & 288 and plot nos.9462, 9463, 9464 and 9471. The said land was acquired by the State Government in the year 1991 for construction of Stage-II Ash Dyke of TSTPP, pursuant to the notification dated 23.04.1990 made under Section 4(1) of the Land Acquisition Act, 1894. Owing to such acquisition, Late Dwari Behera was declared as SAP No.A-307 and his other major married son Maheswar Behera was also declared as SAP No. B-123 for the purpose of grant of rehabilitation benefit as was prevalent then. Apart from receiving the land acquisition compensation of Rs.1,81,351/- on 07.05.1992, the awardee Late Dwari Behera made a requisition in favour of his nominee son Jagdish Behera and Maheswar Behera made a requisition in favour of his nominee son Bibhuti Behera for giving employment in NTPC as per R&R Scheme. Considering the local grievance, survey was done by M/s. IMCO, an agency during the year 1996 to finalize SAP status of the persons whose land has been acquired for establishment of TSTPP of NTPC Ltd. Based on the survey report, the SAP List was finalized by the District Administration, Angul. Thereafter, decision was taken in different RAC and RPDAC meetings that no further addition would be made to the said finally drawn SAP List. In the said finally drawn SAP List the name of Prafulla Chandra Behera-opposite party no.4 was not included as R&R benefit has already been given to the family of Late Dwari Behera, the sole land oustee, based on the prevalent R&R Policy and on the basis of nomination made by the land oustees.

2.1 Opposite party No.4, claiming himself to be a separate family of Late Dwari Behera and original land oustee, filed a writ petition bearing W.P. (C) No.14454/2014 seeking a direction to the opposite parties to declare him as Substantially Affected Person (SAP) / Local Displaced Person and grant the benefit of employment to his son (nominee) as per the R&R policy adopted by NTPC. This Court disposed of the said writ petition on 19.02.2015 directing opposite party no.1 therein to dispose of the representation filed by the petitioner within a period of three months. Pursuant to such direction, opposite party no.2-Collector & District Magistrate, Angul registered the case of opposite party No.4 as Grievance Misc. Case No.1/2015 and issued notice through PR dated 03.07.2015 requiring the petitioner to appear before him on 08.07.2015 at 11.00 AM along with its views for

hearing of the grievance of the present opposite party no.4. On being noticed, the petitioner appeared before the opposite party no.2 and furnished its views in brief.

2.2 During pendency of the Grievance Misc. Case No.1/2015, opposite party no.2 keeping in view the views of the petitioner, directed opposite party no.3 to cause an inquiry and submit report. Opposite party no.3, in its turn, caused an enquiry on the basis of the documents produced and submitted its report on 05.09.2015 indicating that the sole land oustee Late Dwari Behera was awarded SAP No. A-307 and his major married son Maheswar Behera was awarded SAP No.B-123 and based on their nomination two persons of their family, namely, Jagdish Ch. Behera and Bibhuti Behera were given employment in NTPC. But opposite party no.4, Prafulla Chandra Behera, who was the middle son of Late Dwari Behera, was not included in the SAP List and, therefore, has not got R&R benefit from NTPC.

2.3 The petitioner filed objection on 12.11.2015 to the report dated 05.09.2015 before opposite party no.2 with a prayer to reject the inquiry report of the Special Land Acquisition Officer, NTPC, Angul and to hold an impartial and fair enquiry by taking into consideration the rival contentions of both the parties to ascertain additional land holdings and pass such other order as would be deemed fit and proper in the *bona fide* interest of justice.

2.4 The opposite party no.4, who is the middle son of the original land oustee Late Dwari Behera, was an employee and remaining outside by serving in his work place. Therefore, he could not avail the opportunity of inclusion of his name in the SAP List. Subsequently, he pursued his claim to be included in SAP List. As a consequence thereof, in compliance to the order passed by this Court, the opposite party no.3 conducted an inquiry and vide order dated 12.11.2015, opposite party no.2 declared opposite party no.4 as the beneficiary with SAP No.B-123(A). The said order dated 12.11.2015 was communicated by opposite party No.3 vide letter dated 30.11.2015.

2.5 Aggrieved by the order dated 12.11.2015 of opposite party no.2, the petitioner filed W.P.(C) No. 4693/2016 with a prayer to quash the said order dated 12.11.2015 and to direct opposite party no.2 to cause a fresh and fair inquiry by providing reasonable opportunity to the petitioner to participate in the inquiry and produce relevant documents in their support. The said WP(C) No.4693/2016 was disposed of by this Court on 22.11.2016 by remitting the matter back to opposite party no.2 with a direction to comply the principles of natural justice and in case any decision had been taken in the RPDAC meeting dated 05.04.2016 the same would also be considered and consequential action would be taken accordingly. The said exercise would be completed within a period of six weeks from the date of production of the certified copy of the order. In view of the aforementioned order dated 22.11.2016, opposite party no.2 issued notices to the petitioner as well as opposite party no.4 on 15.12.2016 requiring to appear before him on 28.12.2016.

Pursuant to such notice, the petitioner appeared through their advocate and opposite party no.4 as well as learned Govt. Pleader also appeared. Upon giving due opportunity, the order impugned dated 28.12.2016 was passed by the opposite party no.2 holding that being a major married son of Late Dwari Behera, name of Prafulla Chandra Behera has been rightly included in the SAP List. As regards his being a Government Servant, it was further observed that there is no law or rule debarring a Government servant to avail R&R benefit, if he is a land oustee. By so holding, the opposite party no.2 directed that as Sri Prafulla Chandra Behera- opposite party no.4 has exercised job option for his son, the name of his nominee may be sponsored to NTPC, if not already done. Hence, this writ petition.

3. Mr. B.S. Tripathy, learned counsel appearing for the petitioner vehemently contended that the claim of opposite party no.4 to include in SAP List, after lapse of long years of its finalisation, which was done in 1996, is absolutely misconceived one. It is further contended that at the relevant point of time opposite party no.4 was a Government servant and was not residing in the village and, as such, he cannot be included in the SAP List. His further contention is that as per the clarification issued by the Govt. of Odisha, R&DM Department, vide letter no. 92388 dated 20.10.2010, the persons/families who were ordinarily not residing in or near the project area are not eligible for and shall not be enumerated as displaced/affected families for the purpose of R&R benefit. It is also contended that by the time the notification under Section 4(1) was issued opposite party No.4 was not a major married son. Without considering the submissions made on behalf of the petitioner and the objection filed on its behalf, opposite party no.2 came to a conclusion that opposite party no.4, being a major married son of Late Dwari Behera, has been rightly included in the SAP List, and that there is no law or rule debarring a Government servant to avail R&R benefit, if he is a land oustee, and that as he has exercised job option for his son, the name of nominee of opposite party no.4 may be sponsored to NTPC, if not done already. According to learned counsel for the petitioner, the opposite party no.4, after long lapse of 24 years, has raised his grievance for being included in the SAP List, and that too upon receipt of appropriate land acquisition compensation with R&R benefit, therefore, the order impugned, having been passed without application of mind, is liable to be quashed. In support of his contention, he has relied upon a decision of the Allahabad High Court in the case of ***Mohd. Aslam v. State of U.P & Ors***, 2005 (2) AWC 1861, besides the decisions of the apex Court in the cases of ***Union of India v. Joginder Sharma***, JT 2002 (7) SC 425, ***State of J & K and others v. Sajad Ahmed Mir***, 2006 (5) SCC 766 and ***Butu Prasad Kumbhari and others v. SAIL***, JT (1995) 3 SC 428.

4. Mr. P.K. Muduli, learned Additional Government Advocate appearing for the State-opposite parties vehemently urged before this Court that Late Dwari Behera was the exclusive owner of holding nos.287 and 288 of village Dereng appertaining to plot nos. 9462, 9463 and 9471 measuring Ac.2.37 dec., which was

acquired by NTPC for construction of Ash Dyke. During the period of acquisition, Late Dwari Behera had three major sons, namely, Maheswar Behera, Prafulla Chandra Behera and Jagadish Behera. As a land oustee, Late Dwari Behera was awarded with SAP No.A-307. His major married eldest son Maheswar Behera, who was awarded with SAP No.B-123, nominated his son Bibhuti Behera for job as per the provision of R&R Policy of NTPC. Late Dwari Behera, being over aged and unfit, nominated his youngest son Jagadish Behera as his nominee. But due to communication gap, the agency which was entrusted with the work of survey for enumeration of SAPs, excluded Prafulla Chandra Behera, who was the middle son of Late Dwari Behera, as he was serving in other department. As the land of Late Dwari Behera had been acquired for NTPC project and as per the R&R scheme of NTPC all awardees and beneficiaries have availed their R&R benefit, except the middle son Prafulla Chandra Behera-opposite party no.4, therefore, he cannot be debarred from his legitimate claim. The date of birth of Pradyumna Kumar Bhera, son of Prafulla Chandra Behera, as ascertained from HSC certificate, is dated 12.6.1987. Therefore, it cannot be said that at the time of Section 4(1) notification dated 23.4.1990 Prafulla Chandra Behera was unmarried.

4.1 So far as non-inclusion of the name of Prafulla Chandra Behera in the final SAP List is concerned, it is contended that at that time the agency, i.e., IMCO Ltd. had finalized the SAP List by investigating the land/family status of the land owners, but Prafulla Chandra Behera- opposite party no.4 was debarred from his legitimate claim of R&R benefit due to ignorance of family status of the land owner by IMCO Ltd. As a matter of fact, the beneficiary would have been included in the SAP List, which was done accordingly by opposite party no.2 in compliance to the order dated 19.02.2015 passed by this Court in W.P.(C) No.14454/2014. By the said order, opposite party no.2 was directed to dispose of the representation filed by opposite party no.4 within a period of three months from the date of communication of the order. In compliance to the said order, Grievance Misc. Case No.1/15 was registered and after giving due opportunities to all concerned to put forth their views in their support, the order dated 12.11.2015 was passed.

4.2 It is further contended that aggrieved by the order passed by opposite party no.2, the petitioner preferred W.P. (C) No.4693 of 2016 with a prayer to quash the order dated 12.11.2015 of the Collector, Angul and after obtaining the subsequent order dated 22.11.2016 of this Court, the opposite party no.2 initiated another misc. case bearing no.1/15 and to preserve the right and to comply the principle of natural justice, as a consequence of which, the petitioner was given ample opportunities during hearing on 28.12.2016. Both the parties were heard elaborately and consequentially the order impugned was passed. Therefore, no illegality or irregularity has been committed by the State-opposite parties while passing the order impugned.

5. Mr. Manoj Kumar Mohanty, learned counsel appearing for opposite party no.4 vehemently contended that the order dated 28.12.2016 has been passed in compliance to the direction given by this Court in W.P.(C) No. 4693 of 2016 disposed of on 22.11.2016, by affording opportunity of hearing to all the parties. In the order impugned, opposite party no.2 has come to a definite conclusion that opposite party no.4 is a major married son of Late Dwari Behera at the time of notification issued under Section 4(1) of the Land Acquisition Act, 1894, therefore, he has been rightly included in the SAP List and, as such, his son is entitled to a job under NTPC under the provisions of R&R Scheme of NTPC. Thereby, no illegality or irregularity has been committed by the Collector & District Magistrate, Angul in passing the order impugned so as to cause interference by this Court. To substantiate his contention, reliance has been placed on the decision of this Court in the case of ***Govinda Chandra Naik v. Collector, Angul and others***, 2011 (Supp.-II) OLR-267.

6. This Court heard Mr. B.S. Tripathy, learned counsel appearing for the petitioner, Mr. P.K. Muduli, learned Addl. Government Advocate appearing for the State-opposite parties and Mr. Manoj Kumar Mohanty, learned counsel appearing for opposite party no.4 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. On the basis of the factual matrix, as discussed above, there is no dispute that the land of Late Dwari Behera was acquired by the petitioner, and that said Late Dwari Bhera had three major sons, but, while making inquiry, the investigating agency did not include the name of opposite party no.4, who is the middle son of Dwari Behera, in the SAP List, as he was employed outside. It is also not in dispute that Talcher Super Thermal Power Project, Kaniha (Phase-I) of NTPC had formulated Rehabilitation and Resettlement Plan on 04.05.1991. Clause-3 thereof, which deals with rehabilitation, is quoted hereunder:-

> "*3. Rehabilitation.*
>
> *The issue of rehabilitation of families to be displaced as a result of the construction of this project has been hanging fire since the commencement of work. As would be explained later, a satisfactory rehabilitation plan acceptable to the oustee as well as to the State Government could not be so far formulated. The displacement is a serious human problem and its short-term and long-term implications cannot be brushed aside. The families who are going to lose their home and hearth and the means of livelihood for the interest of the nation should have some perceptible compensatory benefits so that they do not visualize the project as enimical to their interests. Any plan of rehabilitation has to aim at least restoring their existing financial and social status, if not improving it. The State Government have been seized with the problem of displacement in a number of irrigation, hydel and thermal project in the State and have substantially liberalized their rehabilitation policy recently to remove the feeling of discontent from the affected families. In the case of the State's own Ib Thermal Power Station presently under construction in Banharpalli in Sambalpur district, the State Government has provided a package of rehabilitation assistance which is in even more liberal than what has been provided in the revised rehabilitation policy. Some of the salient feature of that package are:-*

i) Houses including Ac.0.10 of homestead land for the oustees who are losting their houses.

ii) Shifting allowances at the rate of Rs.2000/- per family.

iii) Job for at least one member of each family (both substantially and marginally affected families).

iv) Treating the married sons as separate families.

v) Training of oustees for improving their potential for semi-skilled jobs.

vi) Provision of school, hospital, roads and drinking water facilities in the rehabilitation area.

vii) Allotment of shops and pindis for rehabilitation of marginally affected families."

8. In view of the aforementioned provision, it is made clear that a married son is to be treated as a separate family and job for at least one member of each family (both substantially and marginally affected families) shall be provided. By the time Section 4(1) notification was issued, opposite party no.4 was the major married son and, as such, constituted a separate family and is entitled to get R&R benefit, being SAP, by providing job to his nominee. The reason for non-inclusion of his name in the SAP List is well founded because he was not available in the locality at the time of inquiry conducted by the private investigating agency, i.e., IMCO Ltd. That is to say, the name of opposite party no.4 was not included in SAP List, as he was rendering service outside the locality. Admittedly, opposite party no.4 is the 2nd son of the original land oustee, namely, Late Dwari Behera. Therefore, non-inclusion of his name in the SAP List is absolutely illegal and arbitrary. When opposite party no.4 approached this Court, vide order dated 19.02.2015 passed in W.P.(C) No. 14454 of 2014, this Court directed for consideration of his representation. As a consequence thereof, after conducting an inquiry, vide order dated 12.11.2015, direction was given to extend the R&R benefit to opposite party no.4. The said order dated 12.11.2015 was challenged by the petitioner in W.P.(C) No. 4693 of 2016, which was disposed of by this Court, vide order dated 22.11.2016, remitting the matter back to opposite party no.2 to comply the principle of natural justice. It was also directed that in case the decision was taken in RPDAC meeting dated 05.04.2016, the same shall also be considered and consequential action shall be taken accordingly, as because in view of the provisions contained in Clause-3 of the R&R Plan, as quoted above, a right has been accrued in favour of the petitioner.

9. In the proceeding of the 13th RAC Meeting of NTPC/TSTPP, Kaniha held on 20.10.2005, which has been placed on record as Annexure-H/4 to the counter affidavit filed on behalf of opposite party no.4, under the heading "consideration of genuine left out cases for inclusion in SAP list", it was resolved as follows:-

"The reason advanced by G.M. for not considering the genuine left out cases is devoid of any merit or legitimacy. The R.A.C., therefore, strongly recommended for considering the genuine left out cases for selection as SAPS. The Collector was advised to form a committee with his representative and a representative of G.M., NTPC which will examine the cases and select only genuine cases strictly on merit."

10. In view of the aforementioned decision taken, it was strongly recommended for considering the genuine left out cases for selection as SAPS. In consonance of such decision taken in the proceeding no.7 of RPDAC meeting of NTPC/TSTPS, Kaniha held on 05.04.2016, which has been placed on record as Annexure-A/4 to the counter affidavit filed on behalf of opposite party no.4, at Sl. No.4 it was indicated as follows:-

4.	*Rehabilitation of new SAP, Sri Prafulla Kumar Behera who was added to the SAP list as per the order of Hon'ble High Court of Odisha. He had prayed job to his son Sri Pradyumna Kumar Behera (B, tech).*	*Nominee change is allowed in favour of Sri Pradyumna Kumar Behera. His name will be sponsored to NTPC for job.*

11. But the same had undergone review. Accordingly, in the proceeding of review meeting on R&R issues of NTPC/TSTPS Kaniha, which has been placed on record as Annexure-1/4 to the counter affidavit filed by the opposite party no.4, at Sl. No.4 it was held as follows:-

4.	*Rehabilitation of 01 SAP added to SAP list due to order of Hon'ble High Court, Odisha.*	*On this issue, it was decided that NTPC will implement the decision of 7th RPDAC.*

12. Therefore, the decision taken in the 7th RPDAC meeting was implemented. Meaning thereby, the nominee change being allowed in favour of Sri Pradyumna Kumar Behera, his name was sponsored to NTPC for job. Even though such decision was taken and his name was recommended by the Addl. District Magistrate, Angul, vide letter dated 27.03.2017, which is annexed as Annexure-P/4 to the counter filed by opposite party no.4, and the same has been implemented, non-consideration of the case of opposite party no.4 is an outcome of non-application of mind and, as it seems, the petitioner is determined not to extend the benefit to opposite party no.4 by giving job to his nominee-Pradyumna Kumar Behera.

13. In the case of ***Mohd. Aslam*** (supra), the Allahabad High Court held that, as such, employment to those persons whose land has been acquired can be compared with the compassionate employment in service law and, therefore, no relief can be claimed at such a belated stage. The ratio decided in ***Joginder Sharma***, ***Sajad Ahmed Mir*** and ***Butu Prasad Kumbhari*** (supra), on which reliance was placed by the learned counsel for the petitioner, are applicable to the facts and circumstances of the own cases and has no application to the present case.

14. In ***Govinda Chandra Naik*** (supra), where the displaced victim of NALCO Angul Project was under consideration for acquisition of land, the right of occupation guaranteed under Article 19(1)(g) of the Constitution was taken away by the State Government while exercising its eminent domain by acquiring the land of

the petitioner in favour of NALCO. It was held that the right of occupation of the petitioner is interrelated to Article 21 as his livelihood depends upon the agricultural income. Income from agriculture is the only source of his livelihood and NALCO having framed the scheme to provide employment to the family members or nominee of land displaced persons, LAP and SAP to rehabilitate, denial of same cannot be sustained. Thereby, it was directed that the petitioner is entitled to get relief of getting employment being LAP and SAP. The ratio decided by this Court in the case of ***Govinda Chandra Naik*** (supra) has application to the present context. Needless to say, in the name of development the lands are being acquired by depriving the livelihood of the land owners. They are being deprived of getting their sustenance from generation to generation. Thereby, their right to life is being affected.

15. The apex Court in the case of ***National Legal Services Authority v. Union of India***, (2014) 5 SCC 438: AIR 2014 SC 1863 observed that Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans.

16. In ***Bugdaycay v. Secretary of State***, (1987) 1 All ER 940, it has been held that right to life is the most fundamental of all human rights, and any decision affecting human life, or which may put an individual's life at risk, must call for the most anxious scrutiny.

17. In ***R (Pretty) v. DPP***, (2002) 1 All ER 1, it has been held that the sanctity of human life is probably the most fundamental of the human social values. It is recognized in all civilized societies and their legal system and by the internationally recognized statements of human rights.

18. In ***State of A.P. v. Challa Ramakrishna Reddy***, AIR 2000 SC 2083, it has been held that Right to life is one of the basic human right and not even the State has the authority to violate that right.

19. In ***Kehar Singh v. State of Chattisgarh***, AIR 2002 Chatt 14, it has been observed that it is also the duty of the State to create a climate where members of society belonging to different faiths to live together and the State has a duty to protect the life of all and if it is enable to do so, it cannot escape the liability to pay compensation.

20. In ***Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni***, AIR 1983 SC 109 : (1983) 1 SCC 124, it has been

observed that the term "life" used in article 21 of the Constitution of India has a wide and far reaching concept. It means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed.

21. In ***Chameli Singh v. State of Uttar Pradesh***, AIR 1996 SC 1051 : (1996) 2 SCC 549, the apex Court held that "right to life" means to live like a human being and it is not ensured by meeting only the animal needs of man. It includes the right to life in any civilized society implies the right to food, water, decent environment, education, medical care and shelter.

22. On careful analysis of the facts and circumstances of this case in the touchstone of the ratios decided in the plethora of decisions cited hereinbefore, this Court does not find any merit in this writ petition, which is accordingly dismissed. However, there shall be no order as to costs.

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2023 (II) ILR - CUT- 395

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

W.P(C) NO. 8139 OF 2007

MOHAMMAD SHA & ORS. .....Petitioners

.V.

SAYED SINDH BAIG PEER SAHEB & KABARSTHAN, BIJE PIPILI SASAN & ORS. .....Opp. Parties

WAKF ACT, 1954 – Section 25(8) – Whether it is mandatory for every wakf to be registered within the period of three months at the office of the Board ? – Held, Yes. (Para 8)

For petitioners : M/s S.K. Mishra, S.K. Samantray, A. Kejriwal and O.P. Sahu

For opp. parties : M/s Rati Mohanty and Bikash Rath, [O.Ps. No.1 & 2)
Md. Fayaz and Md. Riaz, [O.P. No. 3]

JUDGMENT Date of Hearing: 11.05.2023: Date of Judgment: 16.05.2023

Dr. B.R. SARANGI, J.

The petitioners, who were the defendants no. 1 to 8 before the State Wakf Tribunal, Odisha, Cuttack in Case No. W.T.(O)/O.A.6/2005, have approached this Court seeking to quash the judgment dated 12.06.2007 passed by the Wakf Tribunal in dismissing their counter claim filed against the plaintiff-opposite party no.2 and

defendant no.9-opposite party no.3, despite the fact that the petitioners are recorded as Marfatdars in respect of suit schedule properties and the same had never been acquired or treated as wakf properties.

2. The factual matrix of the case, in brief, is that the land appertaining to plot no.7 measuring an area of Ac.0.53 dec. with noting as "Kabarsthan" and plot no.9 measuring an area of Ac.0.75 dec. with noting as "Peer Asthan" under khata no.164 as per 1927 Sabik Settlement ROR of Mouza-Pipili Sasan under 'Stitiban' status stood recorded in the name "Sindh Baig Saheb" marfat Boudi Sha and Roshan Sha, both are sons of Munsab Sha (ancestors of present petitioners). The said suit plots correspond to 1966 hal settlement plot no.7 measuring an area of Ac. 0.53 dec. under kissam 'Debasthali' and plot no.9 measuring an area of Ac 0.80 dec. under kisam 'patita' status 'sthitiban' under khata no.213 which stood recorded in favour of Faizal Sha and Mahmad Sha both are sons of Baudi Sha. The aforementioned suit plots further correspond to plot no.6 measuring an area of Ac.0.53 dec. under kisam 'Kabarsthan' and plot no.7 measuring an area of Ac. 0.80 dec. under kisam 'Debasthali' under hal khata no.424 as per hal consolidation R.O.R finally published in the year 1994 which has been recorded in the name of the present petitioners, who had been arrayed as defendant nos.1 to 8 in the suit.

3.1 The aforesaid RORs consistently recognises the right, title and interest of the petitioners over the aforesaid properties and their long standing possession over the same. They have also planted trees over the suit properties in order to maintain the ecological balance and have been maintaining and utilising the graveyard for their own family purpose. The present petitioners' possession over the aforesaid properties is evident from the rent receipt granted by the State Government in lieu of payment of rent, who has also recognised their lawful ownership and possession of the land in question.

3.2 The opposite party no.2 along with some other persons tried to grab the aforesaid properties from the petitioners, though he has no manner of right either to represent the "institution" or to act as the President of the Managing Committee of the institution "Sayed Singh Baig Peer Saheb and Kabarsthan" bije Pipili Sasan. The opposite party no.2 along with his associates gave threat of interfering in the management and possession of the suit properties for which the petitioners instituted a suit to restrain opposite party no.2 and others permanently from interfering with their rights of *Seva puja* of the Peer, enjoyment, management and possession of the same. The said suit was registered as civil suit no. 15 of 2005 before the Civil Judge (Senior Division), Puri. With an ulterior motive, the opposite party no.2 in connivance with opposite party no.3, constituted a managing committee for the first time through a general meeting convened on 07.01.2005 headed by opposite party no.2 and the said committee was approved by opposite party no.3 on 18.01.2005. In the said committee, petitioners no.1 and 6 were included as members, though they had never given consent for the same.

3.3. The opposite party no.2, subsequent to the formation of the managing committee, instituted a suit vide W.T.(O)/O.A. No. 6/2005 before the Wakf Tribunal, Odisha, Cuttack claiming himself to be the representative of the "institution" impleading the present petitioners as defendants no.1 to 8 and opposite party no.3 as defendant no.9, praying for following reliefs.

> "*It be declared that the suit properties are (public) wakf properties and the suit institution is being represented and managed by duly constituted Managing Committee headed by Plaintiff No.2 as is President.*
>
> *It be declared that the Consolidation R.O.R. in favour of the Defendant No.1 to 8 deleting the real owner 'the institution' prepared on 1.4.1994 as void, inoperative and violation of principles of natural justice and statute.*
>
> *It be declared that the Defendant No.1 to 8 have no semblance of personal right, title or interest over the suit schedule property.*
>
> *The defendant no.1 to 8 be permanently injuncted from alienating the suit properties or any portion thereof as well as from cutting trees or changing the nature of land."*

3.4 The plaintiff-opposite parties no.1 and 2 contended that the parties being Suni Muslims are governed under principles of Hanafi School of Mohammedan Law. The suit properties described in the plaint were recorded in favour of the plaintiff no.1 in 1927 Settlement ROR, The *Peersthan* of plaintiff no.1 situates over suit plot No.9. The adjoining suit plot no.7 is used by the local Muslims as *Kabarstahan*. There exist two Jack-fruit trees, one Neem tree and one Kasi tree over plot no.7 and one Banayan tree, one Bel tree, four Date trees and six palm trees over suit plot no.9. Plot no.7 measuring an area of Ac. 0.53 dec. became insufficient as burial ground by efflux of time due to the rising population. The local Muslims are using the adjoining (Gochar-Anabadi) plot no.5 measuring an area of Ac. 0.97 dec. as well as plot no.8 measuring an area of Ac. 0.14 dec under khata no. 619 as their graveyard amalgamating the same with their original graveyard relating to suit plot no. 7 and this possession is within the knowledge of the Government.

3.5 The further contention of the plaintiffs was that in 1927 Settlement ROR the plaintiff no.1-Peer was represented through Baudi Sha and Roshan Sha, sons of Munsab Sha and after their death one Sk. Mussair, son of S.K. Karhu was appointed as Marfatdar of plaintiff no.1. Defendants no. 1 to 8 are the successors of the Sabik recorded Marfatdars. Sk. Hussain managed the institution for sometime but, later on, remained indifferent for which local Muslims *suo motu* offered prayers, but name of Sk. Hussain remained recorded as Marfatdar for name sake only. According to the plaintiffs, after constitution of Wakf Board, the suit properties were surveyed, registered and notified in the Odisha Gazette dated 20.02.1976 as Wakf properties. The said gazette notification having not been challenged has been crystallised as final and conclusive.

3.6 It is further pleaded that though civil suit bearing C.S. No. 15 of 2005 was filed by the defendants no. 1 to 8 before the Court of Civil Judge (Sr. Division),

Puri, but the Wakf Board was not made a party to the suit. For the first time from the suit, the plaintiffs came to know that the father of defendants no. 1 to 4 and defendant no.5 in collusion with the settlement authorities managed to record their names in 1966 ROR deleting the name of the plaintiff no.1. Since the civil suit had been filed much after establishment of the Wakf Tribunal, the same was not maintainable in view of bar under Section 85 of the Wakf Act, 1955. Since the consolidation ROR is void and illegal and the local villagers brought the aforesaid facts to the knowledge of Wakf Board, the opposite party no.3, after proper inquiry, advised the villagers to constitute a managing committee. Accordingly, a general meeting of the local Muslims was convened on 07.01.2005, which formed a managing committee consisting of 13 members headed by plaintiff no.2 as its President as the same was approved by the opposite party no.2 on 18.01.2005. Therefore, contended that the petitioner-defendants no.1 to 8 had no semblance of exclusive right, title and interest over the suit properties, the right of Mutawalliship is not inherited but the petitioners are trying to interfere in the management of the institution.

3.7 Along with the suit, the plaintiffs also filed a petition under Order 39 Rules 1 and 2 of the C.P.C. vide I.A. No. 3 of 2006 with a prayer to restrain the petitioners from alienating the suit land, cutting the trees from the suit land and changing the nature and character of the suit land pending disposal of the suit. The present petitioners, being the defendants no.1 to 8, filed their objection stating that though no temporary injunction was granted in I.A. No. 5 of 2005 (arising out of C.S. No. 5 of 2005), but the learned District Judge, Puri granted order of status quo in F.A.O. No. 40 of 2005, which was filed against the order of dismissal passed in I.A. No. 5 of 2005. However, the said appeal was dismissed subsequently. The Wakf Tribunal passed an order on 02.07.2005 directing both the parties to maintain status quo over the suit land and not to change the nature and character of the suit lands and not to cut or sale any tree from the suit land till the disposal of the Original Application.

3.8 The present petitioners could not file their written statement in time and, as such, they were set ex-parte and on the basis of the petition filed by the plaintiffs under Order 8, Rule-5 (2) of the C.P.C., the suit was decreed by State Wakf Tribunal on 30.08.2005 in favour of the plaintiffs. But the suit of the plaintiffs filed for declaration that the consolidation ROR in respect of suit plot nos. 5 and 8 issued in favour of the petitioners deleting the name of the real owner as void was dismissed.

3.9 The petitioner-defendants no. 1 to 8, who were set ex-parte, filed a petition vide I.A. No. 8 of 2005 under Order-9, Rule-13 C.P.C. for setting aside the ex-parte judgment dated 30.08.2005, but the same was dismissed by the Wakf Tribunal vide order dated 13.01.2006. As a consequence thereof, the petitioners moved this Court by filing W.P.(C) No. 1171 of 2006 challenging the order dated 13.01.2006 as well as the judgment dated 30.08.2005 passed by the Wakf Tribunal.

3.10 This Court, after hearing both the parties, vide order dated 04.09.2006, allowed the writ petition, quashed the impugned order dated 13.01.2006 and directed restoration of W.T. (O)/O.A. No. 6 of 2005 of the State Wakf Tribunal, Odisha, Cuttack to file, subject to payment of cost of Rs.2000/- to the plaintiff-opposite parties no.1 and 2 and to file written statement by 18.09.2006. It was further directed that the trial of the suit be expedited so as to complete the same within a period of six months.

3.11 The petitioners filed their written statement within the time stipulated by this Court refuting the averments made in the plaints and also lodged a counter claim. Though the plaintiffs had undertaken before this Court to participate and cooperate in the case for early disposal of the same, but in fact tried to delay the proceeding on one plea or other, for which the suit was dismissed for default vide order dated 20.01.2007 by the Wakf Tribunal, Cuttack. The plaintiffs then filed a petition under Rule 12 of the Wakf Tribunal Rules read with Order 9 Rule 9 of the C.P.C. to restore the suit, i.e., W.T. (O)/O.A. No.6 /2005 to file. After hearing the parties, the Wakf Tribunal, vide order dated 12.04.2007, held that there was no sufficient cause preventing the plaintiff-opposite parties no. 1 and 2 to remain absent on the date of hearing on 20.01.2007, therefore, the application of the plaintiff- opposite parties no. 1 and 2 for restoration of the suit was rejected being devoid of any merit.

3.12 Notwithstanding the fact that the suit filed by the plaintiffs dismissed for default, the Wakf Tribunal proceeded with the hearing of the counter claim filed by the present petitioners. In the written statement, the defendants no. 1 to 8, the petitioners herein, challenged the maintainability of the suit being hit by law of limitation, cause of action, barred under the provisions of the Odisha Consolidation of Holding and Prevention of Fragmentation of Land Act, 1972, *res judicata* and want of *locus standi*. The present petitioners stated that their ancestors had installed the Tomb of Sindh Baig Peer Saheb, who was a Muslim Saint. As the ancestors were disciples of the aforesaid Saint, after his demise, they buried the said Saint in plot no.9 and in his memory they installed the tomb over the grave of the Saint. They usually performed the rituals by offering prayer of Fatiha Daroed and Seerini besides the tomb on each 'Tursday' and observed the ceremony 'Urs Mubark' every year.The present petitioners,being the successors, enjoyed the suit property subsequently as 'Marfatdars' and their performance of Sevapuja is hereditary with the knowledge of every one. It was further pleaded in the written statement that the settlement and consolidation authorities have recognised their right, title, interest and possession over the suit land and such recording in Sabik and Hal R.O.Rs have never been challenged by any one at any point of time. Therefore, the notification dated 20.02.1976 was passed behind the back of the present petitioners without conducting proper inquiry and, as such, the same is not binding on them and over the property which exclusively belonged to the present petitioners. Consequently, the managing committee constituted and approved by opposite party no.3 on 18.01.2005

is illegal. It was further specifically stated that there exist two other Kabarsthan in the locality where the villagers of Pipil Sasan were buried. The present petitioners in their written statement also raised counter claim against the plaintiff-opposite parties which reads as under:-

> *"The Govt. Notification dated 20.2.1976 in respect of the suit property be declared as illegal, inoperative and void.*
>
> *The Managing Committee of Sayed Sindh Baig Peer Saheb and Kabarsthan Bije Pipili Sasan constituted and approved by Defendant No.9 on 18.1.2005, by the Muslim villagers in their general meeting dated 7.1.2005 be declared illegal.*
>
> *The right of the Defendant Nos. 1 to 8 be declared as lawful for the purpose of Sevapuja of the Peer Sayed Sindh Baig, enjoyment, management and possession of the property under Hal Khata No.424 as per consolidation R.O.R. of the year 1994.*
>
> *The Institution, i.e. Peer Sayed Sindh Baig Saheb and the Kabarsthan as recorded in Hal Consolidation Khata No. 424 under Plot No.6 and 7 be declared as private institution of Defendant nos. 1 to 8.*
>
> *The Plaintiff be permanently restrained from interfering with the possession of the defendant Nos. 1 to 8 in respect of the suit property as per the counter claim schedule."*

3.13 The opposite party no.2 filed written statement to the counter claim filed by the present petitioners challenging the same on the ground of law of limitation and principles of estoppels and being hit by the provisions of Wakf Act. He contended that neither the civil court nor the revenue court have jurisdiction to adjudicate any dispute relating to Wakf property as provided under Section 85 of the Wakf Act.

3.14 The opposite party no.3, who was defendant no.9, did not file written statement to the counter claim filed by the present petitioners, but was allowed to participate in the hearing of the counter claim.

3.15 The Wakf Tribunal, on the basis of the pleadings available, framed as many as nine issues for consideration. During course of hearing of the counter claim, the plaintiff-opposite parties no. 1 and 2 examined five witnesses including opposite party no.2 himself as P.W.2 and also proved certain documents to establish their claim marked as Exts.1 to 9. The present petitioners examined three witnesses, including defendant no.3 himself as D.W.1, and also proved certain documents marked as Exts.A to D. The opposite party no.3 also examined one witness as D.W.4, who happens to be the Wakf Inspector, Odisha Board of Wakf and also proved certain documents marked as Exts. A-9 to D-9.

3.16 On the basis of the pleadings available on record and documents produced by the parties both documentary and oral, the Wakf Tribunal came to the following findings in its order 12.06.2007 by dismissing the counter claim filed by the present petitioners.

> *"The evidence of D.W.1 is not helpful for contesting defendants.*
>
> *The application submitted by Faijalli Sha and Ahmad Sha for registration of Wakf is marked as Ext. A-9. Defendant Nos. 1 to 8 have raised objection to this document as it was produced*

from the custody of Defendant No. 9 (Orissa Board of Wakf) who support the case of the plaintiffs. Defendant No. 9 is a statutory body. Ext. A-9 is a document more than 30 years old maintained during official course of business. So, it cannot be lightly brushed aside for mere objection by Defendant Nos. 1 to 8.

The document inspires confidence that the registration was made at the instance of Faijalli Sha and Ahmad Sha who were ancestors of Defendant Nos. 1 to 8. Defendant Nos. 1 to 8 cannot change the official act of their ancestors at a later stage like this and they are stopped to do so.

It cannot be said that Defendant Nos. 1 to 8 had no prior knowledge of the Gazette Notification dated 20.02.1976 and only came to know after receipt of summon from this Tribunal.

Defendant Nos. 1 to 8 are not only interested in property but also with the Wakf and therefore, the limitation of one year as contemplated under Section 6 (1) of the Wakf Act, 1954 is applicable to them.

Counter claim is not hit U/S. 89 of the Wakf Act, 1995.

Orissa Gazette Notification dated 20.2.76 notifying the suit property except property under Khata No. 619 as Wakf property and managing Committee formed under approval of Defendant No.9 on dated 18.1.2005 are according to law.

Suit property under Consolidation Khata No. 424 appertaining to Plot No. 6 and 7 are not private properties of Defendant No.1 to 8.

Counter claim is hit by law of limitation provisions of Wakf Act and principle of estoppels. Defendant Nos. 1 to 8 cannot claim title by way of adverse possession.

Plaintiffs are not entitled to any relief as prayed for by them."

3.17 Hence, against dismissal of their counter claim, the petitioners have filed the present writ petition impugning the judgment dated 12.06.2007 passed by the State Wakf Tribunal, Odisha, Cuttack in Case No. W.T.(O)/O.A.6/2005.

4. Mr. S.K. Mishra, learned counsel appearing for the petitioners contended that the Wakf Tribunal, while scrutinizing the materials available on record, failed to appreciate the correct proposition of law *vis-a-vis* Section 6 (1) of the Wakfs Act, 1954 to the extent that the limitation of one year, as prescribed under the Act, is not at all applicable to the present petitioners, as they are not interested in the Wakf. He further contended that the Wakf Tribunal has misconstrued the provisions of Sub-section (8) of Section 25 of the Wakfs Act, 1954 together with the Gazette Notification dated 20.02.1976, which was published after the registration. Though Sub-section (8) of Section 25 of the Act stipulates that in case of Wakf created before the commencement of the Act, every application for registration shall be made within three months from such commencement, and in case of Wakf created after such commencement, within three months from the date of the creation of the Wakf, but, in the instant case, the aforesaid provisions have not been followed. The reason being, in the case at hand, the application was filed on 16.04.1968, the suit property was allegedly registered as Wakf property on 14.03.1974 and the notification was published on 20.02.1976. Therefore, the notification is vitiated. It is further contended that Section 25 of the Wakfs Act, 1954 specifically provides that

the application under Section 25 (1) has to be filed by the 'Mutawallis', but the petitioners or for that matter, their ancestors, being not the 'Mutawallis' but 'Marfatdars', the application purportedly filed by the ancestors of the petitioners cannot be sustained. Though several other grounds have been urged in the petition, but Mr. Mishra, while addressing the Court, confined his contention to the aforementioned grounds.

5. Though opposite parties no.1 and 2 had entered appearance through M/s. Mira Ghose, R. Mohanty, B. Rath, N.S. Ghose and M. Roula, but during pendency of this writ petition Mira Ghose left for her heavenly abode. Even though the names of her associates are reflected in the cause list and opposite parties no.1 and 2 are represented by them, they did not appear in spite of several opportunities given to them, nor any other counsel represented opposite parties no.1 and 2. Since it is an old matter of the year 2007, this Court is not inclined to grant any adjournment to enable opposite parties no.1 and 2 to appear and participate in the hearing. But, as it appears, opposite parties no.1 and 2 have filed their counter affidavit justifying the stand of Wakf Tribunal and have contended that the order passed by the Wakf Tribunal is well justified and does not require any interference by this Court.

6. Md. Fayaz, learned counsel appearing for opposite party no.3 contended that the stand taken by the opposite parties no.1 and 2 in their counter affidavit is well justified and, thereby, the dismissal of the counter claim filed by the present petitioners cannot be said to illegal or illogical and, therefore, sought for dismissal of the writ petition.

7. Therefore, having heard Mr. S.K. Mishra, learned counsel appearing for the petitioner and Md. Fayaz, learned counsel appearing for opposite party no.3 and upon perusing the records, more particularly, the counter affidavit filed on behalf of opposite parties no.1 and 2, since pleadings between the parties have been exchanged, the writ petition is being disposed of finally at the stage of admission with the consent of learned counsel appearing for the parties.

8. During the course of hearing, it was strenuously urged by Mr. S.K. Mishra, learned counsel appearing for the petitioners that the Wakf Tribunal has misconstrued the provisions of Sub-section (8) of Section 25 of the Wakfs Act, 1954 together with the Gazette Notification dated 20.02.1976, which was published after the registration. To appreciate the legality of such contention, Section 25(8) of the Wakfs Act, 1954 is extracted hereunder:-

> *"In the case of wakfs created before commencement of this Act, every application for registration shall be made within three months from such commencement and, in the case of wakfs created after such commencement, within three months from the date of the creation of the wakf."*

On perusal of the aforesaid provision, it is made clear that every Wakf, whether created before or after commencement of the Act, shall be registered at the office of

the Board and in case the Wakfs created before the commencement of the Act, every application for registration shall be made within three months from such commencement and in case of Wakf created after such commencement within three months from the date of creation of the Wakf. Therefore, by the above provision, a mandate has been put that Wakf has to be registered within a period of three months. Nothing has been placed on record to show that the Wakf has been registered within three months. Even after amendment to the Act, the provision, with regard to the bar to the enforcement of right on behalf of unregistered wakfs, as contained in Section 87 of the Wakf Act, 1995, has been omitted with effect from 01.11.2013. Though such a plea was advanced by the present petitioners by filing their written statement and also contending the same in the counter claim, but the Wakf Tribunal has not dealt with the very same provision. Thereby, the findings arrived at by Wakf Tribunal, without considering such provision, cannot be sustained in the eye of law.

9. In view of such position, the judgment dated 12.06.2007 passed by the State Wakf Tribunal, Odisha, Cuttack passed in Case No. W.T.(O)/O.A.-06/2005 is hereby quashed and matter is remitted back to the Wakf Tribunal for re-adjudication of the counter claim of the petitioners taking into consideration the provisions contained in Section 25(8) of the Wakf Act, 1954 by affording opportunity of hearing to all the parties.

10. The writ petition stands disposed of accordingly. However, there shall be no order as to costs.

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2023 (II) ILR - CUT- 403

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

W.P.(C) NO. 32063 OF 2022

M/s P.K. MINERALS PRIVATE LTD. .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Article 226 – Tender matter – Scope of Judicial Review – Held, when the process adopted or decision made by the authority is malafide or intended to favour someone and the process of selection is arbitrary, unreasonable and contrary to the provision of law, the court can interfere in exercise of power of Judicial Review. (Paras 18-21)

Case Laws Relied on and Referred to :-

1. (2020) 17 SCC 577 : Vidarbha Irrigation Development Corporation & Ors. Vs. Anoj Kumar Agarwala.

2. W.P.(C) No. 31112 of 2022 disposed of on 03.04.2023 : Sachin Kumar Agrawal Vs. State of Odisha.
3. 114 (2012) CLT 97 : Rahul Mishra Vs. Collector,Bolangir.
4. (1993) 1 SCC 445 : Sterling Computers Ltd. Vs. M & N Publications Ltd.
5. (1994) 6 SCC 651 : AIR 1996 SC 11 : Tata Cellular Vs.Union of India.
6. (1999) 1 SCC 492 : Raunaq International Ltd. Vs. I.V.R. Construction Ltd.
7. (2000) 2 SCC 617 : Air India Ltd. Vs. Cochin International Airport Ltd.
8. (2006) 11 SCC 548 : (2006) 11 Scale 526 : B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd.
9. (2012) 8 SCC 216 : Michigan Rubber (India) Limited Vs. State of Karnatak.
10. (2014) 3 SCC 760 : Maa Binda Express Carrier Vs. North East Frontier Railway.

For Petitioner : M/s S.K. Dash, A.K. Otta, S.Das, A. Sahoo and P. Das

For Opp. Parties : Mr. P.P. Mohanty, Addl. Govt. Adv. [O.P.Nos.1 to 3]
Mr. U.C. Beura [O.P.No.4]

JUDGMENT Date of Hearing: 10.05.2023: Date of Judgment: 18.05.2023

Dr. B.R. SARANGI, J.

M/s P.K. Minerals Private Ltd., a company registered under the Companies Act, 1956, has filed this writ petition seeking to set aside the order dated 20.10.2022 passed in OMMC Appeal No.33 of 2022 by the Appellate Authority-cum-Sub-Collector, Keonjhar, as well as the order dated 05.08.2022 passed by the Competent Authority-cum-Tahasildar, Banspal in Sand Stone Quarry Case No. 4/2020-21, and to issue direction to the opposite parties to settle the Karangadihi Stone Quarry in its favour in accordance with law.

2. The factual matrix of the case, in a nutshell, is that the Tahasildar, Banspal, on 18.07.2022, floated an auction notice for long term lease of Karangadihi Stone Quarry for a period of five years, i.e., from the financial year 202-23 to 2026-27. The last date of submission of bid was fixed to 04.08.2022 and the date of opening of bid was fixed to 05.08.2022. The auction notice also specified the list of documents to be enclosed by the bidders along with the bid application. Duly complying with the conditions of the auction notice, the petitioner submitted its bid incorporating the documents as required. The tender drop box was opened, on 05.08.2022 at 11.30 A.M., by the selection committee, comprising of Tahasildar, Banspal, Addl. Tahasildar, Banspal and Revenue Inspector. Five sealed envelopes were found to be submitted by Dileswar Behera, Anil Khirwal, Soumyajit Mohanty, M/s P.K. Minerals (P) Ltd. (petitioner herein) and M/s Sri Venkateswar Construction. On scrutiny of the documents, it was found that bids of Dileswar Behera, Anil Khirwal, Soumyajit Mohanty were not accompanied with required documents.

2.1 The tender notice contained a mandate that the incomplete applications will not be taken into consideration and those will be rejected, and that the bid

applications will be scrutinized in presence of the bidders or their representatives, and only the bid applications complying with all the terms will be taken into consideration, and the bidder quoting highest rate of additional charges will be selected. The purpose behind it is only transparency in the matter of selection of the bidder. Since bid applications of Dileswar Behera, Anil Khirwal and Soumyajit Mohanty were incomplete, those bid applications were rejected on the ground of "insufficient documents".

2.2 The petitioner had enclosed all the required documents along with the bid application. As per Rule 27(4)(iv) of the Odisha Minor Minerals Concession (Amendment) Rules, 2022, which required the bidder to submit the income tax return of previous financial year for an amount not less than the amount of additional charge offered and other dues or bank guarantee valid for a period of 18 months for the amount of additional charges etc. offered, the petitioner, in compliance thereto, had also offered bank guarantee issued by the Banker, i.e., Axis Bank Ltd. to the tune of Rs.75, 00,000/- and Rs.5,00,000/- in favour of the Tahasildar, Banspal for a period of 18 months to comply with the requirements of the Rules and Clause-5 of the tender call notice. The petitioner had no dues of Goods and Service Tax (GST) and, on 28.07.2022, he applied before the Superintendent of Central Excise, CGST, Keonjhar-1 Range for issuance of a "No Dues Certificate" to comply with Clause-7 of the auction notice. But, the CGST authorities advised the petitioner to download the information from their website and, accordingly, the petitioner had downloaded the information from their website, which contained the information that the petitioner had no outstanding GST dues.

2.3 The opposite party no.4 had enclosed a check list along with its bid application and vide sl.no.5 though it had enlisted "income tax return of FY 2021-22", but in effect it had enclosed the income tax return for the assessment year 2021-22 for the financial year 2020-21. The tender notification was issued on 18.07.2022 and, therefore, the bidder was required to submit the income tax return for the financial year 2021-22 ending 31.03.2022. Therefore, the bid submitted by opposite party no.4 was without the income tax return of the financial year 2021-22. Apart from the same, opposite party no.4 at sl.no.8 of the check list had described as "GST no dues certificate". But it was not a statutory certificate and the same was issued before his submission of income tax return of financial year 2021-2022 and, as such, the same was issued on the request made by the assessee, as a conditional and not absolute. As such, the GST authorities had made it clear that the certificate is not valid in case of any liability arises for the said period and at the time of scrutiny of the details. Meaning thereby, the authority reserved the right to cancel and declare the certificate to be invalid.

2.4 The petitioner raised objection to the effect that the bid application of opposite party no.4 is incomplete and, therefore, the same is liable to be rejected. But the selection committee, instead of rejecting the bid of opposite party no.4,

deferred the selection of the bid and decided to seek clarification from the concerned Department of the Government as to the validity of the income tax return submitted by opposite party no.4 for the assessment year 2021-22. As such, the bid submitted by opposite party no.4 should have been rejected as per sl.no.5 of the check list, which was not complied with, as the GST no dues certificate submitted by opposite party no.4 was not in order and the same was conditional one. Though the selection committee had deferred the selection of the bid process and was waiting for clarification, but the competent authority, on the very same day, proceeded with the selection by declaring opposite party no.4 as successful bidder. Hence, this writ petition.

3. Mr. S.K. Dash, learned counsel appearing for the petitioner vehemently contended that though the bid submitted by opposite party no.4 had suffered from deficiency and the same was objected to by the petitioner, but such objection was not taken into consideration. On information being received under the Right to Information Act, 2005, since it was found that vide order dated 05.08.2022 the competent authority has declared opposite party no.4 as successful bidder, the petitioner preferred appeal under Rule 46 of the OMMC Rules, 2016 and also presented application for stay of impugned order in terms of Sub-rule (3) of Rule 46 of the Rules, 2016. The same having not been acceded to, the petitioner has approached this Court by filing the present writ petition. It is contended that opposite party no.4 having not complied with all the requirements of the auction notice, its bid should have been rejected, as because non-compliance of the requirements of the tender call notice vitiates the entire proceeding of selection of successful bidder. Therefore, the order of selection passed by the competent authority cannot be sustained in the eye of law.

3.1 It is further contended that opposite party no.4 got selected merely because it had quoted highest price, even if it was an unsuccessful bidder, but even though the petitioner wanted to match with that price, it was not called upon by the opposite parties, although the bid of the petitioner was in order. It is further contended that the competent authority had shown undue haste in settling the source in favour of opposite party no.4, inasmuch as, though decision was taken on 05.08.2022 by the selection committee to take confirmation from the respective department, but on the same day the source was settled in favour of opposite party no.4, which shows that the action of the competent authority is arbitrary and unreasonable. As such, the decision making process by settling the source in favour of opposite party no.4 cannot be sustained in the eye of law. Thus, it is contended that in exercise of power under judicial review, this Court can interfere with the same and pass appropriate order in accordance with law.

3.2 To substantiate his contention, learned counsel appearing for the petitioner has relied upon the judgments of the apex Court as well this Court in the cases of ***Vidarbha Irrigation Development Corporation and others v. Anoj Kumar***

Agarwala, (2020) 17 SCC 577; ***Sachin Kumar Agrawal v. State of Odisha*** [W.P.(C) No. 31112 of 2022 disposed of on 03.04.2023]; and ***Rahul Mishra v. Collector, Bolangir***, 114 (2012) CLT 97.

4. Mr. P.P. Mohanty, learned Addl. Government Advocate appearing for the State-opposite parties contended that pursuant to the auction notice dated 18.07.2022, the tender box was opened on 05.08.2022, wherein five bidders, including the petitioner, were found to have participated in the bid. After scrutiny, it was found that the bids of Dileswar Behera, Anil Khirwal and Soumyajit Mohanty were rejected due to insufficient documents, whereas the petitioner had quoted a sum of Rs.271/- as additional charge and opposite party no.4 had quoted a sum of Rs.589/-. As opposite party no.4 had quoted highest bid of Rs.589/- as additional charge, it was selected as highest bidder. It is further contended that as per Clause-7 of the auction notice dated 18.07.2022 the bidder should have furnished a certificate/letter from the concerned GST jurisdictional officer that no GST dues are pending against such bidder and, as such, such condition has been inserted in the bid documents pursuant to letter dated 13.05.2022 of the Govt. of Odisha, Revenue and Disaster Management Department, wherein the State Government had specifically directed to furnish such certificate by the bidder with regard to no GST dues pending against such bidder. It is contended that the petitioner had not furnished a certificate/letter from the concerned GST jurisdictional officer that no GST dues are pending against it and, as such, the petitioner had submitted a document downloading from the GST site/portal, which was not accepted by the competent authority, as it was not in consonance with the letter dated 13.05.2022 of the State Government and Cluase-7 of the auction notice. It is contended that opposite party no.4 had submitted income tax return dated 31.10.2021 along with its bid, which discloses that its current business was of Rs.1,81,06,830/- and, thereby, opposite party no.4 has been selected. Consequentially, he sought for dismissal of the writ petition.

5. Mr. U.C. Beura, learned counsel for opposite party no.4 contended that opposite party no.4, having quoted highest price, was got selected by the authority. It is contended that as per Sub-section (1) of Section 139 of the Income Tax Act, 1961 for the financial year 2021-22 the income tax returns was due on 31st October, of the assessment year 2022-23. Opposite party no.4 is legally liable to submit its audit report up to 7th October 2022 and income tax returns attaching the said order on or before 31st October, 2022, for which the previous year return of the opposite party no.4 is financial year 2020-21 relating to assessment year 2021-22, which was filed by opposite party no.4 along with the bid documents. Thereby, no illegality or irregularity has been committed by opposite party no.4 in submitting its bid and the same cannot be rejected. It is contended that opposite party no.4, having quoted highest price of additional charges, has been granted with the lease to operate the stone quarry for a period of five years. Thereby, granting the said lease in favour of

the petitioner with a low price does not arise, and that the same would be improper on the part of the authority. As a consequence thereof, dismissal of the writ petition is sought for.

6. This Court heard Mr. S.K. Dash, learned counsel for the petitioner; Mr. P.P. Mohanty, learned Addl. Government Advocate appearing for the State opposite parties no.1 to 3; and Mr. U.C. Beura, learned counsel appearing for opposite party no.4 in hybrid mode and perused the record. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties this writ petition is being disposed of finally at the stage of admission.

7. On the basis of the factual matrix, as delineated above, before delving into the merits of the case itself, Clause-(iv) of Rule-27(4) of the Odisha Minor Minerals Concession (Amendment) Rules, 2022, which is relevant for the just and proper adjudication of the case, is taken note of:-

> *"**R-27(4)(iv)**. Income tax return of previous financial year showing annual income for an amount not less than the amount of additional charge offered and the royalty payable for the minimum guaranteed quantity for one whole year or bank guarantee valid for a period of eighteen months for the amount not less than the amount as above."*

8. As per the provision mentioned above, the bidder has to submit the income tax return of previous financial year for an amount not less than the amount of additional charge offered and the royalty payable for the minimum guaranteed quantity for one whole year or bank guarantee for a period of 18 months for the amount of additional charges offered. As required under Clause-5 of the auction notice, though opposite party no.4 had enclosed a check list along with bid application and vide sl.no.5 had enlisted "income tax return of FY 2021-22", but had enclosed the income tax return for the assessment year 2021-22 for the financial year 2020-21. As the tender notification was issued on 18.07.2022, the bidder was required to submit the income tax return for the FY ending 31.03.2022. If the same would be taken into consideration, the bid application submitted by opposite party no.4 was without any income tax return of the financial year 2021-22, therefore, the same should have been rejected. Apart from the same, against sl.no.8 of the check list, opposite party no.4 had mentioned "GST no dues certificate", but the certificate enclosed was not a statutory certificate and, as such, the same was issued before the submission of income tax return of FY 2021-22. Furthermore, the said certificate was issued on the request made by the assessee and, as such, the same was a conditional one. The GST Authorities had made it clear that the certificate is not valid in case of any liability arises for the said period and at the time of scrutiny of details. Meaning thereby, the authority had reserved the right to cancel and declare the certificate to be invalid.

9. So far as the petitioner is concerned, it had no dues of Goods and Service Tax (GST). On 28.07.2022, the petitioner had applied to the Superintendent, Central

Excise (CGST, Keonjhar-I Range for issue of a "No Dues Certificate" to comply with Clause-7 of the auction notice. But the CGST Authorities advised the petitioner to download the information from their website. Accordingly, the petitioner had downloaded the information from their website, which contained the information that the petitioner had no outstanding GST dues. Thereby, the same is in compliance of Clause-7 of the auction notice. As a consequence thereof, the petitioner objected to the bid submitted by opposite party no.4, but, without considering the same, the authorities proceeded with the decision making process of selection and allotment of the quarry. On the basis of the materials, which have been placed by the petitioner at page 182-183 of the writ petition as Annexure-5, on receipt of the same under the Right to Information Act, 2005, it would be evident that in the comparative statement prepared on opening of the bids on 05.08.2022, which were received pursuant to the auction notice issued vide Advertisement No. 1895 dated 18.07.2022 with regard to Karangadihi Stone Quarry, the competent authority has made endorsement to the following effect:-

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
Sl. No.	Name& Address of the Participant with Mobile No.	Form MT (triplicate)	Treasury Challan @ Rs.1000/-	Affidavit	EMD	IT return of Previous financial year or Bank Guarantee	GST Registration Certificate	Certificate of No dues from GST Jurisdiction Officer	Land Plan and Land Schedule	PAN Card & Other ID Card	Documents on available machinery and transportation	Agreed no lift material (in Cum)	Charge Quoted by Applicant (per Cum.)	Date & Contact No.	(Accepted /Rejected)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)
05	M/s Venkateswar Construction, M partner-Garta Naga, Subrahamanyeswar Rao. At/Po-Rutisila ,P.S-Pandapada Dist-Keonjhar	YES	YES 0032 4/8/22	YES	YES	YES	YES	YES	YES	YES	YES	-	589=00		
		1) M/s Sri. Venkateswara Construction,M.P-G.N .S.Rao of Ruti sila has quoted Additional Charge @589 However the IT return submitted for the assessment year 2021-22. Which is to be clarified by the undersigned in consultation with the concerned department /Authority and the No dues certificate obtained from C.T GST,Jajpur also needs to be confirmed from concerned authority ,if necessary.													
		2) M/s P.K.Minerals P.Ltd, Md.Soumyaranjan Pahi, kenonjhar has quoted Additional Charge @ 22% However the No dues obtained from GST portal needs to be confirmed from concerned department /Authority, if necessary .													
		Hence, after receiving the above mentioned clarification and confirmation, the tender will be finalized.													

10. On perusal of the endorsement of the committee, it is made clear that opposite party no.4 had quoted additional charge at the rate of Rs.589/-, but, so far as its income tax return for the assessment year 2021-22 is concerned, a clarification was to be given by the competent authority in consultation with the concerned

department/authority, and, as regards no dues certificate obtained from the CGST department, confirmation was to be made by the concerned authority. Similarly, it was observed that the petitioner had quoted additional charge of Rs.221/-, but, however, the no dues certificate obtained from GST portal was needed to be confirmed from the concerned department/authority, if necessary, and, thereafter, the tender would be finalized. If such requirement has to be complied with, pursuant to the observation made on 05.08.2022, without getting such clearance from the respective departments and getting confirmation from the respective authority, as was observed, the authority could not have proceeded with the matter and finalize the tender in favour of opposite party no.4 on the very same day, i.e., 05.08.2022. Thereby, the entire decision making process of the tendering authority is arbitrary, unreasonable and contrary to the provisions of law. Under these circumstances, this Court, in exercise of the powers conferred under the judicial review, has got jurisdiction to interfere with the decision making process of the tendering authority.

11. In ***Sterling Computers Ltd. v. M & N Publications Ltd.*** (1993) 1 SCC 445, the apex Court observed as under:-

> *"18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the court is concerned primarily as to whether there has been any infirmity in the 'decision-making process'. … the courts can certainly examine whether 'decision-making process' was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution."*

12. In ***Tata Cellular v. Union of India,*** (1994) 6 SCC 651 : AIR 1996 SC 11, the apex Court, referring to the limitations relating to the scope of judicial review of administrative decisions and exercise of powers in awarding contracts, held to the following effect:-

> *"(1) The modern trend points to judicial restraint in administrative action.*
>
> *(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
>
> *(3) The court does not have the expertise to correct the administrative action. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
>
> *(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. … More often than not, such decisions are made qualitatively by experts.*
>
> *(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.*
>
> *(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."*

The apex Court also noted that there are inherent limitations in the exercise of power of judicial review in contractual matter. As such, it was observed that the duty to act fairly will vary in extent, depending upon the nature of cases, to which the said principle is sought to be applied. It was further held that the State has the right to refuse the lowest or any other tender, provided it tries to get the best person or the best quotation, and the power to choose is not exercised for any collateral purpose or in infringement of Article 14.

13. In ***Raunaq International Ltd.*** **v.** ***I.V.R. Construction Ltd.*** (1999) 1 SCC 492, the apex Court held as under:-

> *"9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:*
>
> *(1) the price at which the other side is willing to do the work;*
>
> *(2) whether the goods or services offered are of the requisite specifications;*
>
> *(3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;*
>
> *(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;*
>
> *(5) past experience of the tenderer, and whether he has successfully completed similar work earlier;*
>
> *(6) time which will be taken to deliver the goods or services; and often*
>
> *(7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.*
>
> *Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.*
>
> *10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work—thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g. a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.*
>
> *11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public*

interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers."

14. In ***Air India Ltd.*** **v.** ***Cochin International Airport Ltd.*** (2000) 2 SCC 617, the apex Court, while summarizing the scope of interference as enunciated in several earlier decisions, held as follows:-

"7. … The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

15. In ***B.S.N. Joshi & Sons Ltd.*** **v.** ***Nair Coal Services Ltd.*** (2006) 11 SCC 548 : (2006) 11 Scale 526, the apex Court observed as follows:

"56. It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor; the same ordinarily being within its domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record."

16. The scope of judicial review has also been taken into consideration elaborately in ***Jagdish Mandal*** (supra). In paragraph-22 of the said judgment, the apex Court held as follows:-

"……..Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

> *(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;*
>
> *Or*
>
> *Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";*
>
> *(ii) Whether public interest is affected.*
>
> *If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."*

Similar view has also been reiterated in ***Michigan Rubber (India) Limited v. State of Karnatak,*** (2012) 8 SCC 216 and ***Maa Binda Express Carrier v. North East Frontier Railway,*** (2014) 3 SCC 760.

17. In ***Vidarbha Irrigation Development Corporation and others*** (supra), the apex Court, in paragraph-16 of the judgment, held as under:-

> *"16. It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court."*

Since in the instant case opposite party no.4 has not complied with the conditions, as stipulated in the auction notice, and the committee has decided to make a verification and confirmation from the concerned authorities, instead of doing so, the same could not have been settled in favour of opposite party no.4.

18. In ***Sachin Kumar Agrawal*** (supra), this Court already held that once the bid submitted by the petitioner was not incorporated by the bank guarantee or the previous year's income tax return, it was defective one and cannot be entertained as per the tender notice. It was also clarified in the tender notice that in absence of any documents, as enumerated in clauses-1 to 14, the application submitted by the bidder would not be taken into consideration. Therefore, fully knowing the conditions stipulated in the tender notice, the petitioner should not have filed the writ petition for consideration of the bid on the ground that he had quoted higher price than opposite party no.5. If the bid submitted by the petitioner was absolutely void ab initio, in view of non-compliance of the tender conditions stipulated in the tender notice, he is estopped from claiming the benefit, as has been claimed in the writ petition.

19. In ***Rahul Mishra*** (supra), this Court in paragraph-24 of the said judgment held as under:-

> *"24.Therefore, the application of the Petitioner, who is already a lessee, may be considered by putting the sairat source to auction. It is open for any category of applicant referred to in Rule 27 including the Petitioner to participate in public auction of minor mineral & in case the Petitioner is not found to be the highest bidder, but agrees to match with the price at which the bid is knocked, preference shall be given to him even though he is not the highest bidder. We make this observation keeping in view the provision of Rule 27, 35& 36 of the Rules, 2004 vis-à-vis interest of the State which really means the larger interest of the people of the State. If the Sairat is settled in favour of the Petitioner then the same may be renewed at least for a period of five years in terms of the observation made by the Hon'ble Supreme Court in its order in the case of Deepak Kumar etc (supra) subject to payment of consideration money each succeeding year which shall be fixed by increasing 15% of the consideration money of the immediate preceding year pending framing of Rules."*

20. A contention was raised that opposite party no.4 had quoted highest price of Rs.589/- as additional charge and the petitioner had quoted Rs.221/-, therefore, opportunity should have been given to the petitioner to match with the bid price of opposite party no.4. But that question does not arise, in view of the fact that the document, which had been submitted by the petitioner with regard to no dues certificate from GST authority, is also required to be verified by the concerned department/ authority, if necessary. Thereby, this Court is of the considered view that even if the petitioner is called upon to match the highest price, but its bid will suffer from deficiency like that of opposite party no.4. Therefore, the question of calling upon the petitioner to match the highest price offered by opposite party no.4 may not arise.

21. In view of the aforesaid facts and law, as discussed above, it is made clear that the decision making process in selecting opposite party no.4, being arbitrary, unreasonable and contrary to the provision of law, cannot be sustained in the eye of law. Consequentially, the order dated 05.08.2022 so passed by the Tahasildar, Banspal settling the source in favour of opposite party no.4 and confirmation thereof made by the Sub-Collector, Keonjhar by order dated 20.10.2022 passed in O.M.C.C. Appeal No.33 of 2022 are liable to be quashed and are hereby quashed. The opposite party-authorities are directed to go for fresh tender in respect of Karangadihi Sand Quarry as expeditiously as possible in the interest of justice, equity and fair play.

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

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2023 (II) ILR - CUT- 415

ARINDAM SINHA, J & SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 10085 OF 2023

SMT. KALPANA PANDA & ORS. .....Petitioners

.V.

COMMISSIONER OF ENDOWMENTS, BBSR & ORS. .....Opp. Parties

ORISSA HINDU RELIGIOUS ENDOWMENT ACT, 1951 – Section 31 r/w section 41(e) – Dispute regarding the right of succession in the religious institution – Competent authority for adjudication of dispute – Held, the provision made in explanation U/s. 31(3) empowers the trustee to appoint militates against filling up the vacancy. (Para 5)

For Petitioners : Mr. Gopinath Mishra
Ms. Bini Mishra, in W.P.(C) No.9781 of 2023

For Opp. Parties : Ms. P. Naidu
Mr. Manmaya Kumar Dash, (Intervener)

ORDER Date of Order :16.05.2023

BY THE BENCH

1. Mr. Mishra, learned advocate appears on behalf of petitioners and submits, there is vacancy for servants in the religious institution. His clients' hereditary right stood reported on inquiry obtained by the Sub-Collector and recorded in order dated 29th April, 2022. In the circumstances, the trustee was required to appoint his clients to the service, they being next in line of succession to the deceased, under sub-section (2) in section 31, Orissa Hindu Religious Endowments Act, 1951. However, the Sub-Collector illegally referred his clients to the Additional Assistant Commissioner for purported resolution of dispute under clause (e) in section 41.

2. Ms. Naidu, learned advocate appears on behalf of the Commissioner. She submits, there is another person, who is also claiming the hereditary service. In the circumstances, there is no irregularity in impugned orders directing petitioners to seek adjudication from the authority under clause (e) in section 41.

3. Ms. Mishra, learned advocate appears on behalf of petitioner in the sub-item (W.P.(C) no.9781 of 2023) and submits, section 31 is attracted on existence of vacancy. There was no vacancy because a partition deed was executed and right to perform the service provided thereunder. In the circumstances, when dispute arose, it was necessary for reference under section 41(e). Mr. Dash, learned advocate appears and submits, his client wants to intervene. The matter be referred to the trustee under section 31.

4. It would be relevant to extract and reproduce a passage from submissions of petitioners' recorded by the Sub-Collector.

> *"The inquiry report of Learned Tahasildar, Cahdbali, reveals that one Muralidhar Pardhi was allotted15 Nos. palis for performing of RitiNiti Seba puja of Deity Sri Sri Akhandaleswar Mahadev.* ***The Petitioners are the legal heirs of Damodar and Padmanav Pardhi and O.P. Satyabrata Pardhi is not a legal heir of Lt. Muralidhar Pardhi****. So, the petitioners claim is genuine and legal and they are the legal heirs of Lt. Muralidhar Pardhi and illegally and arbitrarily by applying force and Muscle power, the present O.P. is performing Riti Niti, Sebapuja of 15 Nos. palis of Deity who was no way related to the same."*
>
> (emphasis supplied)

Having recorded as above the Sub-Collector went on to say that dispute arises for performing rituals etc. and therefore there must be reference under section 41(e).

5. Explanation under section 31(3) indicates appointment to be made by the trustee in case of, inter alia, dispute regarding the right of succession. Sub-section (4) provides for appeal. In the circumstances, it appears that the provision has a mechanism for resolution of dispute. It is also to be taken note of that the provision empowering the trustee to appoint militates against filling up the vacancy by arrangement of document executed between some or all the parties claiming the right. Furthermore, the Sub-Collector has referred to an inquiry report, which is to be considered for the purpose of making the appointment.

6. Direction in impugned orders for reference to the Additional Assistant Commissioner is set aside and quashed. Parties are directed to approach the trustee under section 31(3) for deciding the rival claims and appointment to be made in respect of the service.

7. The writ petition is disposed of.

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2023 (II) ILR - CUT- 416

ARINDAM SINHA, J & SANJAY KUMAR MISHRA, J.

W.P.(C) NO.17748 OF 2023

SWAGATIKA ROUT .....Petitioner

.V.

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

INCOME TAX ACT, 1961 – Sections 144,144 (B) r/w Section 147 – Petitioner could not comply with the notices issued by the assessing

officer because of the pandemic for which order U/s. 147 was issued without any enquiry – Whether the impugned order is sustainable ? – Held, No – In the present case, the Assessing Officer abdicated his role as adjudicator in making the computation – In the circumstances, we are inclined to accept that petitioner deserve a further opportunity to file a return – Impugned assessment order is set aside and quashed.

(Para 4)

For Petitioner : Mr. J. Pattanaik

For Opp. Parties : Mr. S.S. Mohapatra, Sr. Standing Counsel (Revenue)

JUDGMENT Date of Hearing and Judgment : 21.06.2023

ARINDAM SINHA, J.

1. Mr. Pattanaik, learned advocate appears on behalf of petitioner (assessee). He submits, impugned is assessment order dated 21st March, 2022 made under section 147 read with section 144 and 144B in Income Tax Act, 1961. He submits, his client could not comply with the notices issued because of the pandemic. His client has said so in, inter alia, paragraph-11 of the petition. His client seeks interference, for purpose of filing a return and participating in the assessment upon setting aside impugned order.

2. On query from Court Mr. Pattanaik submits, his client never had taxable income and this was the first assessment, consequent upon she having sold her property. It was land and building.

3. Mr. Mohapatra, learned advocate and Senior Standing Counsel appears on behalf of revenue. He submits, the provisions, including those in section 144B were complied with. He demonstrates from impugned order, notices were issued to the assessee. So much so, the assessment order itself was intimated to the assessee and prescribed period for filing appeal thereagainst has also expired. On query from Court he submits, since the assessee had not filed return nor responded to the notices, there was no question of enquiry for allowing indexation.

4. We reproduce below paragraphs-2 and 11 from the writ petition.

> "*2. That in view of the spread of pandemic COVID-19 across many countries of the world including India, causing immense loss to the lives of people, various measures were taken by the Government. Also the Hon'ble Apex Court in Misc. Application No.665/2021 in Suo Motu Writ Petition (Civil) no.3 of 2020 in Re: Cognizance for Extension of Limitation vide order dated 23rd March, 2020 it was directed vide order dated 23rd March, 2020 that the period of limitation in filing petitions /applications/suits/appeals all other proceedings irrespective of the period of limitation prescribed under the general or special laws shall stand extended with effect from 15th March, 2020 till further orders due to COVID 19. Finally, the Hon'ble Apex Court was pleased to hold that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.*

11. That the non-response to the notices was not intentional or deliberate. The petitioner could not respond to the notices in view of the pandemic situation, which has to be accepted as a reasonable cause. Although the decision of the learned ITAT is not binding but for the sake of judicial consideration, it is humbly submitted that the assessment order passed ex parte for the failure to respond to the notices issued during pandemic COVID 19 has been quashed by the learned ITAT, Bangalore Bench and remitted the matter back to the assessing officer for reconsideration in the case of M/s Madanthyar Primary Agricultural Credit Co-operative Society Versus DCIT. This case is also similar to that case referred to above."

It appears from above reproduced paragraphs and impugned assessment order that the demand of tax and interest etc. was made consequent to discovery by revenue that there had been a high value transaction entered into by petitioner, on having sold her property. There is no other allegation or particulars of otherwise income had or concealed by petitioner, as appearing from impugned assessment order. Here we must be mindful that the Assessing Officer may, under section 147 assess income having escaped assessment. In impugned assessment order, also stands invoked is section 144, providing for best judgment assessment. It is clear that the Parliament intended the Assessing Officer to be both investigator, for purpose of detecting income having escaped assessment and adjudicator, for making the best judgment assessment. There does not appear to be any dispute that the property consisted of land and building and there is absence of enquiry on relief under section 48, the revenue was mandated to give. It appears; in the present case the Assessing Officer abdicated his role as adjudicator in making the computation. In the circumstances, we are inclined to accept that petitioner deserves a further opportunity to file a return.

5. Impugned assessment order is set aside and quashed. Petitioner will, within two weeks from date, submit her return for purpose of the assessment.

6. The writ petition is disposed of.

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2023 (II) ILR - CUT- 418

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

JCRLA NO. 61 OF 2012

PRADIP PARIDA .....Appellant

.V.

STATE OF ODISHA .....Respondent

INDIAN PENAL CODE, 1860 – Section 302 – The appellant was convicted U/s. 302 of I.P.C – The case of the prosecution lies on direct evidence based on the testimony of P.W.3 and depositions of the

Prosecution witnesses like P.Ws. 4, 5 & 9 with minor contradictions and discrepancies – Whether that minor contradictions are fatal for the prosecution ? – Held, No – If the depositions of P.Ws. are considered along with the documentary evidence on record and medical evidence and it is crystal clear that the evidence is natural, trust worthy and acceptable, there is no reason to disbelieve the depositions of P.Ws. by referring some minor contradictions in their testimonies.

Case Laws Relied on and Referred to :-

1. (2000)8SCC 457 : Narayan Chetanram Chaudhary & Anr. Vs.State of Maharashtra.
2. 1999 Supp (4) SCR 286 : State of Himachal Pradesh Vs. Lekh Raj & Anr.
3. (1974) (3) SCC 767 : Ousu Varghese Vs. State of Kerala.
4. (1981) SCC (Crl.) 676 : Jagdish Vs. State of Madhya Pradesh.
5. (1981) (2) SCC 752 : State of Rajasthan Vs. Kalki & Anr.
6. (1973) 2 SCC 793 : Shivaji Sahebrao Bobade Vs. State of Maharashtra.
7. (1993) 3 SCC 282 : JT 1993 (2) SC 290: Anil Phukan Vs. State of Assam.

For Appellant : Mr. Achyuta Pattnaik

For Respondent : Mr. B. Panigrahi, ASC

JUDGMENT Date of Hearing:18.11.2022: Date of Judgment:17.05.2023

Dr. S.K. PANIGRAHI, J.

1. In this JCRLA, the convict/ Appellant (Pradip Parida) challenges the judgment of conviction and order of sentence dated 30.09.2011 passed by the learned Ad hoc Addl. Sessions Judge, FTC, Jagatsinghpur in Sessions Trial Case No.171/67 of 2011, whereby the Appellant was convicted under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as "the I.P.C." for brevity) and sentenced to undergo imprisonment for life and pay fine Rs.10,000/- in default to undergo further imprisonment for one year.

I. **CASE OF THE PROSECUTION**:

2. P.Ws.1,3,4, 9, the accused, the deceased and all other labourers are residents of village Ujalla Gopinathpur under Tangi P.S., Dist. Khurda and had been to Paradeep to do labour work under a contractor namely Gobardhan Das and were staying near the school of Railway Colony, Paradeep. On 04.07.2010 evening, there was quarrel in between Ravi Routray (hereinafter "deceased") and Pradip Parida (hereinafter"accused") for Rs.20/-.In the said process of quarrel, the accused holding a katari threatened the deceased to do away his life. However, on the intervention of P.Ws 3, 4 & 9 and others, the matter was pacified and they all went to sleep. P.Ws 1, 4, 9 along with other labourers including the accused decided to sleep inside the school while P.W.3 along with the deceased slept inside the park. At about 1 am on hearing the cry of the deceased, P.W.3 woke up and found the accused assaulting the deceased on his head and face by means of a katari and then fled. He noticed injury

on the head and face of Ravi with profuse bleeding. Seeing this he raised hue and cry, hearing which Rankanidhi Behera (Informant) since dead, Tangu Parida (P.W.4), Chema Sahoo and others from their group arrived there. They shifted the deceased to Atharbanki hospital and thereafter to Cuttack medical. However, on the way the deceased succumbed to the injuries. To that effect, case was registered against the Appellant was arrested and after completion of investigation, he was charge sheeted under Section 302 of the Indian Penal Code. After the charge was framed, the trial was completed by the Adhoc Addl. Sessions Judge, FTC, Jagatsinghpur and the Appellant was convicted under Section 302 of IPC and sentenced to undergo imprisonment for life. Hence, this appeal.

II. SUBMISSION OF THE APPELLANT:

3. Mr. Achyuta Pattnaik, learned counsel for the Appellant strenuously argued that the appellant is innocent. The plea of the defence is one of complete denial and false implication. The specific case/plea of the defence as borne out from the statement of the accused under Section 313 of the Cr.P.C. is that he is in no way connected or concerned with the death of the deceased nor is he is in anyway involved in the incident.

4. Learned Counsel has contended that absence of blood stain in the cloth of the eye witness who cared the injured to hospital, created doubt as to the presence of those witnesses at the time of incident and no blood stained cloth were recovered from the possession of the witnesses which throws considerable doubt about his presence at the time of occurrence and non-examination of any independent witness adversely affects the prosecution case.

5. He has further raised the contention that there was inordinate delay in filing the FIR and no plausible explanation has been given for the same which is fatal to the prosecution case. There is in ordinate delay of about 14 hours in filing FIR and no plausible explanation has been given for the same. An inordinate delay of about 14 hours amounts to an abuse of the process of law.

III. SUBMISSIONS OF THE STATE/ RESPONDENT

6. Mr. B. Panigrahi, learned Additional Standing Counsel for the State submitted that on bare reading of the testimonies of P.Ws.3, 4 and 9, it unfolds that they all including the deceased and the accused are residents of village Ujalla Gopinathpur under Tangi PS Dist. Khurda and had been to Paradeep to do labour work under a contractor namely Gobardhan Das and were staying near the school of Railway colony. Paradeep On 04.07.2010 evening a quarrel ensued between Ravi Routray (deceased) and the accused for Rs.20/- and in the said process of quarrel the accused holding a katari threatened Ravi to kill. However, on the intervention of P.Ws.3, 4 and 9 and others, the matter was pacified and they all went to sleep P.Ws.1, 4, 9 and others including the accused while sleeping in the school. P.W.3 along with the deceased slept inside the park which is unequivocally proved by

P.W's.3, 4 and their evidence with regard to quarrel also amply corroborated by the evidence of P.W.5 (father of the deceased) whose evidence unfolds that his son (deceased along with accused, P.Ws.3, 4, 9 and others had been to Paradeep to do labour work and about 8 months back of his examination, one day on 4 of the month evening his son told him over telephone that there was quarrel between them and accused for Rs.20/- where he was threatened by accused to be killed by means of a katari. Hearing this, he suggested his son to remain alert and at about 3 AM on that night, he got information from one Tangu Parida (P.W.4) regarding the assault on his son which is amply corroborated by P.W.4.

7. He has further contended that the above prosecution witnesses were put to strenuous and decisive cross examination. Their testimonies with regard to the quarrel in between the accused and deceased and the threatening given by the accused to deceased to murder him by means of a katari on the evening of the relevant day of occurrence has not been altered or shaken in any manner to dislodge or disbelieve their testimony which is very much clear, cogent, consistent and trustworthy so far this circumstance is concerned. As such, it has been proved beyond reasonable doubt that the quarrel between the accused and the deceased and the threatening given by the accused to the deceased to kill him showing a katari.

IV. CONCLUSION:

8. In order to drive home the charge against the accused, prosecution has examined as many as 11 witnesses. The informant Rankinidhi Behera (since dead) has not been examined in this case. P.W.1- Panu Routray is a post occurrence witness, P.W.2 is Dr. Soumya Ranjan Nayak who conducted autopsy over the dead body of deceased vide PM report marked Ext 2, P.W.3- Sarbeswar Sahoo @ Kalia, is the pre occurrence witness as well as eye witness to occurrence and also witness to inquest, P.W.4-Tangu Parida is a pre as well as post occurrence witness, P.W.5- Gouranga Routray the father of the deceased a post occurrence witness, P.W.6- S.I. BB Hota is the UD EO, P.W.7- Kedarswar Nanda the ASI of police and P.W.8- Bijaya Kumar Sahoo, constable of police both of Paradeep PS are said to be the witness to seizure, P.W.9 Akhaya Parida is another witness to pre & post occurrence, P.W. 10 is the scribe of the report as well as the witness to seizure of katari and other articles from the spot, and P.W.11- Anil Kumar Mishra is the investigating officer in this case. The rest of the Charge sheeted witnesses are declined by the prosecution. Per contra none has been examined on behalf of the defence to refute the charge leveled against the accused. Besides examining the aforesaid witnesses, prosecution has also relied upon certain documents marked Ext. 1 to Ext. 12 and the material objects M.Os.I to IX.

9. Firstly, it is pertinent to determine whether the death of the deceased was homicidal or suicidal. In this regard, it is pertinent to scrutinize the post mortem report prepared by P.W.2 and his testimony. Doctor further stated that the injuries

are ante mortem in nature and sufficient to cause death of a person in ordinary course of nature. Further, he opined the cause of death is due to shock & hemorrhage as a result of aforesaid injury which are homicidal in nature. Time since death is within 6 to 12 hours at the time of his examination. Besides that he has testified that the injuries which he noticed caused by moderately heavy cutting weapon and the injury no.(xi) is consistent with wound suggested by the defence. He further stated that on 21.9.10 basing on the police requisition made by the I.O. he examined the produced weapon of offence i.e. one iron katari of length 37 cm having iron blade and one iron handle, iron blade was found curved The surface of the blade was found sharp cutting and the convex surface was found blunt. The maximum thickness of the blade at the convex surface was 0.8 cm. He also noticed some reddish brown stain sticking on the iron blade of the weapon along with rust stain all over the weapon and answered to the query made by the IO that all the injuries detected by him on the body of the deceased at the time of autopsy could be caused by the produced weapon which he examined. Apart from that he opined the external injury no.(iii) with its corresponding internal injuries were sufficient to cause death of a person in ordinary course of nature However, all the injuries present on the head and face were combinedly fatal vide his query report.

10. No question was put to doctor by the defence with regard to the nature of death of the deceased as homicidal in nature finding the same to be risky. As such the testimony of doctor-P.W.2 remained unchallenged with regard to the nature of the death of the deceased as homicidal.

11. The case of the prosecution lies on the determination of the question that whether the accused committed the murder of the deceased by intentionally assaulting him by means of a katari. It is pertinent to mention here that the case of the prosecution lies on direct evidence based on the testimony of P.W.3. In this regard, it is pertinent to note the indicting depositions of the prosecution witnesses. The case at hand rests mainly on the three circumstances:

i. Pre occurrence through the mouth of P.Ws.3, 4, 5 and 9.

ii. Direct evidence through the mouth of P.W.3.

iii. Post occurrence evidence through the mouth of P.Ws.1, 4, 5, 9 and 10, and the circumstances i.e. factum of seizure through the mouth of P.Ws.1, 7, 8 and the CE report marked Ext. 12.

12. On bare reading of the testimonies of P.Ws.3, 4 and 9, as it unfolds that they all including the deceased and the accused are residents of village Ujalla Gopinathpur under Tangi PS Dist. Khurda and had been to Paradeep to do some labour work under a contractor named Gobardhan Das and were staying near the school of Railway colony, Paradeep. On 04.07.2010 evening a quarrel ensued between Ravi Routray (deceased) and the accused for Rs.20/- and in the said process of quarrel the accused holding a katari threatened Ravi to kill. However, on the intervention of P.Ws.3, 4 and 9 and others, the matter was pacified and they all went to sleep.

13. P.Ws.1, 4, 9 and others including the accused while sleeping in the school, P.W.3 along with the deceased slept inside the park which is unequivocally proved by P.Ws.3, 4 and their evidence with regard to quarrel also amply corroborated by the evidence of P.W.5 (father of the deceased). His evidence also unfolds that his son (deceased along with accused, P.Ws.3, 4, 9 and others had been to Paradeep to do labour work and about 8 months before his examination, one day on 4th day of the month evening his son told him over telephone that there was quarrel between hum and accused for Rs.20/- where he was threatened by accused to kill by means of a katari Hearing this, he suggested his son to remain alert and at about 3 AM on that night, he got information from one Tangu Parida (P.W.4) regarding the assault on his son which is sufficiently corroborated by P.W.

14. With respect to direct evidence, prosecution has examined P.W.3 who along with the deceased was sleeping at the spot i.e. the Children's park where the deceased was murdered. The testimony of P.W.3 in this matter unfolds that on 4.7.10 evening there was quarrel between the deceased and the accused for Rs.20/-. In the said process of quarrel, accused Pradip Parida holding a Katari threatened the deceased to do away his life. However, on their intervention the matter was pacified. Thereafter, they sent Pradip Parida to sleep and he (P.W.3) along with the deceased went to the Children's park and slept there. Other labourers of their group slept in the school. On the relevant night at about 1 am, hearing the cry of the deceased, he woke up and found Pradip Parida assaulting Ravi on his head and face by means of katari after which the latter fled. He noticed injury on the head and face of Ravi and was profusely bleeding. Seeing this, he raised hue and cry hearing which Rankanidhi Behera (informant) since dead and others from their group arrived there. They shifted Ravi to Atharbanki hospital and thereafter to Cuttack medical. His evidence further unfolds that while shifting the injured Ram to Cuttack, on the way the deceased succumbed to the injuries. Additionally, he stated that the police held inquest in his presence, prepared inquest report wherein he puts his endorsement that due to assault by Pradip Parida by means of katari, they shifted the deceased to Cuttack medical where he was declared dead. He was put to strenuous and decisive cross examination .His evidence in cross examination unfolds that he was examined by the police in this case on the next day of occurrence and categorically stated that he has seen the accused hacking the deceased and has seen him dealing one blow when he woke up. It is further elicited from his mouth that while shifting deceased, his shirt was stained with blood and denied to the suggestion given by the defence counsel that there was no land dispute between their family and the family of accused.

15. All the above prosecution witnesses were put to strenuous and decisive cross examination. Their testimonies regarding the quarrel between the accused and deceased and the threatening given by the accused to deceased to murder him by means of a katari on the evening of the relevant day of occurrence has not been altered or shaken in any manner to dislodge or disbelieve their testimony which is

very much clear, cogent, consistent and trustworthy so far this circumstance is concerned. As such prosecution has well proved the quarrel between the accused and the deceased and the threatening given by the accused to the deceased to kill him showing a katari.

16. If the depositions of P.Ws.4, 5 and 9 are considered along with the documentary evidence on record and medical evidence of P.W.2, it is crystal clear that the evidence is natural, trustworthy and acceptable. There is no reason to disbelieve the depositions of P.Ws.4, 5 and 9 by referring to some minor contradictions in their testimonies. In this regard, several authorities have held that minor contradictions are not so fatal for the prosecution. The Supreme Court in the case of ***Narayan Chetanram Chaudhary & Anr. v. State of Maharashtra***[1] observed:

> *"Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differs from person to person."*

17. Additionally, in ***State of Himachal Pradesh v. Lekh Raj & Anr***[2], dealing with discrepancies, contradictions and omissions, the Supreme Court held:

> *"Discrepancy has to be distinguished from contradiction.Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of the human conduct would be that while narrating a particular incidence there may occur minor discrepancies, such discrepancies in law may render credential to the depositions. Parrot like statements are disfavoured by the courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness was making the statement. This Court in Ousu Varghese v. State of Kerala*[3] *held that minor variations in the accounts of the witnesses are often the hallmark of the truth of their testimony. In Jagdish vs. State of Madhya Pradesh this Court held that when the discrepancies were comparatively of a minor character and did not go to the root of the prosecution story, they need not be given undue importance. Mere congruity or consistency is not the sole test of truth in the depositions. This Court again in State of Rajasthan vs. Kalki & Anr.*[5] *held that in the depositions of witnesses there are always normal discrepancy, however, honest and truthful they may be. Such discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person."*

18. Further, it has been submitted that evidence advanced by P.W.3 cannot act as the sole basis for conviction. However, this Court is of the opinion that it is the quality and not the quantity of evidence which is necessary for proving or disproving

1. (2000) 8 SCC 457, **2**.1999 Supp (4) SCR 286 , **3**.(1974) (3) SCC 767, **4.** (1981) SCC (Crl.)676, **5.** (1981(2) SCC 752

a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. In the case at hand, even though the dying declaration of the deceased was not recorded, the evidentiary value of the deposition of P.Ws.4, 5 and 9 combined with the circumstantial evidence and post mortem Report, affirms the guilt of the Appellant. In the case of ***Shivaji Sahebrao Bobade v. State of Maharashtra***[6], the Supreme Court held that even where a case hangs on the evidence of a single eye witness it may be enough to sustain the conviction given sterling testimony of a competent, honest man although as a rule of prudence courts call for corroboration. The Court observed:

> *"It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs."*

19. Additionally, in ***Anil Phukan v. State of Assam***[7], the Supreme Court observed;

> *"Indeed, conviction can be based on the testimony of a single eye witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eyewitness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eye witness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect."*

20. Learned counsel for the defence has contended that absence of blood stain in the cloth of the eye witness who cared the injured to hospital, created doubt as to the presence of those witnesses at the time of incident and no blood stained cloth were recovered from the possession of the witnesses which throws considerable doubt about his presence at the time of occurrence and non-examination of any independent witness adversely affects the prosecution case P.W.3 in his deposition has clarified that his shirt was stained with blood while shifting the deceased. It is evident from the record the said shirt of P.W.3 has not been seized by the I.O. Hence the decision cited by the defence counsel is not befitting to the present case as each case depends upon its factual matrix. Under the above facts and circumstances the contention raised by the learned defence counsel has got no force and as such not accepted. As such the testimony of the P.W.3 is very much clear, agent, consistent and free from reasonable doubt and there is not infirmities found in his testimony to dislodge or disbelieve his evidence which give life resurrection to the prosecution claim with regard to complicity of the accused in the murder of the deceased.

6. (1973) 2 SCC 793 , **7.** (1993) 3 SCC 282 : JT 1993 (2) SC 290

21. Under the above facts and circumstances, keeping in view of the direct evidence which is clear, cogent, clinching, consistent and trustworthy supported by the other circumstantial evidence coupled with medical evidence, accepting the same as unambiguous and unimpeachable. It is the accused and the accused alone is the perpetrator of the murder of Ravi Routray which was his cool and calculated act with pre meditation, preparation and intention to do away with the life of deceased by assaulting him brutally and mercilessly by means of a deadly weapon i.e. katari-M.O.I by way of giving repeated blows on his vital parts like head and face at the dead of the night while the deceased was sleeping.

22. There is consensus of judicial opinion in favour of the view that where the burden of an issue lies on the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. The original onus never shifts, and the prosecution has to, at all stages of the case, prove the guilt of the accused beyond a reasonable doubt. When the burden of an issue is upon the accused, he is not, in general, called on to prove it beyond a reasonable doubt or in default to incur verdict of guilty; it is sufficient if he succeeds in proving a preponderance of probability, for then the burden is shifted to the prosecution which has still to discharge its original onus that never shifts, i.e., that of establishing, on the whole case, guilt beyond a reasonable doubt.

23. It is well-settled that even if an accused does not plead self-defense, it is open to the Court to consider such a plea if the same arises from the material on record. The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. In the instant case, not only was the plea of private defence not taken by the Appellant in their statement but also, no basis for that plea was laid in the cross-examination of the prosecution witnesses or by adducing any defence evidence. In our opinion, the burden of establishing that plea was not discharged in any manner by the Appellant even applying the test of preponderance of probabilities in favour of that plea. There is absolutely no material on records in this case to lead to any such conclusion. On the other hand, the prosecution has satisfactorily explained as to how the Appellant suffered injuries and we believe that such explanation is cogent and genuine.

24. The result is that this Appeal is without merits and the same is liable to be dismissed. Therefore, this Court finds it appropriate to confirm the judgment of conviction and order of sentence dated 30.09.2011 passed by the learned Ad hoc Addl. Sessions Judge, FTC, Jagatsinghpur in Sessions Trial Case No.171/67 of 2011.

25. Accordingly, this Appeal is dismissed.

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2023 (II) ILR - CUT- 427

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

CRLA NO. 614 OF 2021

ARJUN @ ANDA MAJHI @ MARNDI …….Appellant

.V.

STATE OF ORISSA …….Respondent

CRIMINAL TRIAL – The appellant has been convicted for committing the offence U/s. 302 of the Indian Penal Code – There is no direct evidence to establish the complicity of the accused as the author of such crime – The conviction based upon the circumstantial evidence – The motive of the crime could not be established – Effect of – Held, the prosecution has failed to prove the fact that the deceased and the accused were in inimical terms for quite a long length of time prior to the death of the deceased, which got aggravated in course of time so as to provide the motive behind the crime – The judgment of conviction and the order of sentence are liable to be set aside. (Paras 13-15)

Case Law Relied on and Referred to :-

1. (1984) 4 SCC 116 : Sharad Birdhichand Sarda -V- State of Maharashtra.

For Appellant : Mr.Santanu Kumar Sarangi, Sr. Adv.
For Respondent : Mr.S.K. Nayak, Addl.Govt. Adv.

JUDGMENT Date of Hearing : 09.05.2023: Date of Judgment:19.05.2023

D.DASH,J.

The Appellant, by filing this Appeal, has called in question the judgment of conviction and the order of sentence 23rd March, 2021 passed by the learned Additional Sessions Judge, Rairangpur, in S.T. No.15 of 2018 arising out of G.R. Case No.464 of 2017 (T.C. No.109(A)/2018) corresponding to Rairangpur Rural P.S. Case No.69 of 2017 of the Court of the learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Rairangpur.

The Appellant (accused) thereunder has been convicted for committing the offence under section 302 of the Indian Penal Code, 1860 (for short, 'the IPC') and accordingly, he has been sentenced to undergo imprisonment for life and pay fine of Rs.10,000/- (Rupees Ten Thousand) in default to undergo rigorous imprisonment for six (6) months for the offence under section 302 IPC.

2. Prosecution Case:-

On 03.12.2017 around 9.00 a.m., Masang Majhi, son of Pirthi Majhi went to his place of service at Rairangpur. The mother of Masang, namely, Dhanka Majhi

(P.W.9) and the wife of Msasang, namely, Dukhini Majhi (P.W.16) then went to their paddy field. At that time, Pirthi Majhi (deceased) was in the house.

Around 5.15 p.m. on that day, Dukhini (P.W.16) informed Masang (P.W.13) over telephone that her father-in-law Pirthi (deceased) was lying in the cultivable land of one Bahadur Majhi with bleeding injury on his head and ear. Dukhini (P.W.16) then called the villagers, namely, Ranjan Majhi, Kasinath Mahali, who carried her father-in-law (deceased) to their house from that paddy field. Masang son of Pirthi (P.W.13) then arrived there and he, with the help of others, took the deceased to Rairangpur Hospital. Condition of Pirthi being serious and he was not able to talk. Masang (P.W.13) having asked Pirthi (deceased) as to who assaulted him, he could not speak anything.

On 14.12.2017 around 1.30 a.m. in the night, Pirthi died in the Hospital. Masang (P.W.13), the son of Pirthi (deceased), then having suspected the accused to have intentionally caused the death of his father (Pirthi) as he was having prior enmity, lodged a written report with the Officer-in-Charge (O.I.C) of the Rairangpur Rural Police Station. The O.I.C, then treated the same as F.I.R. (Extg.6), registered the case and took up the investigation.

3. In course of investigation, the Investigating Officer (I.O.) examined Masang, (Informant-P.W.13) and recorded his statement and those of other witnesses under section 161 of the Code of Criminal Procedure, 1973. He visited the spot and prepared the spot map (Ext.11) and held inquest over the dead body of the deceased and prepared the report (Ext.3). He seized the blood stained earth and sample earth from the spot and sent the dead body of the deceased by issuing requisition for post mortem examination. The accused, being arrested, said to have confessed his guilt while in police custody. It is further stated that the accused, pursuant to his statement while in police custody, led the police and others to the place where he had kept the stone and gave recovery of the same, which was seized by the I.O. (P.W.19) in presence of the witnesses under seizure list (Ext.8). The incriminating articles seized in course of investigation were sent for chemical examination. Receiving the order of transfer, the I.O. (P.W.19) handed over the charge of the investigation to his successor-in-office i.e., P.W.18, who, on completion of the investigation, submitted the Final Form placing the accused to face the Trial for commission of the offence under section 302 of the IPC.

4. Learned S.D.J.M., Rairangpur, on receipt of the Final Form, took cognizance of the offence and after observing the formalities, committed the case to the Court of Sessions. That is how the Trial commenced by framing the charge for the aforesaid offence against the accused.

5. The prosecution, in support of its case, has examined in total nineteen (19) witnesses during trial. Out of the above, the son of the deceased, who happens to be the informant and had lodged the FIR (Ext.6) is P.W.13. The daughter-in-law of the

deceased, who is the wife of the informant (P.W.13) when has been examined as P.W.16, the mother of the informant, who happens to the wife of the deceased is P.W.9. The sister and brother-in-law of P.W.13 have come to the witness box as P.Ws.16 & 11 respectively. P.W.17 has been examined in support of the recovery of the stone, which is said to have been made pursuant to the statement of the accused. The Doctor, who had conducted the autopsy over the dead body of the deceased has been examined as P.W.12 when P.W.19 is the I.O., who had conducted major part of the Investigaiton and P.W.18 is the subsequent I.O., who took the charge of the investigation from P.W.19 at the fag end and submitted the Final Form.

Besides leading the evidence by examining the above witnesses, the prosecution has also proved several documents which have been admitted in evidence and marked Exts.1 to 12. Out of those, important are the FIR (Ext.6) and the inquest report (Ext.3). The post mortem report has been proved by the Doctor as Ext.4. The statement of the accused, which is said to have been made before the police while leading the police and others to the place of keeping of that stone in finally giving recovery of the same has been admitted in evidence and marked Ext.10. The spot map prepared by the I.O. (P.W.19) has been admitted in evidence as Ext.11. The report of the Chemical Examiner given after examination of the incriminating articles sent to him through Court, has come into evidence as Ext.12.

6. The plea of the accused is that of complete denial. In support of the same, he examined two witnesses as D.Ws.1 and 2.

7. The Trial Court, upon examination of the evidence of the Doctor (P.W.12) and his report (Ext.4) as well as the specific opinion given by him vide Ext.4 and the evidence of other witness including P.W.19. who had held inquest over the dead body of the deceased and noticed injuries on his person, which have been so noted by the Doctor (P.W.12) in his report (Ext.4) and who has further described those during his evidence; has come to the conclusion that Pirthi (deceased) met a homicidal death. In fact, this aspect of the case was not under challenge before the Trial court and that is also the situation before us.

The Doctor (P.W.12), conducting the post mortem examination over the dead body of the deceased, has found three lacerated injuries near the canthus of the left eye, left cheek and near the tragus of the left ear. He too had noted that the left side of the face of the deceased had been swollen and blackened. On dissection, he found linear fracture of left side of the frontal bone of size of 2” length and beneath the frontal bone, there was contusion of frontal lobe of left side cerebral hemisphere of size 1” X 1”. As per his evidence, the death was on account of such injuries on head and the time since the death was 12-24 hours of his examination. In the report, all such details have been reflected by P.W.12. The injuries, as per his evidence, are ante mortem in nature and his conclusive opinion is that the death was homicidal.

With such overwhelming evidence on record as to the nature of death of the deceased and in absence of any challenge to the same when also no evidence to counter has been led from the side of the defence, we are of the firm view that the death of the deceased was homicidal.

8. Learned Senior Counsel for the Appellant submitted that here the prosecution has tendered no direct evidence in establishing the complicity of the accused as the author of such injuries found on the body of the deceased, which have led to his death. He further submitted that the prosecution, when relies upon the circumstantial evidence to establish the guilt of this accused, the circumstances are motive and recovery of a piece of stone said to have been made at the instance of the accused, which according to him, are too fragile and those also in view of the evidence on record, do not unerringly point the guilt of the accused. He also submitted that even if for a moment, it is accepted that the circumstances such as motive and the factum of recovery of the stone, which is said to have been used for causing the injuries upon the deceased have been proved, yet those taken together, do not complete the chain of events in ruling out all the hypothesis other than the guilt of the accused. He, therefore, submitted that the Trial court has gone wrong in convicting the accused for having committed the murder of Pirthi (deceased).

9. Learned Additional Government Advocate submitted all in favour of the finding returned by the Trial court. While admitting the position that no direct evidence has been let in during Trial in order to establish the complicity of the accused, he, however, submitted that the circumstances such as motive, recovery of the stone at the instance of the accused and the medical evidence that the fatal injury can be caused by that stone complete the chain of events by ruling out all the hypothesis except that of the guilt of the accused.

10. Keeping in view the submissions made, we have carefully gone through the impugned judgment of conviction. We have also travelled through the depositions of the witnesses examined from the side of the prosecution (P.Ws.1 to 19) and have perused the documents admitted in evidence and marked as Exts.1 to 12.

11. Before proceeding further to examine the evidence on record and have our say over the sustainability of the finding of guilt, as has been fixed upon the accused, by the Trial Court, it would be proper to take note of the settled principles of law governing the field in appreciation of circumstantial evidence.

In case of Sharad Birdhichand Sarda -V- State of Maharashtra; (1984) 4 SCC 116, the five principles, which constitute the *Panchsheel* of a proof of a case based on circumstantial evidence have been summarized. It has been said at Paragrapha-153 of said judgment:-

> "1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.

> It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Another -V- State of Maharashtra where the following observations were made:
>
> Certainly, it is a primary principle that the accused must be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.
>
> 2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty.
>
> 3) The circumstances should be of a conclusive nature and tendency;
>
> 4) They should exclude every possible hypothesis except the one to be proved; and
>
> 5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

Thus, in view of the above, the Court must consider a case of circumstantial evidence in the light of the aforesaid settled legal propositions. In a case of circumstantial evidence, the judgment remains essentially inferential. The inference is drawn from the established facts as the circumstances lead to particular inferences. The Court has to draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion that the accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused.

12. Having held the death of the deceased to be homicidal in nature, the next circumstance projected by the prosecution here is the motive. P.W.13 is the informant, who happens to be the son of the deceased. The son of the deceased, in his F.I.R. (Ext.6), has raised the suspicion that in view of the previous enmity between his father (deceased) and the accused, the role of the accused in the death of his father is suspected. However, in the FIR, no such details with regard to the reasons for the enmity have been indicated nor any prior instance/s has/have been cited. P.W.3, is a co-villager who has simply stated that some days prior to the death of the deceased, he had disclosed before him that he had a dispute with the accused. He too is, however, silent as to what for the dispute had arisen and whether the dispute was still continuing with the accused remaining in a mood to take revenge upon the deceased, which he had marked from some of his conduct before the incident or even that the deceased was so apprehending and expressed before this P.W.3 at any point of time prior to his death. P.W.16, the elder brother of informant (P.W.13) has simply stated that three years prior to the death of his father, he had a dispute with the accused but it was not relating to any landed properties. He, being

the son of the deceased is not stating that what was actually the subject matter of that dispute, which had arisen three years before the death. The distance of time then is also quite significant and as no such untoward incident is said to have happened since then, it cannot be inferred that the ill-feeling for that was actually continuing and degree of the animosity was quite high. He does not whisper a word that the relationship between the accused and the deceased was enmical and that the accused was bearing grudge all along since then.

13. P.W.11, who is the daughter-in-law of the deceased is silent on that score. The informant (P.W.13), who is the son of the deceased, although had raised his suspicion with regard to the involvement of the accused in causing the death of the deceased father, during his evidence, has not stated anything even about that. He rather during examination has stated to have no remembrance in which year the dispute had arisen and there was the quarrel between his father although he states that it was during one Kali Puja. His simple version is that his father was not in talking terms with the accused, which itself is not enough to infer the motive. His evidence then is very affirmative that they had never quarreled with each other. The co-villagers (P.Ws.14 & 15) have also not stated anything and that has also been the evidence of P.W.16, who is the wife of P.W.13 and daughter-in-law of Pirthi (deceased). P.W.17 is stating nothing about the same.

Thus, with such evidence on record, we find that the prosecution has failed to prove the fact that the deceased and the accused were in enimical terms for quite a long length of time prior to the death of the deceased, which got aggravated in course of time so as to provide the motive behind the crime.

14. The other important circumstance placed by the prosecution is that the accused, being arrested, while in police custody, had confessed to have committed the crime. The statement of the accused, having been recorded by P.W.19, it has been admitted in evidence and marked Ext.10/1. The statement of the accused recorded therein with regard to his complicity in causing the death of the deceased is wholly inadmissible in view of the provisions contained in section 25 of the Evidence Act.

Next coming to the recovery of the stone, which is said to have been made at the instance of the accused by taking the police and others to the place where he had kept, we even find the evidence of the I.O (P.W.19) to be wholly insufficient to satisfy the tests laid down under section 27 of the Evidence Act for the admissibility of that part of disclosure and recovery. He has simply stated that the accused led the police for recovery of the stone in presence of the witnesses. It is not his evidence as to where the accused gave the statement, whether it was recorded instantly and wherefrom the journey started and to which place, i.e., where the journey ended being the destination, the place of the recovery of the stone. He is not stating even as to who were present with him at the relevant time. The stone (M.O.I) is commonly

available and there is no further evidence to independently connect with the incident so as to infer its user. Thus, we find that the prosecution has also not been able to prove the fact that the accused, while in police station, having disclosed to have kept the stone in a place known to him, had led P.W.19 and other witnesses to that place, which was not accessible to others and was within his special knowledge and that having been recovered, was seized. Also there appears no evidence except that statement of the accused, which is inadmissible evidence to connect the stone in any way with the commission of the crime.

With all these evidence, as above discussed, we are of the view that the prosecution has failed to establish the complicity of the accused through circumstantial evidence. The Trial Court, in our view, has fallen in grave error in holding the accused guilty of murder of the deceased. Therefore, the judgment of conviction and the order of sentence are liable to be set aside.

15. In the result, the Appeal is allowed. The judgment of conviction and the order of sentence dated 23rd March, 2021 passed by the learned Additional Sessions Judge, Rairangpur, in S.T. No.15 of 2018 are hereby set aside.

The accused, namely, Arjun @ Anda Majhi @ Marndi be set at liberty forthwith, if his detention is not wanted in any other case.

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2023 (II) ILR - CUT- 433

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

CRLA NO. 233 OF 2023

SESADEV KUDEI .....Appellant

.V.

STATE OF ODISHA .....Respondent

CRIMINAL TRIAL – Offence under section 302 of the Indian Penal Code – Conviction based upon the evidence and statement recorded under section 164 of the Cr.P.C – Whether it is permissible to take the statement recorded U/s. 164 of the Cr.P.C. as substantive evidence – Held, No – Statement recorded U/s. 164 is not substantive evidence and it can be used to corroborate the statement of a witness as also to contradict – The finding of Trial Court cannot be sustained.

(Paras 14-15)

For Appellant : Mr. J.R. Dash

For Respondent : Mr. S.S. Mohapatra, Addl. Standing Counsel

JUDGMENT Date of Hearing : 02.05.2023 : Date of Judgment:19.05.2023

D.DASH, J.

The Appellant, by filing this Appeal has challenged the judgment of conviction and order of sentence dated 11.01.2023 passed by the learned Additional Sessions judge, Athamallik in C.T.(S) Case No.11 of 2020 arising out of G.R. Case No.413 of 2019 of the Court of learned Sub-Divisional Judicial Magistrate, (S.D.J.M.), Athamallik.

By the same, the Appellant (accused) has been convicted for commission of offence under section-302 of the Indian Penal Code (for short called as 'the IPC') and has been sentenced to undergo imprisonment for life and pay fine of Rs.50,000/- with the default stipulation to undergo rigorous imprisonment for two years.

2. The prosecution case is that on 19.08.2019 in the forenoon, one Anek Bagha, who is the sister's son of Pitambar Bhoi came and informed Pitambar that Pitambar's sister (Raseswari) has been murdered by her husband namely, Sesadev Kudei (accused). Pitambar getting this information from Anek, came to the house of his sister and saw his sister lying dead on a cot with severe cut injuries on her head. The villagers present there on being asked told that the accused had murdered his wife namely, Raseswari by means of spade. On that day around 12.30 pm, Pitambar (Informant-P.W.1) lodged a written report with the Inspector-In-Charge (IIC), Athamallik Police Station. Receiving the said report, the IIC, treated the same as F.I.R.(Ext.6) and upon registration of the case took up investigation.

The Investigating Officer (I.O.-P.W.18), then examined the Informant and proceeded to the spot. He held inquest over the dead body of the deceased and prepared the report to that effect (Ext.1). He then issued requisition for postmortem examination of the dead body. He also seized some incriminating materials at the spot in presence of witnesses and examined other witnesses. The incriminating articles were sent for chemical examination through Court. On completion of investigation, Final Form was submitted, placing the accused to face the Trial for commission of offence under section-302/498-A/494 of the IPC.

3. The learned SDJM, having received, Final Form as above took cognizance of said offences and after observing the formalities, committed the case to the Court of Sessions. That is how the Trial commenced by framing the charge for the said offences against the accused.

4. In the Trial, the prosecution in total has examined nineteen (19) witnesses. Out of them, P.W.1 is the Informant, who happens to be the brother of the deceased and P.W.13 is the nephew of P.W.1, who had first informed P.W.1 about the incident. The person who have scribed the F.I.R.(Ext.6) has been examined as P.W.12; whereas P.Ws. 2 and 11 are the witnesses to the inquest. P.Ws. 8 and 9 are

the witnesses to the seizure said to have been made at the instance of the accused pursuant to his statement while in police custody in leading them to the place of keeping of those articles. The first wife of the accused has been examined as P.W.11. The Doctor who had conducted postmortem examination over the dead body of the deceased has come to the witness box as P.W.16 whereas the I.O. has examined himself as P.W.18.

The prosecution besides leading the evidence by examining the above witnesses has also proved several documents which have been admitted in evidence and marked Exts.1 to 19. The details of the same being given at the foot of the judgment of the Trial Court, this judgment is not burdened by noting those again since those will be referred to as per the numbering as and when would be so required in course of our discussion to follow.

5. The defence plea is that of complete denial. The accused has however not led any evidence despite being provided with the opportunity.

6. The Trial Court upon examination of the evidence and their evaluation at its level has held that the prosecution has been able to establish the charge under section-302 of the IPC as against the accused beyond reasonable doubt by leading clear, cogent and acceptable evidence. Accordingly, the accused has been convicted for the said offence and sentenced as aforestated.

7. Learned Counsel for the Appellant submitted that the conviction recorded by the Trial Court the outcome of wholly erroneous appreciation of evidence on record. According to him, without any substantive evidence as regards complicity of the accused, the finding of guilt against this accused has been returned. He further submitted that there is absolutely no evidence either direct or circumstantial to attribute the authorship of the injuries received by the deceased which had led to her death upon the accused. He submitted that the Trial Court has erred in holding the accused guilty for the murder of the sister of the Informant. He further submitted that the Trial Court has committed grave error in law by accepting the statement of the witnesses of P.W.11 recorded under section-164 of the Cr.P.C. as the substantive evidence, when that P.W.11 has stated nothing in support of what have been reflected in her said statement. He, therefore, contended that the judgment of conviction and order of sentence are being vulnerable are liable to be set aside.

8. Learned Counsel for the State-Respondent refuting the submission as above supported the finding rendered by the Trial Court holding the accused guilty for commission of offence under section-302 of the IPC in intentionally causing death of the deceased.

9. Keeping in view the submissions made; we have carefully read the judgment of conviction. We have also extensively travelled through the depositions of all the witnesses i.e. P.W.1 to P.W.19 and have perused the documents which have been marked as Exts.1 to 19.

10. The nature of death of the deceased that it is homicidal is not under challenge from the side of the accused. The deceased is found to have received two cut injuries; one on the forehead and the other one over the occipital region of the scalp. There was fracture underline occipital bone with profuse bleeding. The Doctor who had conducted postmortem examination i.e. P.W.16 has stated all these. According to him, all these injuries are antemortem in nature and might have been caused by sharp cutting weapon. According to the evidence of P.W.16, the cause of death is due to heamorrhage and shock flowing from the injuries on the body. Thus we find that the prosecution has well proved the fact that Raseswari met homicidal death.

11. Having said so, we are now called upon to judge the sustainability of the finding of the Trial Court that the prosecution has established the charge under section-302 of the IPC as against the accused beyond reasonable doubt by leading clear, cogent and acceptable evidence.

12. P.W.1 is the brother of the deceased and he himself is the Informant. He has stated that getting news about the death of his sister (deceased), he had gone to village Gadadharpur with one Lalita Bhoi, P.W.1 and Prasanta Bhoi, P.W.3. He has stated that arriving at the village; he found the dead body of the deceased lying near the banana tree in the backyard of the accused. It has been stated by him that the accused had his first wife who has been examined as P.W.11 and as no child was born through her, the accused had married the deceased. But this witness is not stating as to whether the deceased was staying in the very house where the first wife of the accused (P.W.11) was staying or that they were staying in separate houses.

P.W.2, Lalita Bhoi who had accompanied P.W.1 has reiterated the version of P.W.1. That is also the version of P.W.3, who had gone with P.Ws.1 and 2. P.W.4, having stated that the informant is her cousin, has simply stated that having gone to the place, had seen the deceased lying dead near the banana tree in the backyard of the accused. The witness although had spoken about the ill-treatment upon the deceased by the accused in her previous statement in course of investigation, she has not stated so in the Trial. The prosecution has simply remained satisfied to her drawing attention of this witness to her previous statement before the police which too she has denied.

P.W.5 is another witness, who happens to be the relation of P.W.1. He has also stated what those P.Ws.1, 2 and 3 had said. Other witness P.Ws. 7, 8, 9, 10 and 12 have not supported the prosecution case.

13. The first wife of the accused has come to the witness box as P.W.11 and has tendered her evidence. She has stated that her husband had married the deceased for the second time. She has simply stated to have found the deceased lying dead in the backyard of their house and then she was having bleeding injuries on her head. In course of investigation, the I.O. had got the statement of this witness recorded under

section-164 of the Cr.P.C. This witness has not stated in Court as to what she had stated in her 164 statement. She has simply stated to have deposed before the learned Magistrate on earlier occasions. Interestingly, since the statement when has been shown to this witness during her examination in the Trial, she has admitted to have appeared before the learned Magistrate in giving her statement, that statement has been admitted in evidence marked as Ext.5. However, the prosecution having been permitted to cross-examine this witness, it would be seen that except inviting the attention of this P.W.11 to what she had stated in her previous statement under section-164 of the Cr.P.C. nothing more has been elicited. Thus even though for a moment we say that this P.W.11 is stating falsehood, yet it is not permissible to take the statement recorded under section-164 of the Cr.P.C. as substantive evidence.

14. The position of law is too well settled that the statement recorded under section-164 of the Cr.P.C. is not substantive evidence and it can be used to corroborate the statement of a witness as also to contradict. The Trial Court having taken the statement of the witness (P.W.11) that as she has deposed during the Trial that her statement had been recorded by the Magistrate on the earlier occasion and has proved that document containing the recorded statement as Ext.5 that become the substantive evidence of P.W.11, has then gone to narrate as to what has been recorded in that Ext.5 as if that is the version of P.W.11 during Trial. Such course adopted by the Trial Court is having no legal sanction. By going through the paragraph-9 of the judgment of the Trial Court, we find all the force in the submission of the learned Counsel for the Appellant (accused).

15. Having said as above, we find that no other circumstance/s have been proved by the prosecution by leading reliable evidence in support of the charge. The finding of the Trial Court holding the accused guilty for commission of offence under section-302 of the IPC thus cannot be sustained. Therefore, we are of the considered view that the judgment of conviction and order of sentence impugned in this Appeal are liable to be set aside.

16. In the result, the Appeal stands allowed. The judgment of conviction and order of sentence dated 11.01.2023 passed by the learned Additional Sessions Judge, Athamallik in C.T.(S) Case No.11 of 2020 are hereby set aside.

Since, accused- Sesadev Kudei is in custody, he be set at liberty forthwith, if his detention is not required in any other case.

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2023 (II) ILR – CUT-438

BISWANATH RATH, J.

W.P.(C) NO. 8534 OF 2023

BHOLESWARI DAS .....Petitioner

.V.

THE COLLECTOR & DISTRICT MAGISTRATE, NUAPADA & ANR. .....Opp. Parties

ORISSA GRAMA PANCHAYAT ACT, 1964 – Section 19(a) – Election dispute regarding the age of a contestant for the post of Sarpanch – Whether the details as mentioned in the Voter Identity Card holds more evidentiary value than the details as mentioned in the High School Certificate or Student Admission Record ? – Held, the entry in the Electoral Roll can have a better value than the entry in the Educational/Matric Certificate.

Case Law Relied on and Referred to :-

1. AIR 1964 SC 1625 : Mohd. Ikram Hussain Vs. The State of U.P & Ors.
2. AIR 1965 SC 282 : Brij Mohan Singh Vs. Priya Brat Narain Sinha & Ors.
3. AIR 1982 Ori. 221 : Mayadhar Nayak Vs. Sub-Divisional Officer, Jajpur & Ors.
4. AIR 1999 SC 1587 : Santenu Mitra Vs. State of West Bengal.
5. 1988 Supp. SCC 604 : Birad Mal Singhvi Vs. Anand Purohit.
6. (2003) 8 SCC 673 : Sushil Kumar Vs. Rakesh Kumar.
7. (2006) 1 SCC 283 : Vishnu alias Undrya Vs. State of Maharastra.
8. 2010(II) CLR (SC) 660/AIR 2010 SC 2933 : Madan Mohan Singh Vs. Rajni Kant.
9. AIR 2019 Ori. 134 (2019 SCC Online Ori 361 : Saraswati Nayak Vs. State of Odisha & Ors.
10. AIR 1954 SC 520 : Durga Shankar Mehta Vs. Thakur Raghuraj Singh & Ors.
11. AIR 1960 SC 1049 : Brijendralal Gupta & Anr. Vs. Jwalaprasad and & Ors.
12. AIR 1965 SC 282 : Brij Mohan Singh Vs. Priya Brat Narain Sinha & Ors.
13 .(2010) 9 SCC 209 : Madan Mohan Singh and Ors. Vs. Rajni Kant & Anr.
14. (2011) 111 CLT 885 : Tipnna Kesab Reddy Vs State of Orissa & Ors.
15. 1982 SCC OnLine Ori 1 (AIR 1982 Ori 221) : Mayadhar Nayak Vs. Sub- Divisional Officer, Jajpur & Ors.
16. AIR 2014 Ori 138 : Debaki Jani Vs. The Collector & Anr.

For Petitioners : M/s.P.Acharya, Sr.Adv., S.S.Tripathy & A.B.Pattanaik

For Opp. Parties : Mr.U.K.Sahoo, ASC.
M/s.G.B.Singh & A.P.Bose

JUDGMENT Date of Hearing : 06.04.2023 & Date of Judgment :18.04.2023

BISWANATH RATH, J.

1. This is a Writ Petition at the instance of the returned candidate, Petitioner herein, for the post of Sarapanch of Sunari Sikuan Gram Panchayat in challenge to the impugned order at Annexure-12 passed by the Collector & District Magistrate, Nuapada in exercise of power under Section 26 of the Orissa Gram

Panchayat Act, 1964 (herein after called, O.G.P.Act) in allowing the Section 26 Application at the instance of the unsuccessful candidate, O.P.2 herein seeking declaring the returned candidate to be disqualified to hold the post of Sarapanch.

2. Factual background as revealed, the Petitioner along with O.P.2 and two others contested for the post of Sarapanch of Sunari Sikuan Gram Panchayat of Khariar Panchayat Samiti of Nuapada District in the General Elections to Panchayati Raj Institutions, 2022. Nomination papers of all these persons were duly accepted by the Election Officer after proper scrutiny, vide the Election Notification at Annexure-1. Annexure-2 is a disclosure of candidates to the post of Sarapanch of different Gram Panchayats in Khariar Panchayat Samiti. In the election the Petitioner having secured highest number of votes was elected as the Sarapanch of Sunari Sikuan Gram Panchayat. On 2.3.2022 the Election Officer notified the name of the Petitioner being duly elected as Sarapanch, vide Annexure-3.It is while the Petitioner was in charge of Sarapanch of Sunari Sikuan Gram Panchayat, she received notice dated 28.3.2022 appearing to be in connection with the proceeding under Section 26 of the O.G.P.Act on the File of the Collector & District Magistrate, Nuapada, as Application being moved by O.P.2 to remove the Petitioner from the post of Sarapanch on the footing that she had not attended 21 years of age as on date of filing of nomination. It appears, the complain before the Collector & District Magistrate was based on the Student Admission Register of the Petitioner while she was a student of Odisha Adarsha Vidyalaya, Badi and High School Certificate. This case was registered as Misc. Case No.4/2022 on the File of O.P.1. Notice is appended as Annexure-4. The Petitioner on her appearance filed a detailed show cause along with supporting documents, such as Voter Identity Card, Voter List, Aadhar Card, Pan Card, Medical Certificate issued by the Medical Officer in-charge of Khariar C.H.C., Birth Register of the Anganwadi Worker of Sunari Sikuan A.W.C. 4.The Petitioner in the show cause attempted to support all the above documents in order to establish that she had already attended 21 years of age at the time of filing of nomination paper for the post of Sarapanch. Copy of the show cause reply is appended here as Annexure-5 and copies of the documents indicated herein above introduced by the Petitioner herein are all appended as Annexure-6 to 11. There has been involvement of an enquiry in the Section 26 proceeding. On completion of argument, O.P.1 passed order dated 15.3.2023 in Misc. Case No.4/2022 at Annexure-12 declaring the Petitioner disqualified to contest the post of Sarapanch and as a consequence, there was also direction for removal of her from the post of Sarapanch.

3. The Petitioner assailed the impugned order on the following grounds :-

> "9.A. Though the Petitioner adduced sufficient material evidences such as voter id card, voter list, Aadhar card, Pan card, medical certificate issued by the medical officer in charge of Khariar CHC, birth register of the Anganwadi worker of Sunariskuan AWC 4 to prove her age, the same was conveniently ignored by the Opp.Party no.1, without assigning any reason thereto. The Petitioner fails to comprehend the fact that when the Opp. Party No.1 himself is

the District election officer and responsible for the preparation of voter list, how can he give more importance to the details as mentioned in the student admission record over the details as mention in the voter identity card or voter list.

9.B. It is settled position of law that while deciding the age of person to contest a particular election in an election dispute the details as mentioned in the voter identity card holds more evidentiary value than the details as mentioned in the High School certificate or student admission record. In the case of Tipnnakesab Reddy v. State of Orissa, (2011 (Suppl 1) OLR 122) the Hon'ble Orissa High Court held as follows :-

"10. However, even accepting all the materials, it is found that the date of birth mentioned in the Voter Identity Card Ext-B as on 01.01.2002 shows to be 18 years. It can, therefore, safely be concluded that the Petitioner had a right to exercise his franchise as on 01.02.2002 having been considered to be eligible to be registered in the electoral roll being not less than eighteen years of age u/s 19(a) of the Representation of the People Act, 1950. It is a common knowledge and judicial notice can also be taken of the fact that parents have a tendency to reduce the age of the child by mentioning a subsequent date of birth in the school register, which would ultimately culminate in the certificate granted to the children in the High School Certificate Examination. No doubt, the date of birth as reflected in the Matriculation Certificate relates to the date of birth mentioned in the application form filled up by the candidate, which is required to be submitted before the Examining Authority for appearing in the said examination. But, while considering as to whether a person has attained the age of 21 years on the date of filing of the nomination paper as contemplated u/s 11 of the Act, the age mentioned in the Voter Identity Card assumes relevancy more so because such person is allowed to cast his vote in the General Election having attained the age of majority and registered in the electoral roll."

9.C. Further it's a common practice normally adopted by the parents making a false statement of age in student admission register with a view to secure an advantage in getting public service. Therefore, when it comes to decide the age of a person the details as mentioned in the voter identity card carries more evidentiary value than the details as mentioned in the High School Certificate. In the case of Brij Mohan Singh v.Priya Brat Nareain Sinha, AIR 1965 SC 282 the Hon'ble apex Court made the following observation with respect to the above mentioned issue;

20. An objection was faintly raised by Mr.Agarwal as regards the admissibility of Ex.2 on the ground that the register is not an official record or a public register. It is unnecessary to consider this question as the fact that such an entry was really made in the admission register showing the appellant's date of birth as October 15, 1937 has all along been admitted by him. His case is that this was an incorrect statement made at the request of the person who went to get him admitted to the school. The request was made, it is suggested, to make him appear two years younger than he really was so that later in life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed. The appellant's case is that once this wrong entry was made in the admission register it was necessarily carried forward to the Matriculation Certificate and was also adhered to in the application for the post of a Sub-Inspector of Police. This explanation was accepted by the Election Tribunal but was rejected by the High Court as untrustworthy. However, much one may condemn such an act of making a false statement of age with a view to secure an advantage in getting public service, a judge of facts cannot ignore the position that in actual life this happens not infrequently. We find it impossible to say that the Election Tribunal was wrong in accepting the appellant's explanation.Taking all the circumstances into consideration we are of opinion that the explanation may very well be true and so it will not be proper for the court to base any conclusion about the appellant's age on the entries in these three documents viz. Ex.2, Ex.8 and Ex.18.

During the course of hearing though the Petitioner vehemently submitted before the Opp.Party no.1 that the details pertaining to the date of birth of the Petitioner has been wrongly entered by the School authority during admission, the same was never taken into account, in spite of the fact that there were material evidences placed on record to prove the actual date of birth of the Petitioner. The father of the Petitioner while she was a student of Saraswati Sisu Mandir,Gandabehali,Nuapada, vide application dated 07.04.2007 brought it to the knowledge of the Headmaster that there is discrepancy in the date of birth of the Petitioner in the school record and requested to correct it as 09.01.1999. However, the school authority never bothered to correct the same.

Copy of the letter dated 07.04.2007 addressed to the Headmaster is annexed hereto and marked as Annexure-13.

9.D. It is significant to note here that the voter list on the basis of which the Election officer held the Petitioner to be eligible to contest the election was stated to have been prepared in accordance with law and no objection, whatsoever was raised by anybody during the preparation or after publication of the same. Therefore, the attempt of the Opp.Parties to declare an elected representative of the people to be disqualified to hold the post of Sarpanch is an attempt to frustrate the sanctity of the election process.

9.E. The enquiry to be conducted under Section 26 by the Collector is a quasi-judicial enquiry and of summary in nature, in contrary an election dispute raised under Section 30 of the Act is in the nature of a suit, inasmuch as the provisions of the Code of Civil Procedure and the Evidence Act are applicable to the said dispute. The Power of an election tribunal under section 30 of the Act is wide enough to adjudicate a dispute for violation of any of the provisions of the Act, whereas in the section 26 the Collector can only adjudicate the dispute pertaining to grounds of disqualification as mentioned in the section 25(2) of the Act. In the case of Raghunath Sahoo v. Collector & District Magistrate, Keonjhar, 2008 (I) OLR-230, the Hon'ble Orissa High Court discussed the scope of proceeding under section 26 and section 30 as follows :

"6. The grounds for declaring a candidate disqualified in election under Section 30 are confined to the grounds specified under Section 39; whereas in a proceeding initiated under Section 26, the Collector has to only consider the disqualification as stipulated under Section 25(2)……..

From a bare perusal of the impugned order it can be observed that the Opp.Party No.1 has exceeded his jurisdiction while deciding the dispute as referred by the Opp.Party No.2. Though the proceeding under section 26 is of summary nature in contrary to the proceeding under section 30, the Opp.Party no.1 solely relying upon the student admission register and HSC certificate went on to conclude that the Petitioner was ineligible for the post of Sarpanch as per section 11(b) of the Act, for not attaining the age of 21, While adjudicating a proceeding under section 26 the Opp.Party no.1 was supposed to limit his jurisdiction with respect to the grounds of disqualification as mentioned in the section 25(2) of the Act.

9.F. Further it will be pertinent to state here that ignoring all the material evidence on record without assigning any reason thereto, though the Opp.Party No.1 has solely relied upon the HSC certificate and Student admission record as produced by the Principal, Odisha Adarsha Vidyalaya, Badi,he never though it necessary to record the statement of the Principal with respect to the veracity of the record produced. Moreover the Petitioner was never given an opportunity to cross-examine the Principal in order to ascertain the true facts. Therefore, the whole proceeding before the Opp.Party No.1 is vitiated for being partial, illegal and arbitrary.

> 9.G. In catena of decision the Hon'ble apex Court has held that correctness of entry of date of birth in the matriculation certificate or school admission record has lesser evidentiary value than the details as mentioned in the voter identity card, while deciding the age of a candidate in an election dispute."

4. Mr.P.Acharya, learned senior counsel for the Petitioner apart from the above grounds on the returned candidate declared to be disqualified attempting through the documents appended herein to establish the above grounds took this Court to the provision at Section 4(1), 11, 25 & 26 of the O.G.P. Act and submitted that there has been exercise of power by the Collector beyond the jurisdiction of the Collector provided to him, vide Section 26 of the O.G.P. Act. Mr.Acharya, learned senior counsel reading through the provisions at Section 4(1) of the O.G.P. Act contended, this is a provision dealing Voter List meant for Assembly Constituency shall be deemed to be a Voter List of Grama. Through Sections 11 & 25 of the O.G.P. Act, Mr.Acharya further contended, so far as the provision at Section 11 of the O.G.P. Act is concerned, this is a chapter dealing with qualification for membership in the Gram Panchayat. Reading through the provision at Section 25 of the O.G.P. Act, Mr.Acharya, learned senior counsel for the Petitioner contended, this provision contains two parts; Paragraph-1 of Section 25 of the O.G.P. Act when prescribes that a person shall be disqualified for being elected or nominated as a Sarapanch or any other member of the Gram Panchayat constituted under this Act, whereas Paragraph-2 of Section 25 of the O.G.P. Act prescribes that a Sarapanch or any other member of a Grama Panchayat shall be disqualified to continue and shall cease to be a member if he incurs any of the disqualifications provided therein. Mr.Acharya, learned senior counsel for the Petitioner in the above legal scenario contended, the provision at Sections 11 and Section 25(1) of the O.G.P. Act are all pre-election stage, whereas Section 25(2) of the O.G.P. Act is an attachment post-election. Taking this Court to the provisions as well as power of the Collector, vide Section 26 of the Act, Mr.Acharya submitted, the proceeding herein is to giving effect to disqualification. It is again reading the provision at Section 26 of the O.G.P. Act, Mr.Acharya, learned senior counsel attempted to contend that the Collector's power herein is confined to post-election disqualification. It is here, reading through the provision at Sections 35 & 37 of the O.G.P. Act, Mr.Acharya attempted to make a distinction in between the powers of the Collector and the Civil Judge (Jr.Divn.) exercising their power under Sections 26 & 30 of the O.G.P. Act respectively and thus contended, the Collector taking up the proceeding here under Section 26 of the O.G.P. Act taking aid of the provisions at Sections 35 & 37 has exceeded its jurisdiction. Reading through the provision at Section 26(2) of the O.G.P. Act, Mr.Acharya, learned senior counsel for the Petitioner, contended, once there is an allegation of a member being disqualified or is in doubt whether or not such person has become disqualified or any other member may, the Collector though takes up such issue under the provision of Sub-Section (2) of Section 26 of the O.G.P. Act, he is to simply make such enquiry as he considers necessary and after giving the person whose disqualification is in question an opportunity of

being heard, determine whether or not such person is or has become disqualified and make an order in that behalf which shall be final and conclusive. It is in this view of the matter, Mr.Acharya, learned senior counsel for the Petitioner, the returned candidate, keeping in view the background involving the complain before the Collector contended, the Petition under Section 26 of the O.G.P. Act does not exist unless an elected Sarapanch earns disqualification after being elected as Sarapanch under the provision of Section 25 of the O.G.P. Act. Mr.Acharya, learned senior counsel here reading through the provision at Section 25 of the O.G.P. Act and the complain of the private O.P.2, the defeated candidate, advanced his submission on the pretext that there is no attraction of disqualification under Section 25(2) of the O.G.P. Act, and therefore, the complain submitted under Section 26 of the Act per se was not maintainable and the Collector has miserably failed on this aspect and has entered into a unwarranted controversy and decided such Petition taking aid of the provision at Sections 35 to 37 of the O.G.P. Act and such order becomes thoroughly improper. Taking to the nature of complain and reading here the provision at Section 11 of the O.G.P. Act, Mr.Acharya, learned senior counsel contended, the Collector & District Magistrate, Nuapada has failed in providing its exercise being limited only to attachment of disqualification in post-election and the complain presumes involved the allegation on the qualification for the membership in the Gram Panchayat, which is ultimately not within the domain of the Collector.

5. Mr.P.Acharya, learned senior counsel for the Petitioner also contended, Section 26 of the O.G.P. Act is a draconian provision, which confers unbridled and uncontrolled power upon executive to deal with the disqualification having been incurred during the tenure of an elected representative. Mr.Acharya claimed, unless the Collector's satisfaction is based on cogent and convincing reasons with reference to the germane material available on record, the Collector cannot cursorily exercise the said power to bring an immature end to the tenure of popularly elected sarapanch. Mr.Acharya also alleged, the test applied by the Collector in the instant case is not only evasive but also does not stand to reason and also runs contrary to the settled position of law and an illegal infringement in the people's mandate for obvious reason. Finally taking to the conclusion arrived at by the Collector, Mr.Acharya, learned senior counsel alleged, the Collector has heavily relied upon the submission of school Authority without applying procedure for proving the same in conformity with section 35 of the Indian Evidence Act. Mr.Acharya also contended, looking to the limited role of the Collector in his exercise under section 26 of the O.G.P. Act should be a summary proceeding and is in the nature of a sui generis quasi-judicial function.

6. Mr.P.Acharya, learned senior counsel for the Petitioner to strengthen his submission took support of the following decision :-

I. ***Brij Mohan Singh vrs. Priya Brat Narain Sinha & Ors*** : AIR 1965 SC 282

II. ***Mayadhar Nayak vrs. Sub-Divisional Officer, Jajpur & Ors.*** : AIR 1982 Ori. 221

III. ***Sushil Kumar vrs. Rakesh Kumar*** : (2003) 8 SCC 673

IV. ***Madan Mohan Singh & ors. Vrs. Rajni Kant & anr***. : (2010) 9 SCC 209

V. ***Tipnna Kesab Reddy Vrs. State Of Orissa & Others*** : (2011) 111 CLT 885 (para-9 to 13)

VI. ***Bilash Majhi vrs. Collector & District Magistrate, Kalahandi & anr***. : (W.P.(C) No.11412 of 2013 disposed of on 23.09.2015)

VII. ***Saraswati Nayak vrs. State of Odisha & ors***. : AIR 2019 Ori. 134

VIII. ***Manita Sahu Vs State Of Orissa & Others*** : W.P.(C) No.2924/2019 disposed of on 9.4.2019

IX. ***Jagdev Majhi vrs. State of Odisha & ors.*** : (Writ Appeal No.172 of 2019 disposed of on 3.9.2021)

X. ***Tikayat Naik vrs. State of Odisha & ors***. : (W.P.(C) No.3321/2018 disposed of on 26.2.2019)

7. Mr. P. Acharya, learned senior counsel for the Petitioner even though attempted to take this Court to several decisions taken note herein above, however confined his submission through the decisions in ***Mohd. Ikram Hussain vrs. The State of U.P. & ors.*** *: AIR 1964 SC 1625****, Brij Mohan Singh vrs. Priya Brat Narain Sinha & ors :*** *AIR 1965 SC 282,* ***Mayadhar Nayak vrs. Sub-Divisional Officer, Jajpur & ors. :*** *AIR 1982 Ori. 221****, Santenu Mitra vrs. State of West Bengal :*** *AIR 1999 se 1587,* ***Birad Mal Singhvi vrs. Anand Purohit :*** *1988 Supp. SCC 604****, Sushil Kumar vrs. Rakesh Kumar :*** *(2003) 8 SCC 673,* ***Vishnu alias Undrya vrs. State of Maharastra : (2006) 1 SCC 283, Madan Mohan Singh vrs. Rajni Kant****: 2010(II) CLR* ***(SC)660/AIR 2010 SC 2933, Saraswati Nayak vrs. State of Odisha & ors. : AIR 2019 Ori. 134*** *(2019 SCC Online Ori 361).*

8. In his opposition, Mr.A.P.Bose, learned counsel for the contesting O.P.2 in his attempt to support the impugned order passed by the Collector contended, O.P.2 filed a Petition before the D.P.O., Nuapada complaining the disqualification attended by the returned candidate, the Petitioner herein under the provision of sections-11, 25 & 26 of the O.G.P. Act involving a request to the Collector for his decision on the allegation in exercise of his power under section 26 of the O.G.P. Act. This proceeding is registered as Misc. Case No.4 of 2022. Mr.Bose further contended, the case of O.P.2, particularly, on the disqualification of the returned candidate on account of age of the Petitioner herein at the time of nomination specifically pleaded that the age of the Petitioner in fact at the time of nomination was 17 years 8 months 2 days as per the school Admission Register in Odisha Adarsha Vidyalaya, Badi in the district of Nuapada, which has a clear disclosure on the date of birth of the returned candidate showing it to be 9.5.2004. Mr.Bose, learned counsel contended, it is based on the allegation and material support by his Client, the Collector and the District Magistrate, Nuapada ascertained the date of birth of O.P.2 and the Principal of Odisha Adarsha Vidyalaya, Badi was asked to produce the student Admission Register of the school. In response to which the

Principal of the school appeared before the Authority and produced the students Admission Register. The Collector on verification of the Admission Register has come to find that the date of birth of the returned candidate appearing to be 9.5.2004. As a consequence, the Collector being the Competent Authority declared the Petitioner herein disqualified to hold the post of sarapanch of sunari sikuan Gram Panchayat under Khariar Panchayat samiti, vide the impugned order. Mr.Bose, learned counsel for O.P.2 also brought to the notice of this Court that during pendency of the proceeding, the District Administration of Nuapada has already handed over the charge to the Naib sarapanch of the concerned Gram Panchayat and the Naib sarapanch in the meantime functioning as sarapanch has already commenced to perform as whole time sarapanch. Mr.Bose, however, fairly submitted, the Naib sarapanch is continuing as in-charge sarapanch. Mr.Bose also fairly submitted that there was no asking by his Party, the Complainant to either declare the Voter List and/or entry, it becomes bad nor there has been any endeavor by his Client even to involve any such document and the case was fought simply on basis of entry in the Admission Register and the School Certificate prepared on such foundation. To satisfy his submission, Mr.Bose learned counsel for O.P.2 attempted to support the following decisions along with supply of copy of each such decisions apart from filing a written note of submission to supplement his above contentions.

i) ***Raghunath Sahoo vrs. Collector & District Magistrate & ors***.: Manu/OR/0425/2007

ii) ***Jagdev Majhi vrs. State of Odisha & ors.*** (Writ AppealNo.172 of 2019 decided on 3.9.2021)

iii) ***Ch. Sudhakar Reddy vrs. Tipnna Kesab Reddy*** (W.A. No.381 of 2010 decided on 2.2.2011)

iv) ***Sushil Kumar vrs. Rakesh Kumar*** : AIR 2004 SC 230 v) Debaki Jani vrs. The Collector : AIR 2014 Orissa 138.

9. For the factual scenario and the nature of contest between the Parties, this Court here finds, the case needs decision on the following questions :-

A. For the settled position of law giving weightage to Voter Identity Card vis-à-vis school Admission Register or the Matriculation Certificate, if the Collector is justified in prioritising the School Admission Register and the Matriculation Certificate prepared on such foundation over Voter Identity Card vis-à-vis enrolment in the Electoral Roll ?

B. For the provision at Section 4(1) of the O.G.P. Act makes it clear that a Grama Sasan shall be composed of all persons already entered in the Voter List under the Representation of the People Act, 1950 in so much of the electoral roll for any Assembly Constituency for the time being in force as relates Grama of the roll shall be deemed to be the electoral roll in respect of the Grama and the Petitioner herein being already registered in the electoral roll failing satisfied through appropriate proceeding that such entry in the electoral roll is wrong and illegal, if the Collector in exercise of power under section 26 of the O.G.P. Act is competent to discard such role and interfere on one's eligibility to file nomination on the basis of such entry?

C. Looking to the power conferred on the Collector under Section 26 of the O.G.P. Act and the power conferred on the Election Tribunal under sections 30 as well as 31 read together with sections 35 and 37 of the O.G.P. Act, if the power of the Collector is as good as that of the Election Tribunal ?

10. Considering the rival contentions of the Parties and the undisputed fact remains herein to be the Petitioner and O.P.2 herein were all candidates for the post of sarapanch of sunari sikuan Gram Panchayat under Khariar Panchayat samiti in the district of Nuapada. The Petitioner appears to have filed her nomination on the basis of Voter Identity Card on the registration of the Petitioner in the electoral roll of the Assembly Constituency and further on such basis being a Member of the Grama involved herein. The dispute here involved being raised at the instance of O.P.2 raising a question on disqualification of the Petitioner in even filing the nomination for the post of sarapanch being under aged at the time of filing of nomination being disqualified under the provision of Sections 11 & 25 of the O.G.P. Act. The Collector in exercise of power under section 26 of the O.G.P. Act, for the limited power with him entered into enquiry to find the foundation in the allegation on disqualification to find as to whether or not such person is or has become disqualified ? It is in this connection, both the Parties were noticed to appear before the Collector with relevant Records for enquiry even asking the Petitioner herein being the O.P. therein to file show cause as to why her candidature will not be disqualified ?

11. Attending to the allegation the Petitioner, i.e., O.P. filed response, inter alia, contending that she filed nomination before the Election Officer with all relevant documents required for qualifying to the nomination, which ought to have been duly scrutinized and it was only after verifying and finding all the documents found to be true and genuine, the nomination of the Petitioner was passed through. It was specifically contended by the Petitioner that she had already completed 21 years of age as on the date of declaration of result. She along with her nomination filed public documents, such as Voter Identity Card, Voter List, PAN Card, Medical Certificate issued by the Medical Officer in-charge of Khariar CHC all indicating her age to be more than 21 years. Entries of birth and death in the Register of Anganwadi Worker of Sunari Sikuan AWC-4 categorically indicated the date of birth of the Petitioner mentioned as 9.1.1999.

12. It is for raising an issue through the Admission Register and the HSC Certificate to ascertain the date of birth of the O.P., the Principal of Odisha Adarsa Vidyalaya was asked to produce the students Admission Register of the School. It is only on the basis of material disclosure through the students Admission Register before the Collector, the Collector came to observe that the date of birth of the O.P. as per such Register appears to be 9.5.2004 and accordingly, held the Petitioner disqualified as per Section 26 of the O.G.P. Act.

13. Now attending to Question No.A, this question is taken up again herein as follows :-

> "A. For the settled position of law giving weightage to Voter Identity Card vis-à-vis School Admission Register or the Matriculation Certificate, if the Collector is justified in valuing the School Admission Register over Voter Identity Card vis-à-vis enrolment in the Electoral Roll ?

This Court here keeping in view the rival contentions of the Parties, one Party relies on Voter Identity Card along with several other documents as taken note in Paragraph-11 and O.P.2 taking help of the Admission Register and the School Certificate prepared on such foundation, finds, this issue has been considered time and again and Voter List entry in Voter Identity Card will edge over entry in Admission Register has been settled long since. This Court here takes down the law laid down by different Courts including the apex Court as hereunder :-

In the decision reported in **Durga Shankar Mehta v. Thakur Raghuraj Singh and Others**, AIR 1954 SC 520 it has been held (para 8):

> "… … … the electoral roll is conclusive as to the qualification of the elector except where a disqualification is expressly alleged or proved … … …"

In the decision reported in **(1958) 14 Ele LR 386 (Bom**) it has been held:

> "Much reliance cannot be placed on entries in school admission registers which are not proved to have been made on the basis of statements made by a person, e.g., the father of the boy, who knew the true date of his birth."

As held in **(1958) 14 Ele LR 386 (Bom)**, much reliance cannot be placed on entries in the school admission registers which are not proved to have been made on the basis of the statement made by a person, e.g. the father of the boy, who knew the true date of his birth. It is well settled that it would depend entirely on the totality of evidence offered by the rival parties as to what value can be properly attached to them and no hard and fast rule can be laid down as to whether the one kind of evidence should prevail or the other.This must depend on the facts and circumstances of each case. Each case must depend upon its own facts and circumstances and must be decided on the net balance of the various counts of proof offered therein. In this case the petitioner depends solely on the entries in the school and college records (even assuming that the documents marked Z/8, Z/9 and Z/10 are to be taken into consideration) to prove the date of birth of respondent No. 3 to be 25-4-1957. However, there is no oral evidence to support his case. On the other hand there is overwhelming evidence - both oral and documentary - on behalf of respondent No. 3 to prove his date of birth to be 30-1-1951.

In the decision in **Brijendralal Gupta and Another v. Jwalaprasad and Others**, AIR 1960 SC 1049 it has been held (at pp. 12 and 15):

> "Under S. 36(7) a certified copy of the entry in the electoral roll shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency. … ..

> … … Section 19 read with S. 36(7) shows that when a presumption is raised under Section 36(7) it may mean prima facie that the person concerned is not less than twenty-one years of age. .. … …"

In the decision in **Brij Mohan Singh v. Priya Brat Narain Sinha and Others, AIR 1965 SC 282** it has been held:

> "In actual life it often happens that persons give false age of the boy at the time of his admission to a school so that later in life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed. The Court of fact cannot ignore this fact while assessing the value of the entry and it would be improper for the Court to base any conclusion on the basis of the entry, when it is alleged that the entry was made upon false information supplied with the above motive."
>
> ".. .. … once this wrong entry was made in the admission register it was necessarily carried forward to the Matriculation Certificate and was also adhered to in the application for the post of a Sub- Inspector of Police.
>
> xxxxxx
>
> However much one may condemn such an act of making a false statement of age with a view to secure an advantage in getting public service, a judge of facts cannot ignore the position that in actual life this happens not infrequently. We find it impossible to say that the Election Tribunal was wrong in accepting the appellant's explanation. Taking all the circumstances into consideration we are of opinion that the explanation may verywell be true and so it will not be proper for the Court to base any conclusion about the appellant's age on the entries in these three documents, viz., Ex. 2, Ex. 8 and Ex. 18."

In the decision reported in **(1967) 31 Ele LR 401 (Mad),** it has been held as follows :

> "The date of birth as given in the School Certificate is not conclusive as proving the age of a person. When there is conflict between the age as given in the school registers and the birth extract, if the birth extract is proved to relate to the person concerned, it is safe to rely on the age as given in the birth extract."

In the decision reported in **Bhagwan Das Singla v. Harchand Singh and Another**, AIR 1971 Punj and Har 65 : 42 Ele LR 439 it has been held :

> "The entry in electoral roll is conclusive to prove that age of a person whose name is entered is 21 years at least and where nomination paper was rejected ignoring S. 36(7) of the Representation of the People Act, 1951, such rejection was held improper."

It has been further held in Para 18 as follows:

> "It would thus appear that the true legal position is that the entry of a person in the electoral roll on the qualifying date is a conclusive proof of the fact that he is more than 21 years of age. But a candidate has to possess the constitutional qualification that he is 25 years of age. In order that the nomination paper of such a candidate is rejected for want of the constitutional qualification, there must be prima facie evidence that he does not possess the qualification as to age; and even if a decision is rendered on this matter by the Returning Officer, that decision is not final and it is open to examination by the Election Tribunal when an election petition is filed."

Madan Mohan Singh and Others v. Rajni Kant and Another,(2010) 9 SCC 209 :

> 19. Such entries may be in any public document i.e. school register, voters' list or family register prepared under the Rules and Regulations, etc. in force, and may be admissible under section 35 of the Evidence Act as held in Mohd. Ikram Hussain v. State of U.P. [AIR 1964 SC 1625 : (1964) 2 Cri LJ 590] and Santenu Mitra v. State of W.B. [(1998) 5 SCC 697 : 1998 SCC (Cri) 1381 : AIR 1999 SC 1587]
>
> 20. so far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under section 35 of the Evidence Act but the Court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entries in school register/school leaving certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.

Tipnna Kesab Reddy Vs State of Orissa And Others : (2011) 111 CLT 885 (Para-9 & 13)

> 9. However, even accepting all the materials, it is found that the date of birth mentioned in the Voter Identity Card Ext-B as on 01.01.2002 shows to be 18 years. It can, therefore, safely be concluded that the petitioner had a right to exercise his franchise as on 01.01.2002 having been considered to be eligible to be registered in the electoral roll being not less than eighteen years of age under section 19 (a) of the Representation of the People Act, 1950. It is a common knowledge and judicial notice can also be taken of the fact that parents have a tendency to reduce the age of the child by mentioning a subsequent date of birth in the school register, which would ultimately culminate in the certificate granted to the children in the High School Certificate Examination. No doubt, the date of birth as reflected in the Matriculation Certificate relates to the date of birth mentioned in the application form filled up by the candidate, which is required to be submitted before the Examining Authority for appearing in the said examination. But, while considering as to whether a person has attained the age of 21 years on the date of filing of the nomination paper as contemplated under section 11 of the Act, the age mentioned in the Voter Identity Card assumes relevancy more so because such person is allowed to cast his vote in the General Election having attained the age of majority and registered in the electoral roll.
>
> 13. This Court is, therefore, of the view that the learned courts below could not have ignored Ext-B, the Voter Identity Card produced by the petitioner while considering the question as to whether the petitioner was entitled to contest the election to the office of sarpanch or not in view of mandate of section 11 of the Act and should have held that his nomination paper was rightly accepted as he already attained 21 years of age on the date of filing his nomination paper.

14. Taking into account many of these decisions referred to herein above, this Court in the decision in ***Mayadhar Nayak vr. Sub- Divisional Officer, Jajpur & ors.*** : 1982 SCC OnLine Ori 1 (AIR 1982 Ori 221) has come to observe, the entry in the electoral roll can have a better value than the entries in the Admission Register

or the Matriculate Certificate, as the case may be and this decision declared the election of the returned candidate as valid.

15. In the above concrete legal scenario, this Court finds, Issue No.1 has to be answered in favour of the Petitioner herein thereby holding the Collector in exercise of power under Section 26 of the O.G.P. Act has failed in appreciating the settled position of law on this aspect and thus arrived at wrong and illegal order, which ought to be interfered with and set aside.

16. Now coming to answer Question No.B, this Court here finds, the provision at Section 4(1) of the O.G.P. Act, 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."

Reading the aforesaid provision, it becomes clear that the Grama Sasan, which shall be composed of all persons registered by virtue of Representation of People Act in so much of electoral roll for any Assembly Constituency for the time being in force, this roll shall be deemed to be the electoral roll in respect of Grama. Looking to the factual scenario involved herein, this Court finds, once the electoral roll of the Assembly Constituency is deemed to be electoral roll in respect of a Grama unless somebody raises a question on the entry in the electoral roll of the Assembly Constituency in appropriate forum and get it nullified or rectified, there should not be entertaining of any question on the entry in the electoral roll, which is deemed to be treated as electoral roll of a Grama and the dispute involving entry in the electoral roll or Assembly Constituency vis-à-vis Grama again unless be agitated in the asking of objection to such preparation in the concerned election Notification, such issue should not be brought under the purview of either Election Tribunal or the dispute under adjudication of the Collector. This Court here thus answering this issue in favour of the Petitioner observes, the Collector exceeded its jurisdiction in coming to the impugned conclusion.

17. Coming to decide on the Question No.C, this Court for better appreciation takes note of Question No.C.

> C. Looking to the power conferred on the Collector under Section 26 of the O.G.P. Act and the power conferred on the Election Tribunal under Sections 30 as well as 31 read together with Sections 35 and 37 of the O.G.P. Act, if the power of the Collector is as good as the Election Tribunal ?

Attending to the controversy related to Question No.e, this Court keeping in view the rival contentions taken note herein above and reading of the impugned order finds, the Collector since exercised its power by only entering into an enquiry

and deciding the matter only by providing natural justice to the Petitioner herein, there is strict compliance of the provision at Section 26 of the O.G.P. Act. Such action of the Collector also gets full support of a judgment in Full Court of this Court, vide ***Debaki Jani vrs. The Collector & anr***. : AIR 2014 Ori 138. This Court answers this question holding there is no exceeding jurisdiction by the Collector in its exercise of power under Section 26 of the O.G.P. Act.

18. In the ultimate, this Court finds, the decision of the Collector is not sustainable in the eye of law. Accordingly, the impugned order under Annexure-12 is interfered with and set aside. As a consequence of setting aside of the impugned order, since the Petitioner has been made to un-sit by virtue of the impugned order, she should be restored to her position as Sarapanch forthwith.

19. The Writ Petition succeeds. No cost.

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2023 (II) ILR - CUT- 451

BISWANATH RATH, J.

W.P.(C) NO. 11235 OF 2023

KAMALA MOHAPATRA .....Petitioner

.V.

COLLECTOR & DISTRICT MAGISTRATE, CUTTACK & ANR. .....Opp. Parties

ORISSA SURVEY & SETTLEMENT ACT, 1958 – Section 15(B) – Power of the Commissioner – The petitioner filed the application for correction of status of land recorded in Record of Right – Originally the land was recorded as 'Puratana Patita' – In Hal settlement, the land has been recorded as 'Gadia' – Whether, the Commissioner is justified in remitting the matter to Tahasildar ? – Held, No. – The Revisional Authority should exercise its power by simply directing to bring the status of land from 'Gadia Jalasaya' to 'Puratana Patita' in the Record of Right. (Para 6)

For Petitioner : Mr. D.Mohapatra, Mr.M.R Pradhan, Mr.J.Barik, Mr.P.K. Singhdeo & Mr.S.K.Rout.

For Opp.Parties : Mr. S.Ghose, AGA

JUDGMENT Date of Hearing & Judgment :11.05.2023

BISWANATH RATH,J.

This writ petition involves the following prayer:

> "The petitioner therefore most humbly prays that this Hon'ble Court may graciously be pleased to issue rule Nisi calling upon the Opposite Parties (i) as to why the order passed by the Revisional Authority in Annexure-3 and consequential order passed by the Tahasildar in Annexure-6 shall not be quashed.(ii) as to why there shall not be a direction to consider the case of the petitioners in the light of the materials available on records and (iii) accordingly as to why there shall not be a direction to change the Kissam of the schedule land of the petitioners from GADIA Kissam to PURATAN PATITA and thereafter for consideration of the recording of the land as GHARABARI.
>
> And if the Opposite Parties fail to show cause or show insufficient cause to make the said rule absolute by issuance of appropriate writ(s), order(s), direction(s) as this Hon'ble Court may deem fit and proper;
>
> And/or to pass such other order(s) as this Hon'ble court may deem just and proper under the facts and circumstances of the present case.
>
> And for this act of kindness the petitioner shall as in duty bound ever pray."

2. Principal ground of challenge to the impugned order appears to be once there is power provided to the Commissioner under the provision of Section 15(b) of the O.S.S. Act, 1958, it is only the Commissioner to discharge such power and he has no authority to remit the matter to the Tahasildar for involving Tahasildar's exercise in such dispute. Second limb of argument appears to be even assuming the Tahasildar has worked out on the direction of the Commissioner,the Tahasildar should have confined the proceeding considering it ought to be a request for correction of record-of-right and in no circumstance there involved a case for conversion of land. Further argument advanced by Mr.Mohapatra, learned counsel for the petitioners appears to be Tahasildar while having remand exercise took the proceeding to be involving a request for conversion of land and therefore, there is inadvertent following of the previous judgment of this Court referred to therein. It is keeping the above legal position, Mr.Mohapatra, learned counsel sought for setting aside of the impugned order. Mr.Mohapatra, learned counsel also to satisfy his such submission brought to the notice of the order dated 27.07.2022 in W.P.(C) No.14368 of 2022 and the judgment dated13.04.2023 involving W.P.(C). No.5042 of 2019 with W.P.(C).No.9426 of 2023 passed by this Court. Reading through the judgment and order referred to hereinabove, Mr.Mohapatra, learned counsel attempted to satisfy this Court that it was only for the Commissioner to discharge his exercise looking to the nature of the proceeding.

3. Mr.Ghose, learned Additional Government Advocate however referring to the proceeding filed in R.P. Case No. 248 of 2007 and Misc. Case No. 29 of 2021 involving R.P. Case No.248 of 2007, reading through the different orders at page - 56 and 57 of the brief in his first limb of argument submitted that there is no proper

assistance to the Court for there has been non-appearance of the contesting parties in several occasions. Further in reference to the judgment and order referred to hereinabove, Mr. Ghose, learned Additional Government Advocate contended that for the judgment and order came to exist subsequently, there was no occasion on the part of the Commissioner either to come to know such legal position or to refer such orders. Further, similarly the Tahasildar had also no occasion to go through the judgment and order passed on this particular aspect by this Court in the meantime. Taking this Court to the order involving previous round of litigation, Mr.Ghose, learned Additional Government Advocate contends the Tahasildar remain bound to give a lawful outcome. Mr. Ghose however submitted that there cannot be any dispute of the decision in W.P.(C).No.8797 of 2004 and O.J.C.No.6721 of 1999 not applying to the case at hand.

4. Considering the rival contentions of the parties, attaining to the validity of the order under Annexure-3 & 6, this Court refers to the pleadings of the petitioner based on hal record-of-right appears to be a clear case of bringing in change in the status of the land mentioned in sabik khata and in no circumstance, there involves any case for conversion.Facts as borne through the pleading undisputedly establishing petitioner herein is subsequent purchaser. Plot No.1563, Plot No.1481 and Plot No.1483 originally recorded as "Puratana Patita". In sabik there has been recording of status of above land as "Gadia", compelling the vendor of the petitioner brought a Section 15(b) of O.S.S.Act proceeding on the file of Revisional Authority. Looking to the record of right and discussions involving hal record vis-à-vis sabik record, this Court finds there should not be any doubt that there was inadvertent mentioning of status of the land in the further preparation of record and as such Section 15 (b) application should have considered the limited aspect in bringing in correct status of land dependant on hal record-of-right.

5. In the circumstance, looking to the nature of dispute brought under Section 15(b) of the O.S.S. Act, this Court finds even considering the case of the petitioner, the Commissioner vide page-46 & 47 has come to observe as follows:

> "On verification of documents filed by the petitioners and the submissions made by the learned Counsel for the petitioners, it is revealed that the Hal Plot No.465, area Ac0.112 dec. and Plot No.911, area Ac.0.348 dec. stands recorded in the names of Abhaya Chandra Mohanty, Son of Dinabandhu Mohanty under Hal Khata No.34 with stitiban status. It is further contended that the original Hal recorded tenant namely Abhaya Chandra Mohanty died leaving behind his three sons namely Petitioner No.1, 2 and Proforma Opp.Party No.2 namely Dr.Anil Chandra Mohanty, Asit Chandra Mohanty and Ananda Chandra Mohanty, Sons of Late Abhaya Chandra Mohanty. It is further contended that the counsel for the petitioners by adducing the true copy of Sabik settlement Record-of-Right in the year 1931, that the classification in respect of Hal Plot No.465 & 911 which corresponds to Sabik Plot No.1481 & Sabik Plot No.1483 under Sabik Khata No.1563 as a "Puratana Patita", but while the Hal settlement Record-of-Right finally published on 13th March, 1992. The classification of Hal Plot No.465 and

911 has been wrongly recorded as "Gadia" in column 9 (nine) instead of "Puratana Patkita" in the impugned Hal ROR No.34. Hence, this revision."

It is here taking into account the observation of the Commissioner, this Court finds the commissioner even after coming to conclude there was wrong recording on the status of the land involved herein and maintained it to be "Puratana Patita", there involves change in kissam of the property in sabik record-of-right bringing it to be puratana Patita from recording Gadia. The Revisional Authority should have stop his exercise here simply directing bringing in record-of-right with change in status of land to "Puratana Patita". Further reading of the observation, this Court again finds the Revisional Authority coming to his direction remitted the matter to the Tahasildar for consideration keeping in view the judgment of this Court in W.P.(C) No.8797 of 2004 and O.J.C.No.6721 of 1999, this Court finds there is mis-application of the judgment referred to therein to the case at hand. Deciding such issue, this Court in both the order dated 29.07.2022 in W.P.(C).No.13468 of 2022 and the judgment dated 13.04.2023 in W.P.(C).N0.5042 of 2019 has already come to hold there is no application of the judgment vide W.P.(C).No. W.P.(C) No.8797 of 2004 as well as O.J.C.No.6721 of 1999 to this nature of case.

6. In the circumstance, this Court sets aside the direction part at end of page -46 and continuing till page- 47 of the brief at Annexure-3. It is for the aforesaid finding the impugned order at Annexure-6 is declared as bad and in total non-application of mind and thus also is sets aside. This Court accordingly remits the matter back to the Revisional Authority for giving the rightful declaration bringing in the status of the disputed land involved herein from "Gadia Jalasaya" to "Puratana Patita" by completing his exercise within a period of one month from the date of communication of this order by the petitioners There should also be consequent direction to the concerned Tahasildar to bring the corrected record-of-right within a further one month time. For this Court records the submission of Mr.Mohapatra, learned counsel for the petitioners that there has been subsequent sale and vendor is not co-operating presently, in such event, it may be open to the petitioner herein to pursue the litigation in R.P. Case No.248 of 2007. It is open to the Revision Petitioner to bring to the notice of the Commissioner the decision of this Court vide W.P.(C).No.5042 of 2019 dtd.13.04.2023 and W.P.(C).No.14368 of 2022 dtd.29.07.2022 respectively.

7. In the result, the writ petition succeeds however; there is no order as to cost.

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2023 (II) ILR - CUT- 455

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

W.P.(C) NO.11396 OF 2019

EXECUTIVE ENGINEER, ELECTRICAL (TPNODL), BALASORE ELECTRICAL DIVISION-II …..…..Petitioner

.V.

M/s. RAJ COMPLEX, BALASORE & ORS. …..…..Opp.Parties

ELECTRICITY ACT, 2003 – Section 42(5) r/w OERC (GRF and Ombudsman) Regulation, 2004 – The consumer filed the case for implementation of the GRF Order which was not challenged by the licensee – The Ombudsman passed order for implementation on 05.01.2019 – The licensee/petitioner filed the writ petition on 02.07.2019 – Scope of judicial interference – Held, this Court has to be slow in interfering with the finding of the fact unless they are found to be perverse, arbitrary and in ignorance to the statutory provisions. (Para 29-33)

It is coming to the knowledge of the Court that, the licensees are busy in bringing unnecessary litigation – In such a scenario this Court is constrained to observe that if such pattern of litigation is pursued, the Court would be compelled to impose heavy cost. (Para 36)

Case Laws Relied on and Referred to :-

1. 2023 SCC Online 233 : MSEDCL Vs. APML & Ors.
2. (2002) 3 SCC 711 : Association of Industrial Electricity users Vs. State of A.P.
3. 2023 SCC Online SC 1 : Vivek Narayan Sharma Vs. Union of India.

For Petitioner : Mr. S.C. Dash

For Opp.Parties : None

JUDGMENT Date of Hearing: 05.05.2023 : Date of Judgment: 11.05.2023

M.S. SAHOO, J.

Introduction

The petitioner Tata Power North Odisha Distribution Licensee (TPNODL) is the electricity distribution licensee, who have stepped into the shoes of the earlier electricity distribution licensee, North Eastern Electricity Supply Company of Odisha Utility (NESCO Utility) with effect from 25.03.2021 as per the vesting orders of the Odisha Electricity Regulatory Commission (hereinafter 'OERC' for short) under Sections 20 & 21 of the Electricity Act, 2003.

2. The utility-NESCO had filed the writ petition challenging the order dated 28.09.2018 passed by the (GRF) Grievance Redressal Forum (NESCO), Balasore in

Consumer Complaint (CC) No.165 of 2018 as well as the order dated 05.01.2019 passed by the Ombudsman-II of Orissa Electricity Regulatory Commission, Bhubaneswar in Consumer Representation Case (hereinafter for short, CR Case) No. Omb(II) N-41 of 2018 vide Annexures 3 & 6 respectively. It may be noted here that the Consumer Representation Case No. 41 of 2018 was instituted by the consumer challenging the non-implementation of order dated 28.09.2018 in GRF CC No. 165 of 2018. The writ petition before this Court has the following prayer made by the licensee :

> *"It is therefore humbly prayed that the Hon'ble Court may be pleased to admit the writ application, issue a rule "nisi"calling upon the opposite parties specifically to O.P.No.1 to show-cause as to why the writ petition shall not be allowed and the impugned Order of the GRF dated 28.09.2018 passed in Case No.165/2018 vide Annexure-3 as well as the Order/Award dated 05.01.2019 passed by the Ombudsman-II in C.R.Case No.41 of 2018 vide Annexure-6 so far the same relates to waiver of Transformer Loss & claim of Supervision charges only in the Construction of line" shall not be quashed as illegal, arbitrary, contrary to law, without jurisdiction, barred by time and in the event, the said O.P. fails to show cause or shows insufficient cause, your lordships may be pleased to make the rule absolute and issue an appropriate writ/order quashing the impugned Orders of the G.R.F. as well as of the Ombudsman vide Annexure-3 and Annexure-6 to the writ petition respectively."*

Brief Facts

3. The opposite party no.1, the consumer of electricity under the distribution licensee (NESCO Utility) entered into an agreement for supply of electricity since February, 2014 with a contract demand 24 Kilo Watts (KW) in General Purpose (GPS) tariff category through a transformer rated 63 Kilo Volt Ampere (KVA) installed by the consumer with 11 Kilo Volt (KV) supply. The licensee installed a LTCT meter and billed the consumer on the basis of LT tariff determined by the OERC.

Proceeding before the GRF

3.1 The consumer filed the Consumer Complaint (CC) No.165 of 2018 (Annexure-1) under Section 42(5) of the Electricity Act read with relevant provisions of the OERC Distribution (Conditions of Supply) Code, 2004 (in short, 'OERC Code, 2004'). In the said complaint, the consumer detailed the nature of electricity supply availed and the electrical equipments installed, for such supply the consumer referred to the tariff order of the Financial Year 2005-06 of the OERC. The consumer specifically stated that it had deposited Rs.4,12,055/- towards the capital work of distribution licensee to provide electricity.

The following prayers were made before the GRF by the consumer :

> *"Under the aforesaid facts and circumstances, this Hon'ble Forum graciously be pleased to admit this petition, issue notice to the opp.party & after hearing, direct the opp.party.*

(1) To withdraw of Tr. Loss unit from the month of initial power supply to till date and not to add further.

(2) To refund of the HT & LT meters cost deposited during initial power supply.

(3) To refund of excess meter rent.

(4) To revision of bills against MMFC since initial power supply to till date as per recorded Max. Demand and further bills towards MMFC as per recorder Max. Demand.

(5) To refund of 6% supervision charges beyond point of supply.

(6) To refund of capital cost invested by the complainant.

(7) To review Security Deposit u/r-20 of OERC dist. Code 2004 & refund the excess."

4. The licensee filed their counter (Annexure-2) before the GRF inter alia contending the following :

4.1. That the consumer is a GP category having CD of 24KW and availing power supply with a LTCT meter on 11KV supply. As per the OERC Regulation Clause 54(3) read with clause 93(9), in the case of High Tension Supply, if HT metering set cannot be readily provided and installed, LT metering set shall be provided and connected on the LT side of the Consumer's transformers, the reading of such metering units will be added the average losses in the transformers calculated as per the regulation. As per tariff order GP consumers with CD < 70 KVA shall be treated as LT consumers for tariff purpose irrespective of supply voltage. The applicant's contention to withdraw the transformer loss is not justified. Regarding the second connection the first party i.e. owner of Raj Complex Smt. Sakuntala Sahu has executed a lease rent agreement with Raju Gopal Sahu and gives a No Objection for taking power supply.

4.2. At the time of power supply the HT meter was not available and supply has been made through LTCT meter. However the HT meter will be installed at the consumer premises on availability and confirmation from Executive Engineer (MRT & EA) Division, Balasore.

4.3. At the time of new consumer in the billing fold wrong punching has been made in the meter rent code for which meter rent has been charged till date. Steps have been taken to stop the meter rent and adjust the meter rent recovered from the date of supply in the next bill generated in Oct-18.

4. That the petitioner's claim not to pay MMFC on the basis of the agreed CD as stipulated in the agreement but to be billed as per RST order of OERC issued from time to time is not logically correct and justified. The said tariff orders of OERC are wrongly interpreted by the petitioner. So as per Regulation-84 of OERC Distribution (Conditions of Supply) Code, 2004 which is as follows :

Every consumer during continuance of agreement under Regulation-15, shall be liable to pay MMFC even if no electricity is consumed for any reason whatsoever or supply has been disconnected due to defaulter of the consumer."

[MMFC : Monthly Minimum Fixed Charge; C.D.: Contract Demand;
GP: General Purpose, LT-Low Tension, HT-High Tension.]

5. It was not disputed by the licensee that the consumer had deposited 6% supervision charges for the 63KVA substation installed at consumer's own cost

apart from paying the entire capital cost of such installation. The licensee denied the refund of cost of capital expenditure deposited by customer on remunerative ground, purportedly, in terms of the Regulation-13 of Appendix-I of OERC Distribution Code, 2004. It also denied that such non-adjustment of the amount paid by the consumer in the bill raised over two years contract referring to Section 142 of the Electricity Act, 2003.

6. After considering the rival assertion regarding the facts and contentions raised before the GRF regarding the transformer loss claimed by the licensee–respondent (petitioner herein), the GRF gave the following observation (Annexure-3) :

> *"(xiv) In the condition of supply, there is provision that in the event of metering on LT side, for H.T. consumer, the H.T. reading is obtained in the following manner:*
>
> *(i) Suitable meter will be installed by the licensee on L.T. side of consumer's transformer and the reading of the meter shall be added the average loss in the transformer ordinarily calculated as follows :*
>
> *730* KVA rating of the transformer/100 unit per month.*
>
> *(ii) And to arrive equivalent HT demand 1% of the rating of the transformer in KVA shall be added to recorded Maximum Demand of the LT meter on the L.T. side.*
> *Therefore this clause is applicable for HT consumer only for tariff purposes.*
>
> *(iii) The State Commission specifies GP consumer <70KVA will be treated as LT consumer for the tariff purposes. The Distribution licensee is not claiming any transformer loss from identical class of consumer who is obtaining power from transformer provided by them and the transformer loss is claimed by them from the consumer who has installed his own transformer. They are same classes in themselves and have to be treated equally.*
>
> *(iv) The Clause-86 of the regulation specifies actual consumption of electrical energy shall be the basis which shall be payable by the consumer as per the licensee's tariff. Thus the consumer is liable to pay only the actual consumption of electrical energy recorded in the meter.*
>
> (v) *The Forum is of the opinion that the respondent cannot claim the transformer loss from the consumer."* [Emphasis Supplied]

7. Regarding refund of cost of meter, the GRF observed as follows :

> *"(xxii) Commission while framing Supply Code 2004 specifies the expenses leviable by a Distribution Licensee from a person requiring supply of electricity reasonably incurred in providing any electricity line or electrical plant used for the purpose of giving that s upply as per Section 46 of the Act. The commission did not specify the cost of meter in the Regulation as the said Section of the Act does not require the Commission to specify the cost of the meter. Since meter is not included in the definition of electric line and electric plant given in the act mentioned earlier. However in accordance with the Section 47(1) (b) & 55(1) of the Act the Commission vide Regulation 19 of the Supply Code Regulation specified the security amount to be obtained by the Distribution Licensee for the meter if provided by the licensee.*

(xxiii) According to above provisions of the Electricity act, the following positions emerges regarding cost of meter.

(xxiv) A consumer is required to give securing for the price of meter provided by the Distribution Licensee as determined by Regulations notified by the State Commission.

(xxv) The consumer has to also pay rent as specified by the State Commission for the meter provided by the Distribution Licensee.

(xxvi) Consume has a Choice to purchase meter in which case no security and rent for meter can be charged by the Distribution Licensee from the consumer.

(xxvii) There is no provision in the Electricity Act, 2003 for recovery of cost of meter from the consumer and the Act only empowers the Distribution Licensee to take security for meter specified by the State Commission.

(xxviii) The Forum direct the licensee respondent to refund the cost of meter.

(xxix) The respondent can claim the meter rent provided by them from the consumer as specified by the State Commission." [Emphasis Supplied]

8. Regarding challenge to the Monthly Minimum Fixed Charge (in short, 'MMFC') to be made by the licensee, the GRF did not give any order in favour of the consumer and observed as follows :

"In connection with the same issue, the matter is pending before the Hon'ble Court of Odisha vide W.P.(C) No.10153 of 2014. The respondent has stated in his petition that he will accept the final verdict of the Hon'ble Court. Hence, to avoid multiplicity of litigations on the same issue, the Forum finds it sensible not to further proceeds into the matter till outcome of the final decision of the court." [Emphasis Supplied]

9. Regarding the dispute raised by the consumer pertaining to collection of 6% supervision charges for line and substation already deposited by the consumer with the licensee, the GRF gave the following finding :

"(vi) ***Refund of 6% Supervision charges*** *:*

As per the provisions of OERC Distributions (Conditions of Supply) Code 2004 when a consumer is asked to bear the capital work, the licensee is entitled to collect the requisite supervision charge for checking and ensuring that the capital works have been done as per the standards.

1. To avoid delay in construction by Distribution licensee the prospective consumer can construct a line on behalf of NESCO Utility and handover the same to NESCO perpetually and in such instance NESCO shall be entitled only to the supervision charges of 6% of the gross estimate.

2. The State Commission has authorized to recover Supervision charges in case service line is laid by consumer under Clause-13 of Supply Code specified by the Commission under Section 50 of the Act.

3. The supervision charge is applicable when the asset is created by the consumer, i.e., the consumer incurs the cost of materials and labour and hands over the licensee. Thus in such case the ownership of line remains with the licensee and the responsibility of the operation and maintenance of the line also remains with the licensee. The rational is that since the

asset is to be maintained by the licensee for whole of its life. Licensee has to replace any part of the asset which got defective during life time at his costs. He is entitled to claim supervision charges. After payment of supervision charges & transfer of line to the licensee, the consumer is free from payment of any charges for maintenance of lines for all times.

Here in the instance case the asset i.e., transformer is created by the complainant and they intend to own and maintain the transformer and its associated equipment by themselves. Therefore in the instance case complainant shall not be liable to pay 6% supervision charges on cost of work.

Considering all the provisions the Forum is of the opinion that the respondent is liable to collect the supervision charges only in the construction of the line." [Emphasis Supplied]

10. Regarding the refund/adjustment of the estimated amount of Rs.4,12,055/- towards construction of the line and substation made by the consumer under Regulation-13 (Appendix-1) of OERC Code, 2004, the GRF did not pass any order in favour of the consumer and observed the following :

"Further, it is to mention here as the matter is under sub-judice before the Hon'ble High Court of Odisha vide WP(C) No.29408 of 2011. To avoid further litigation, it is sensible not to further proceeds into the matter."

11. Regarding the prayer of the consumer for refund of excess security deposit under Rule-20 of the OERC Distribution Code, the GRF observed the following :

"Review the adequacy of Security Deposit for the Financial Year 2017-18 as the provision of Regulation-20(1) and based on the calculation take necessary action as per Regulation-20(2) of the OERC Distribution Code 2004."

12. To sum up, the order dated 28.09.2018 passed by the GRF is reproduced below :

"In the above facts and circumstances, the Forum funds it appropriate to direct the respondent to:-

(1) The respondent cannot claim the transformer loss from the consumer.

(2) (i) The respondent will refund the cost of meter to the complainant.

(ii) The respondent can claim the meter rent provided by them from the consumer as specified by the State Commission.

(3) The respondent is eligible to claim the supervision charges only in the construction of line.

(4) The respondent can review the adequacy of Security Deposit for the Financial Year 2017-18 as the provision of Regulation-20(1) and based on the calculation take necessary action as per Regulation-20(2) of the OERC Distribution Code, 2004."

Proceeding before the Ombudsman of OERC

13. As the distribution licensee did not implement the order passed by the GRF as per the mandate of the statute, within 30 days and thereafter the consumer filed Consumer Representation (C.R.) Case No.41 of 2018 (Annexure-4) invoking the jurisdiction of the Ombudsman-II, OERC under Section 42(5) of the Electricity Act,

2003 read with OERC Code , 2004 seeking direction for implementation of the order passed by the GRF and issuance of a revised bill by the licensee to the consumer and to produce the same before the GRF to ascertain the correctness of the revision of bill. In paragraph-3 of the CR Case No.41 of 2018, the following was stated :

> *"That one month already passed, opp.party has not provided any revised statement as per the direction given by the learned GRF to comply his order. The opp.party is requested to serve a revised statement before this Hon'ble forum to ascertain the correctness of revision and compliance of the order of the learned GRF.*
>
> *(a) The respondent should withdraw the Tr. Loss units since initial power supply to till date and not to add further. Refund the deposited amount against Tr. Loss units.*
>
> *(b) The respondent will refund the cost of meters i.e. Rs.66,622.00 to the complainant. But till date not adjusted/refund.*
>
> *(c) The respondent can claim metre rent but up to certain limit. Hence opp.party may refund the excess after deducting the landing cost of the meter.*
>
> *(d) The opp.party is only illegible for supervision charges for line only. Hence opp.party may refund the 6% supervision charges deposited by the complainant towards construction of sub- station, which is beyond point of supply.*
>
> *(e) The respondent can review the Security Deposit amount and refund/adjust the excess, but till date respondent has not taken any action for the same. Opp.party may produce the statement before this forum to ascertain the correctness of revision."*

14. The distribution licensee concededly had not challenged the order passed by the GRF, filed its response contesting the petition of the consumer on merits before the Ombudsman in C.R. Case No.41 of 2018 stating the following :

> *"That before going to reply the averments made tin the application it would be just and proper to bring before the forum factual background of the case for better appreciation. After getting GRF order the respondent has sought for approval before higher authority regarding implementation and the process of implementation is delayed.*
>
> *1. That the consumer is a GP category having CD of 24KW since 07.02.2014 and availing power supply in 11KV with LTCT metering arrangement installed at Secondary side of transformer. As per the OERC Regulation clause 54(3) read with clause 93(9), in the case of High Tension supply, if HT metering set cannot be readily provided and installed, LT metering set shall be provided and connected on the LT side of the consumer's transformers, the reading of such metering units will be added the average losses in the transformers calculated as per regulation. As per tariff order GP consumers with CD < 70 KVA shall be treated as LT consumers for tariff purpose irrespective of supply voltage. Regarding the second connection, the first party i.e. owner of Raj Complex Smt. Sakuntala Sahu has executed a lease rent agreement with Raju Gopal Sahu and gives a No objection for taking power supply and the second connection has been given on 22.08.2016. However the respondent finds it proper to stop the transformer loss with effect from the second connection i.e 22.08.2016 and give adjustment the effect in the energy bill. (Annexure-1).*
>
> *2. At the time of power supply, the HT Meter was not available and supply has been made through LTCT meter. Due to second connection, it is not possible to install the HT meter now. However the respondent finds it proper to refund the cost of 11KV metering unit and HTTV meter of Rs.32796.07/- (27011.25+5784.82) by way of adjustment in the energy bill. (Annexure-2)*

3. At the time of new consumer in the billing fold wrong punching has been made in the meter rent code for which meter rent has been charged till date. Necessary advice has been sent to billing center to stop the meter rent in this month and refund the meter rent already recovered from the date of supply by way of adjustment in the energy bill."

[Underlined to supply emphasis]

15. Considering the pleadings of the consumer, the licensee as well as the respective submissions of both the parties, the Ombudsman by order dated 05.01.2019 (Annexure-6) observed the following :

"Observation:

The petitioner's commercial complex M/s. Complex, Sahadev Khunta, Balasore has filed a case before the learned GRF in Case No.165 of 2018 has passed order on dated 28.09.2018, whose extract is as below :

In the above facts and circumstances, the Forum finds it appropriate to direct the respondent to:

1. The respondent cannot claim transformer loss from the consumer.

2. (i) The respondent will refund the cost of meter to the complainant.

(ii) the respondent can claim the meter rent provided by them from the consumer as specified by State Commission.

3. The respondent is eligible to claim the supervision charges only in the construction line.

4. The respondent can review the adequacy of security deposit for the F.Y. 2017-18 as the provision of Regulation 20(1) and based on the calculation take necessary action as per the Regulation 20(2) of the Distribution Code 2004.

Due to inaction by the respondent the petitioner has filed the present case before this authority to direct the respondent to implement the aforesaid order of the learned GRF, Balasore.

The respondent through his counter before this Authority, has placed his actions and arguments towards implementation of the various parts of the order of the learned GRF. From perusal of the aforesaid counter and hearing before this Authority, it is seen that while the respondent has partly carried out the GRF order in the matter of transformer loss and meter rent to the satisfaction of the petitioner, but he is not at all willing to carry out the other part of the GRF order in the matter of supervision charges and reviewing the Security Deposit for FY 2017-18 and he has agreed to refund the cost of meter totaling to Rs.32,796.07 in compliance to the GRF order against the petitioner's claim for refund of Rs.66,622.00 deposited by him. Thus, it is observed that the respondent is not interested to carry out the aforesaid order of the learned GRF, Balasore in its entirety, which means that the respondent is not fully satisfied with the aforesaid order of the learned GRF. The petitioner's representation before this Authority is only to direct the respondent to implement the roder of the learned GRF, Balasore since he is not aggrieved by such orders of the GRF. At this stage, this Authority is of the opinion that the respondent, if aggrieved by any portion of the GRF order, neither can he chose to implement only a part of such order agreeable to him at this discretion, nor can he place such grievances fo r consideration of this Authority

towards reason for non-implementation of the GRF order, since this is not permissible under any existing statutory provisions including the OERC GRF and Ombudsman Regulation 2004.

Hence this plea of the respondent towards partial non-implementation of the GRF order is not considered by this Authority, as this case is filed only due to non-compliance of order of the learned GRF and adjudication, if any, on the issues raised by the respondent is not within the jurisdiction of this Authority, if the respondent is dissatisfied with the order of the learned GRF, they should have approached the appropriate court of law in the matter, which has not been informed to have been done so far. Hence, the respondent is directed to implement the aforesaid order dated 28.09.2018 in Case No.165 of 2018 of the learned GRF, Balasore immediately.

[Emphasis Supplied]

ORDER/AWARD

In view of the above facts and circumstances and examining the records submitted by both the parties, this Authority pronounces with the following orders :

1. The respondent is directed to implement the aforesaid order dated 28.09.2018 in Case No.165 of 2018 of the learned GRF, Balasore immediately within 30 days from the date of this order and file compliance within 45 days to this Authority."

16. Significantly, only after the decision by the Ombudsman was pronounced, the licensee brought this litigation challenging the order dated 28.09.2018 passed in Consumer Grievance Case No.165 of 2018. Though notices were issued by order dated 06.08.2019 to the opposite parties, apparently the petitioner licensee has not taken any step to serve notice on the contesting opposite party no.2. The matter is pending since 2009 and has been listed on 20.03.2023, 22.03.2023, 27.03.2023, 03.04.2023 and 04.04.2023 before being taken up today.

In view of the conclusion that would follow and that the matter does not involve any substantial question of law, this Court is not issuing further notice to the opposite party and the matter is dealt with and disposed of based on the pleadings of the petitioner- licensee and the opposite party no.2 before the GRF and the Ombudsman which form part of the record. This Court records despite notice being sufficient no body appears for opposite party no.1.

Submissions

17. Heard Mr. S.C. Dash, learned counsel for the petitioner. The learned counsel for the reasons best known to him, did not refer to the pleadings of opposite party no.2 nor the pleadings of the licensee before the GRF or the Ombudsman though the same are available on record. Reference to those pleadings are essential for the fact that the petitioner-distribution licensee has challenged the order passed by the GRF that has been confirmed by the Ombudsman. Apparently, after the order passed by the GRF was not complied within 30 days and the licensee did not challenge the orderof the GRF, the consumer moved the Ombudsman for implementation of the order of the GRF. Thereafter, in absence of any challenge to the order of the GRF, the Ombudsman directed for implementation of the order of GRF. Only thereafter,

the licensee has chosen to challenge the order of the GRF by filing the present writ petition.

Analysis & Conclusion

18. On perusal of the findings of the G.R.F., it is apparent that the order dated 28.09.2018 passed by the GRF which is impugned by the petitioner-respondent-distribution licensee contains directions in favour of the licensee at paragraph-1 in toto. The order at paragraph-2, partly is in favour of the licensee. The order at paragraph-3 is also in favour of the licensee to the extent, the licensee is allowed to claim the supervision charges on construction of the line. Lastly, the order of the GRF at paragraph-4 is also in favour of the licensee. In such scenario it is not understood why the licensee has challenged the order passed by the GRF in its favour even the learned counsel appearing for the licensee did not have any answer when such question is asked specifically why the distribution licensee will challenge the order of GRF which is in favour of the licensee. Further, the order of Ombudsman is for implementing the order of GRF.

19. On perusal of the reply (Annexure-2) filed by the licensee before the Ombudsman it is evident that the licensee has admitted "*As per tariff order GP consumers with CD < 70 KVA shall be treated as LT consumers for tariff purpose irrespective of supply voltage"* the consumer with contract demand less than 75KVA shall be treated as LT consumer for tariff purposes irrespective of supply voltage. The consumer in the present case, as per agreement with the licensee has contract demand 24 KW, 63 KVA i.e. less than 70 KVA. The licensee has also stated in its written reply to have stopped the transformer loss with effect from second connection, i.e., 22.08.2016 and it shall give adjustment to that effect in the energy bill annexed to the reply marked as Annexure-1.

20. Regarding refund of cost of 11KV metering unit, it is admitted in the written reply by the licensee that at the time of power supply, the HT meter was not available and supply was made through LTCT meter; as it is not possible for the licensee to install the HT meter, it shall refund the cost of Rs.32,796.07 by way of adjustment in the energy bill.

21. Regarding collection of meter rent, the licensee admitted that due to wrong punching in the billing fold, in the meter rent code, meter rent was wrongly charged. It is further stated that necessary advice has been sent to billing center of the licensee to stop the Meter rent in the month of filing of the reply before GRF and to refund the meter rent already recovered from the date of supply by way of adjustment in the future energy bill.

22. Regarding the 6% supervision charges deposited by the consumer, i.e., 6% of the calculated capital cost, in view of the direction of the GRF to collect the supervision charges only on the cost of construction of the electricity power line, the

licensee though did not challenge the order of GRF, but refused to implement the order and stated before the Ombudsman in their reply that the consumer cannot be refunded the supervision charges collected on construction of the substation.

Regarding the review of security deposit, as directed by the GRF, which in any case, was in the nature of an advice, the licensee stated before the Ombudsman that it is not competent to review the security deposit and sought further time to wait for the end of Financial Year 2018-19.

Compliance of the order of GRF by licensee in part.

23. Though the licensee has challenged the order passed by the GRF in the present writ petition filed on 22.07.2019, the licensee in its written reply dated 05.12.2018 before the Ombudsman, as it had not challenged the order of GRF till then, stated and admitted to have implemented the order passed by the GRF to the extent having stopped to collect the transformer loss with effect from 22.08.2016 from the second connection and give adjustment in the energy bill that was annexed marked as Annexure-1 to the reply before the Ombudsman. Further, the licensee stated and conceded before the Ombudsman in its reply, that it would to refund cost of metering unit and HTTV meter of Rs.32,796.07. In the written reply of the licensee it is further admitted and stated that the collection of meter rent shall be stopped by the licensee forthwith and the meter rent already recovered shall be adjusted in the energy bill.

24. Since the licensee stated before the Ombudsman that it has partly and substantially complied the order passed by the GRF, the Ombudsman observed :

> "*The respondent through his counter before this Authority, has placed his actions and arguments towards implementation of the various parts of the order of the learned GRF. From perusal of the aforesaid counter and hearing before this Authority, it is seen that while the respondent has partly carried out the GRF order in the matter of transformer loss and meter rent to the satisfaction of the petitioner, but he is not at all willing to carry out the other part of the GRF order in the matter of supervision charges and reviewing the Security Deposit for FY 2017-18 and he has agreed to refund the cost of meter totaling to Rs.32,796.07 in compliance to the GRF order against the petitioner's claim for refund of Rs.66,622.00 deposited by him. Thus, it is observed that the respondent is not interested to carry out the aforesaid order of the learned GRF, Balasore in its entirety, which means that the respondent is not fully satisfied with the aforesaid order of the learned GRF. The petitioner's representation before this Authority is only to direct the respondent to implement the roder of the learned GRF, Balasore since he is not aggrieved by such orders of the GRF. At this stage, this Authority is of the opinion that the respondent, if aggrieved by any portion of the GRF order, neither can he chose to implement only a part of such order agreeable to him at this discretion, nor can he place such grievances for consideration of this Authority towards reason for non-implementation of the GRF order, since this is not permissible under any existing statutory provisions including the OERC GRF and Ombudsman Regulation 2004.*

Hence this plea of the respondent towards partial non-implementation of the GRF order is not considered by this Authority, as this case is filed only due to non-compliance of order of the learned GRF and adjudication,if any, on the issues raised by the respondent is not within the jurisdiction of this Authority,if the respondent is dissatisfied with the order of the learned GRF, they should have approached the appropriate court of law in the matter, which has not been informed to have been done so far.Hence, the respondent is directed to implement the aforesaid order dated 28.09.2018 in Case No.165 of 2018 of the learned GRF, Balasore immediately.

ORDER/AWARD

In view of the above facts and circumstances and examining the records submitted by both the parties, this Authority pronounces with the following orders :

The respondent is directed to implement the aforesaid order dated 28.09.2018 in Case No.165 of 2018 of the learned GRF, Balasore immediately within 30 days from the date of this order and file compliance within 45 days to this Authority."

25. Though not pleaded before the GRF as well as before OERC in the reply of the licensee (Annexures-2 & 5 to the writ petition) and also not pleaded in the writ petition filed before this Court, the learned counsel for the licensee for the reasons best known to him, during hearing of the writ petition went on addressing this Court to explain the technical concept of "transformer loss," presumably that happens when electricity is supplied through a stepdown transformer. While advancing his argument before the Court he had no answer as to what could be the relevance of such submission on the technical issue and concept of "transformer loss", when the reply filed before the GRF and Ombudsman nor the writ petition filed by licensee do not contain any such submission.

Concededly, such an issue was neither pleaded by the licensee before both the forums below nor both the forums had any occasion to deal with the same in the respective adjudications made by them. The GRF dealt with the rival contentions as to whether the licensee can collect an amount towards transformer loss apart from the tariff imposed based on LT tariff.

26. Learned counsel for the distribution licensee relied on the decision dated 26.08.2022 rendered by co-ordinate bench of this Court in ***W.P.(C) No.12735 of 2019 (The Executive Engineer, Electrical (NESCO Utility), Baripada Electrical Division, Baripada, Dist-Mayurbhanj v. M/s. Kamadhenu Agro based Ind. (P) Ltd., Mayurbhanj***, particularly, paragraphs-22, 23 and 24.

In considered opinion of this Court reliance placed by the learned counsel on the order passed in ***Kamadhenu Agro (supra)*** is misconceived in as much as, the order relied on was rendered in different fact situation. It would be appropriate to indicate here that in the case at hand apart from installing LTCT meter, the licensee has collected the tariff based on the LT tariff which is higher than the HT tariff as per the OERC determination of the tariff order for the relevant period. Perusal of the order of the GRF, significantly indicates that there is no direction by the GRF

regarding collection of tariff. Such contention of the petitioner-licensee is rather surprising in view of the fact that before the Ombudsman the licensee stated that as per tariff order : GP consumers with CD less than 70KVA shall be treated as LT consumers for tariff purpose irrespective of supply voltage (Annexure-1) and further stated in their written reply : *"…..the respondent finds it proper to stop the transformer loss with effect from second connection i.e. 22.08.2018……."*

Raising the issue regarding imposition/collection of transformer loss, by filing the writ petition seems to be an afterthought of the licensee-petitioner and is abuse of process of law.

27. Before the Ombudsman on 13.11.2018, the consumer filed the case for implementation of the GRF order dated 28.09.2018 which was not challenged by the licensee till it is challenged subsequently in the present writ petition filed on 02.07.2019 after the Ombudsman passed the order dated 05.01.2019. Evidently, the petitioner-respondent-licensee did not challenge the order of the GRF dated 25.09.2018 till final order was passed by Ombudsman on 05.01.2019, it carried out the GRF order with regard to *transformer loss* and *meter rent* to the satisfaction of the petitioner but it is not willing to carry out the other part of the GRF order regarding the supervision charges and regarding the review of the security deposit for Financial Year 2017-18.

Against the refund claim of Rs.66,622.07 deposited by the consumer, the licensee also agreed before the Ombudsman to refund the cost of the meter totaling to Rs.32,796.07, as per the observation of the Ombudsman.

28. This Court holds that the Ombudsman has correctly observed that it is not permissible under the existing statutory provision including the OERC (GRF & Ombudsman) Regulation, 2004 for the licensee to choose to partly implement the order and not to implement another part.

To say the least the conduct of the licensee has frustrated the statutory scheme of the Electricity Act, 2003 [e.g. S.42(5)] and the OERC (GRF & Ombudsman) Regulation 2004.

29. It would be apt to refer to the decision rendered by the Hon'ble Supreme Court in ***Civil Appeal No. 11095 of 2018 (GMR WARORA Energy Limited v. Central Electricity Regulatory Commission (CERC) & others)*** : decided on 20.04.2023, regarding "concurrent finding of fact" in *GMR* (supra), the Hon'ble Supreme Court has observed as follows (paragraphs-127. 129 and 130) :

> *Concurrent Finding of Fact*
>
> *127. Apart from the aforesaid issues, there is one another common thread in all these appeals.Many of these appeals arise out of concurrent findings recorded by the Central/State Electricity Regulatory Commissions and the learned APTEL.*

*128. This Court, in the case of **MSEDCL v. APML & Ors.**[a] (supra), after considering the statutory provisions in the Electricity Act, 2003, held that the CERC, SERCs and the learned APTEL are bodies consisting of experts in the field.*

129. This Court, in the said case, observed thus:

"120. It could thus be seen that two expert bodies i.e. the CERC and the learned APTEL have concurrently held, after examining the material on record, that the factors of SHR and GCV should be considered as per the Regulations or actuals, whichever is lower. The CERC as well as the State Regulatory bodies, after extensive consultation with the stakeholders, had specified the SHR norms in respective Tariff Regulations. In addition, in so far as GCV is concerned, the CEA has opined that the margin of 85-100 kcal/kg for a non-pit head station may be considered as a loss of GCV measured at wagon top till the point of firing of coal in boiler.

*121. In this respect, we may refer to the following observations of this Court in the case of **Reliance Infrastructure Limited v. State of Maharashtra** [(2019) 3 SCC 352].*

"38. MERC is an expert body which is entrusted with the duty and function to frame regulations, including the terms and conditions for the determination of tariff. The Court, while exercising its power of judicial review, can step in where a case of manifest unreasonableness or arbitrariness is made out. Similarly, where the delegate of the legislature has failed to follow statutory procedures or to take into account factors which it is mandated by the statute to consider or has founded its determination of tariffs on extraneous considerations, the Court in the exercise of its power of judicial review will ensure that the statute is not breached. However, it is no part of the function of the Court to substitute its own determination for a determination which was made by an expert body after due consideration of material circumstances.

*39. In Assn. of Industrial Electricity Users v. State of A.P. **[Assn. of Industrial Electricity Users v. State of A.P., (2002) 3 SCC 711]**[b] three-Judge Bench of this Court dealt with the fixation of tariffs and held thus : (SCC p. 717, para 11) "11. We also agree with the High Court [S. Bharat Kumar v. State of A.P., 2000 SCC OnLine AP 565 : (2000) 6 ALD 217] that the judicial review in a matter with regard to fixation of tariff has not to be as that of an appellate authority in exercise of its jurisdiction under Article 226 of the Constitution.*

All that the High Court has to be satisfied with is that the Commission has followed the proper procedure and unless it can be demonstrated that its decision is on the face of it arbitrary or illegal or contrary to the Act, the court will not interfere. Fixing a tariff and providing for cross-subsidy is essentially a matter of policy and normally a court would refrain from interfering with a policy decision unless the power exercised is arbitrary or ex facie bad in law."

Xxx xxx xxx

*123. Recently, the Constitution Bench of this Court in the case of **Vivek Narayan Sharma v. Union of India** [2023 SCC OnLine SC 1] has held that the Courts should be slow in interfering with the decisions taken by the experts in the field and unless it is found that the expert bodies have failed to take into consideration the mandatory statutory provisions or the decisions taken are based on extraneous considerations or they are ex facie arbitrary and illegal, it will not be appropriate for this Court to substitute its views with that of the expert bodies."*

> *130. As is indicated in the aforesaid judgments, this Court should be slow in interfering with the concurrent findings of fact unless they are found to be perverse, arbitrary and either in ignorance of or contrary to the statutory provisions.*
>
> *[Emphasis supplied]*

30. It is observed that the petitioner-licensee has conceded that it did not instal any HT meter as contemplated in the agreement in terms of the Code 2004. Assuming that there was an agreement for supply of HT that was to be billed by HT meter at HT tariff, the reasons of billing the consumer by LT tariff by installing LT meter has been most conveniently avoided to be answered by the licensee in the proceedings before the GRF, before the Ombudsman as well as in the present writ petition before this Court.

31. By applying the principles enunciated laid down in **MSEDCL v. APML & Others: 2023 SCC Online 233**, it is held that this Court has to be slow in interfering with the findings given by an expert body like Ombudsman-II, OERC. As has been held in ***Association of Industrial Electricity users v. State of A.P. (2002) 3 SCC 711.*** All that this Court has to be satisfied is that the Ombudsman has followed the proper procedure and unless it can be demonstrated that the decision is on the face of it arbitrary or illegal or contrary to the Act, this Court would not interfere.

32. Following the principle laid down in the decision rendered by the Constitution Bench of the Hon'ble Supreme Court in ***Vivek Narayan Sharma v. Union of India; 2023 SCC Online SC 1,*** it is held that this Court should be slow in interfering the decision taken by expert in the field, i.e., GRF, Ombudsman, OERC and unless it is found that the expert body has failed to take into consideration the mandatory statutory provision or the decisions taken is, based on extraneous considerations or it is ex-facie arbitrary and illegal. It would not be appropriate for this Court to substitute its views with that of the expert body.

33. Applying the principles as laid down by the Hon'ble Supreme Court to the present case, it has to be held that the petitioner has failed to bring to the notice of this Court that any of the mandatory statutory provisions have not been considered by the GRF and the Ombudsman. The petitioner has also failed to show that the decision of the GRF and the Ombudsman is based on extraneous consideration. To reiterate the principles laid down in ***Vivek Narayan Sharma*** *(supra)*, this Court has to be slow in interfering with the findings of the fact unless they are found to be perverse, arbitrary and in ignorance of contrary to the statutory provisions.

As discussed above, the petitioner distribution licensee has failed in its efforts to make any case before this Court to interfere with the order passed by the Ombudsman.

34. It is worth noting and referring to "epilogue" as given by the Hon'ble Supreme Court in *GMR (supra*) is reproduced herein below :

"VI. EPILOGUE

169. Before we part with the judgment, we must note that we have come across several appeals in the present batch which arise out of concurrent findings of fact arrived at by two statutory bodies having expertise in the field. We have also found that in some of the matters, the appeals have been filed only for the sake of filing the same. We also find that several rounds of litigation have taken place in some of the proceedings.

170. Recently, this Court, in the case of MSEDCL v. APML & Ors.[a] (supra), has noted that one of the reasons for enacting the Electricity Act, 2003 was that the performance of the Electricity Boards had deteriorated on account of various factors. The Statement of Objects and Reasons of the Electricity Act, 2003 would reveal that one of the main features for enactment of the Electricity Act was delicensing of generation and freely permitting captive generation. In the said judgment, we have recorded the statement of the learned Attorney General made in the case of Energy Watchdog (supra) that the electricity sector, having been privatized, had largely fulfilled the object sought to be achieved by the Electricity Act. He had stated that delicensed electricity generation resulted in production of far greater electricity than was earlier produced. The learned Attorney General had further urged the Court not to disturb the delicate balance sought to be achieved by the Electricity Act, i.e. that the producers or generators of electricity, in order that they set up power plants, be entitled to a reasonable margin of profit and a reasonable return on their capital, so that they are induced to set up more and more power plants. At the same time, the interests of the end consumers also need to be protected.

171. However, we find that, in spite of this position, litigations after litigations are pursued. Though the concurrent orders of statutory expert bodies cannot be said to be perverse, arbitrary or in violation of the statutory provisions, the same are challenged.

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176. We find that, when the PPA itself provides a mechanism for payment of compensation on the ground of 'Change in Law', unwarranted litigation, which wastes the time of the Court as well as adds to the ultimate cost of electricity consumed by the end consumer, ought to be avoided. Ultimately, the huge cost of litigation on the part of DISCOMS as well as the Generators adds to the cost of electricity that is supplied to the end consumers.

xx xx xx

178. Ultimately, these late payment surcharges are added to the cost of electricity supplied to the end consumers. It is, thus, the end consumers who suffer by paying higher charges on account of the DISCOMS not making timely payment to the Generators.

35. The "EPILOGUE" in ***GMR*** *(supra)* highlights the observation of the Hon'ble Supreme Court and this Court feels it apt and appropriate to reiterate the observations of the Hon'ble Supreme Court. It is seen that several appeals are being filed by the distribution licensee arising out of concurrent finding of fact given by statutory bodies like Grievance Redressal Forum and Ombudsman of OERC having expertise in the field and it is found in some of the matters, the appeals have been filed only for the sake of filing the same, perhaps with an objective of not implementing the order passed by the GRF confirmed by the Ombudsman. As has

been observed by the Hon'ble Supreme Court in ***GMR*** *(supra)*, the objects and reasons of Electricity Act, 2003 would reveal the statutory scheme was brought with the avowed objective of better management of the generation of power and electricity distribution by the distribution licensee, to minimize transmission loss and to give better service to the consumers who are paying the bill for electricity they are consuming. In spite of this position, litigation after litigations are pursued though the concurrent orders of statutory expert bodies like GRF, Ombudsman of OERC cannot be said to be perverse, arbitrary or in violation of the statutory provisions. To reiterate the observations of the Hon'ble Supreme Court in ***GMR*** *(supra)* unwarranted litigation, which wastes the time of the Court as well as adds to the ultimate cost of electricity consumed by the end consumer, ought to be avoided. Ultimately, the huge cost of litigation on the part of DISCOMS adds to the cost of electricity that is supplied to the end consumers.

36. In view of the above discussions, the writ petition fails. The order passed by the Ombudsman be complied with forthwith. In the facts and circumstances of the case, there shall be no order as to costs.

Postscript

Before parting with the case, this Court feels it appropriate to observe that since for about the last two months of its sitting, a pattern seems to be prevalent : the lincensees are busy in bringing unnecessary litigation in the manner indicated by the Hon'ble Supreme Court in the "EPILOGOUE" of **GMR** *(supra)*. In such a scenario, this Court is constrained to observe that if such pattern of litigation is pursued, the Court would be compelled to impose heavy cost that would act as a disincentive for indulging in unnecessary litigation that frustrates the statutory scheme that has brought the GRF & Ombudsman as adjudicating authorities to achieve the objective of providing resolution of disputes between consumers of electricity and the distribution licensees.

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2023 (II) ILR - CUT- 471

S.K. SAHOO, J.

CRLA NO. 274 OF 2016

BABLU @ BULU @ MINAKETAN SAHU .....Appellant

.V.

STATE OF ORISSA .....Respondent

CRLA NO.275 OF 2016
GIRISH SAHU -Vs- STATE OF ORISSA

CRLA NO.282 OF 2016
ABHIMANYU DIGAL -Vs- STATE OF ORISSA

(A) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 32-B – Offence punishable U/s. 20(b)(ii)(c) – The learned trial court found all the appellants guilty of the offence charged and sentence each of them to rigorous imprisonment for a period of twelve years – Whether imposition of higher sentences of twelve years was justified ? – Held, No – While imposing a substantive sentence of RI of twelve years, the learned trial court has not kept in view the provision U/s. 32-B of the Act for which the imposition of higher sentence is not sustainable in the eyes of law. [Para 9(i)]

(B) NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 – Section 42 – Non-compliance of section 42 – Effect of – Held, the impugned judgment and order of conviction of the appellants is not sustainable in the eyes of law. [Para 9(ii)]

Case Laws Relied on and Referred to :-

1. (2018) 70 OCR 340 : Ramakrushna Sahu Vs. State of Odisha.
2. (2009) 44 OCR (SC) 183 : Karnail Singh Vs. State of Haryana.
3. 2019 (I) OLR 34 : Biswanath Patra Vs. State of Odisha.
4. 1999 (II) OLR (SC) 474 : State of Punjab Vs. Baldev Singh.
5. (2016) 11 SCC 687 : State of Rajasthan Vs. Jag Raj Singh @ Hansa.

For Appellant : Mr. Prahalad Sahu
Mr. G.N. Sahu
Mr. Biswajit Moharana

Respondent : Mr. Priyabrata Tripathy A.S.C.

JUDGMENT Date of Hearing & Judgment: 16.03.2023

S.K. SAHOO, J.

The appellant Bablu @ Bulu @ Minaketan Sahu in CRLA No.274 of 2016, appellant Girish Sahu in CRLA No.275 of 2016 and appellant Abhimanyu Digal in CRLA No.282 of 2016 faced trial for the offence punishable under section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereafter 'N.D.P.S. Act') in the Court of the learned Addl. Sessions Judge & Special Judge, Phulbani in G.R. Case No. 74 of 2014 on the accusation that on 18.10.2014 at about 10.00 a.m. near Bunduli Chhak on Gochhapada and Balandapada road, they were found in possession of 175 Kg. 115 gms. of cannabis (ganja) kept in eight plastic bags and one jute bag and transporting the same in a TATA 407 Pick Up Van bearing Regd. No.OR-12-B/3251.

The learned trial Court vide impugned judgment and order dated 06.04.2016 found all the appellants guilty of the offence charged and sentenced each of them to undergo rigorous imprisonment for a period of twelve years each and to pay a fine of Rs.1,00,000/- (rupees one lakh) each, in default of payment of fine, to undergo rigorous imprisonment for one year.

Since all the appeals arise out of one judgment, with the consent of the parties, those are heard analogously and disposed of by this common judgment.

2. The prosecution case, in short, is that on 18.10.2014 at about 9.00 a.m. Baba Sankar Saraf (P.W.1), the officer in charge of Gochhapada police station received reliable information that three persons were transporting ganja in a TATA 407 vehicle bearing Registration no.OR-12B/3251 through Gochhapada Balandapada road. P.W.1 entered the said fact in Station Diary Entry No.348 dated 18.10.2014 and intimated the same to the S.D.P.O, Sadar, Phulbani and Superintendent of police, Kandhamal through constable Sushil Digal. As it was not possible on the part of P.W.1 to obtain search warrant due to paucity of time, he formed a raid party, proceeded to the spot in a police jeep to verify the authenticity of the information. On the way, P.W.1 took two local witnesses, namely, Prakash Sahu and Suresh Kanhar (P.W.3) with them. The raiding party reached Bunduli Chhak on Gochhapada Balandapada road at about 10.00 a.m. on 18.10.2014 and waited there and within a short period, they found the TATA 407 vehicle bearing Registration No.OR-12B/3251 was coming towards Bunduli Chhak from Gochhapada side being escorted by a motorcycle bearing No.OD-03-D/6661. On seeing the police party, the rider of the motorcycle fled away towards the forest leaving the motorcycle by side of the road. The police team intercepted the TATA 407 vehicle and found three persons including the driver sitting inside the cabin and there were eight numbers of plastic bags and one jute bag filled with some material kept on the dalla of the vehicle. P.W.1 interrogated the persons found inside the vehicle and they disclosed their names and identities and they are the appellants of the three appeals and they admitted to be transporting ganja in the bags. P.W.1 found smell of ganja was coming out of the bags kept on dalla. Since the appellants could not produce any authority in support of the possession/transportation of ganja, P.W.1 wanted to take personal search of the appellants and gave option to each of them in terms of section 50 of the N.D.P.S. Act whether they were interested to be searched in presence of Executive Magistrate or Gazetted Officer to which each of the appellants opted for search in presence of the Magistrate. Constable Chakdardhar Sethi (P.W.6) was immediately deputed to intimate S.D.M., Phulbani with a requisition of service of the Magistrate and A.S.I. R.B.R. Reddy was also deputed to procure the attendance of a weighman, weighing machine and other materials. At about 12.20 p.m., Nabin Chandra Patel (P.W.7), Executive Magistrate and Tahasildar, Phiringia arrived at the spot and soon thereafter the personal search of the members of the police team was taken, but nothing incriminating was recovered and in presence of the Magistrate, the personal search of the appellants were taken and some cash and one mobile phone was seized and then the vehicle was searched and the bags containing contraband articles were unloaded from the vehicle and the weighman Bishnu Kesari Sahu (P.W.4) made weighment of the bags and it was found that those persons were transporting 175 kg. and 115 gms. of ganja in the bags. P.W.1 collected two samples each weighing 50 gms. from each of the bags and the bulk quantity ganja, sample

ganja were packed, labeled, sealed and seized in presence of the Magistrate and the witnesses. The truck as well as the motorcycle was also seized. The seal used along with the weighing machine were left on the zima of the weighman. As prima facie case under section 20(b)(ii)(C) of the N.D.P.S. was made out, P.W.1 immediately drew the F.I.R. at the spot and returned to the police station with the seized articles and the appellants. As per the direction of P.W.1, P.W.8 Bibhudutta Routray, S.I. of police Gochhapada police station took up investigation of the case. During course of investigation, P.W.8 examined the informant (P.W.1), received the material objects, the documents, the motorcycle, 407 truck and other materials from the appellants. He also examined other material witnesses including the Executive Magistrate and kept the seized articles in P.S. Malkhana vide Malkhana Entry no.19 of 2014. On the next day, P.W.8 visited the spot i.e., Bunduli Chhak on Gochhapada Balandapada road being accompanied by P.W.1 and prepared the spot map, examined some more witnesses and forwarded the appellant to Court after their medical examination. On the same day, the Investigating Officer prayed before the Special Judge, Phulbani to keep the seized M.Os. at Court Malkhana and submit one part of the seized sample to S.F.S.L., Rasulgarh, Bhubaneswar for chemical test. As per the order of the Court, the constable Chakradhar Sethi (P.W.6) proceeded to Bhubaneswar with one part of the seized sample.

P.W.8 also sent requisition to R.T.O., Balangir to verify the ownership of the seized motorcycle bearing Registration No.OD-03-D/1661 and on 20.11.2014, he received the chemical examination report from S.F.S.L., Rasulgarh, Bhubaneswar vide Ext.28. A detailed report which was sent to Superintendent of Police, Phulbani under section 57 of the N.D.P.S. Act was also seized by the Investigating Officer (P.W.8) including Malkhana registrar and station diary book of Gochhapada police station on production by P.W.1 and a seizure list was prepared and ultimately P.W.8 submitted preliminary charge sheet on 11.02.2015 keeping further investigation open.

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

4. The defence plea of the appellants was of complete denial.

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

P.W.1 Baba Sankar Saraf, was the Officer in-charge of Gochhapada Police Station, Phulbani stated that on 18.10.2014 at about 9.00 a.m., he got reliable information that three persons were transporting contraband articles in a vehicle bearing Registration No.12-B/3251 and they were proceeding towards Bunduli Chhak and on receipt of the information, he made station diary entry and sent the copy of the station diary to his authority i.e., S.D.P.O, Phulbani and Superintendent of Police, Kandhamal. He also detained the three appellants while transporting ganja

in bags in the vehicle, conducted search and seizure. He is also the informant in the case.

P.W.2 Biswambar Sahoo was the constable attached to Gochhapada P.S., Phulbani who was also one of the members of the raiding party and stated about recovery of contraband ganja from the possession of the appellants.

P.W.3 Suresh Kanhar and P.W.4 Bishnu Keshari Sahu, who were independent witnesses, did not support the prosecution case and have been declared hostile by the prosecution.

P.W.5 Sushil Digal, who was working as police constable in Gochhapada police station, Phulbani and he was deputed by P.W.1 to the office of Superintendent of Police, Phulbani and S.D.P.O, Sadar, Phulbani to deliver local Dak and accordingly, he delivered the Dak.

P.W.6 Chakradhar Sethi, who was working as police constable in Gochhapada police station, Phulbani, has stated that he along with other police staff were on patrol duty at Balandapada area and he noticed a motorcycle coming following the TATA Ace vehicle. On the direction of A.S.I. R.P. Reddy, he detained the motorcycle.

P.W.7 Nabin Kumar Patel, was working as Tahasildar, Phulbani in whose presence the personal search of the appellants was conducted and then the plastic bags and gunny bag were unloaded from the vehicle, ganja which was found on opening the bags was weighed by weighman and samples of 50 grams in duplicate from each bag were taken. He also proved the seizure list marked as Ext.4 and similarly he stated about seizure of 407 vehicle and Hero Honda motor cycle.

P.W.8 Bibhudutta Routray who was the Sub-Inspector of Gochhapada police station is the Investigating Officer of the case and after registration of first information report, he took up investigation of the case, seized all the articles which were seized by P.W.1, examined the witnesses, visited the spot, prepared the spot map Ext.22 and he submitted preliminary charge sheet keeping further investigation open.

The prosecution exhibited thirty three documents. Ext.1 is the notice issue to appellant Abhimanyu Digal, Ext.2 is the notice issued to appellant Girish Sahu, Ext.3 is the notice issued to appellant Minaketan Sahu, Exts.4, 5, 6, 16, 17, 25, 29 and 32 are the seizure lists, Exts.7 to 15 are the Drug Secret Memo, Ext.18 is the first information report, Ext.19 is the signature of P.W.4 on seizure list, Ext.20 is the letter addressed to Tahasildar, Ext.21 is the relevant Entry in Malkhana Register, Ext.22 is the spot map, Ext.23 is the prayer to Special Judge, Phulbani, Ext.24 is the prayer to Special Judge, Phulbani to submit one part of seized sample to S.F.S.L., Ext.26 is the receipt granted by S.F.S.L., Ext.27 is the command certificate, Ext.28 is the chemical examination report, Ext.30 is the intimation letter, Ext.31 is the

Detailed report, Ext.33 is the relevant entry dated 18.10.2024 in S.D. Book Entry No.348 to 350.

M.O.I to M.O.IX are bulk quantity ganja, M.O.X to M.O.XVIII are sample ganja and M.O.XIX and M.O.XX are mobile phones.

6. Three witnesses were examined on behalf of the defence.

D.W.1 Khageswar Sahu is the father-in-law of appellant Girish Sahu and he stated to have purchased a Hero Honda motorcycle and filed the R.C. book of the motorcycle vide Ext.A and further stated that on 17.10.2014, the appellant took the motorcycle from him.

D.W.2 Kekaya Ghatari stated that the appellants Minaketan Sahoo and Girish Sahu visited his house on 17.10.2014 and stayed in the house overnight and left the house at about 12 noon on 18.10.2014 by a motorcycle.

D.W.3 Girish Sahu is the appellant in CRLA No.275 of 2016 and he stated to have stayed in the house of P.W.2 on the previous date of the occurrence and left at about 12.00 noon.

The defence proved three documents. Ext.A is the Registration Certificate, Ext.A-1 is the Original Job Card of appellant Abhimanyu Digal and his father Santosh Digal and Ext.A-2 is the copy of receipt register of Sub-Collector –cum-S.D.M., Phulbani.

7. The learned trial Court after assessing the oral as well as documentary evidence on record, has been pleased to hold that the officer rightly adopted the procedure laid down under section 42 of the N.D.P.S. Act before search and seizure and there has been full compliance of the provisions under section 42 of the N.D.P.S. Act. With regard to the compliance of the provisions of section 50 of the N.D.P.S. Act, learned trial Court held that since the contraband articles were recovered from vehicle, compliance with the provision of section 50 of the N.D.P.S. Act is not required. Learned trial Court further held that the prosecution witnesses being public officials very categorically stated that the appellants were transporting ganja in a TATA 407 vehicle and nothing has been elicited in their evidence to show that they have got any bias towards the appellants and the plea of false implication of the appellants by the I.O. does not stand to reason. The learned trial Court discussed the chemical examination report finding wherein it is indicated that the contents of the sample was found to be fruiting and flowering tops of cannabis plants (ganja) and held that the prosecution has also produced the report in compliance to section 57 of the N.D.P.S. Act vide Ext.31 and accordingly came to the conclusion that the prosecution has successfully established its case that on 18.10.2014 at about 10.00 a.m., the appellants were in possession and transporting 175kg. 115 gms of cannabis (Ganja) by a TATA 407 Truck bearing No.OR-12-

B/3251 at Bunduli Chhak without any authority and therefore, held the appellants guilty of the offence under section 20(b)(ii)(C) of the N.D.P.S. Act.

8. Mr. Prahalad Sahu & Mr. G.N. Sahu, learned counsel appearing for the appellant Bablu @ Bulu @ Minaketan Sahu in CRLA No.274 of 2016 and the appellant Girish Sahu in CRLA No.275 of 2016 and Mr. Biswajit Moharana, learned counsel appearing for the appellant Abhimanyu Digal in CRLA No. 282 of 2016 contended that the independent witnesses including the weighman have not supported the prosecution case and there are contradictions between the statements of the independent witnesses and official witnesses. It is argued that the learned trial Court erroneously held that there has been compliance of the mandatory provision under section 42 of the N.D.P.S. Act. It is further argued that the sentence of twelve years which was imposed on the appellants for the offence under section 20(b)(ii)(C) of the N.D.P.S. Act is illegal as the learned trial Court has not taken into account the provision under section 32-B of the N.D.P.S. Act and therefore, such higher sentence is not sustainable in the eye of law. Learned counsel for the appellants argued that the impugned judgment and order of conviction is not sustainable in the eye of law and therefore, benefit of doubt should be extended in favour of the appellants.

Mr. Priyabrata Tripathy, learned Addl. Standing Counsel for the State, on the other hand, contended that even though the independent witnesses have not supported the prosecution case, the same cannot be a ground to disbelieve the version of the official witnesses as it is clear and trustworthy and therefore, the learned trial Court has not committed any illegality in accepting such evidence. He further argued that Constable Sushil Digal has been examined as P.W.5 and he is a very vital witness to the compliance of section 42 of the N.D.P.S. Act. Learned counsel for the State placed the relevant paragraph from the impugned Judgment where compliance of section 42 of the N.D.P.S. Act has been discussed and contended that the learned trial Court has come to the just conclusion regarding full compliance of section 42 of the N.D.P.S. Act and therefore, there is no merit in any of the appeals and all the appeals should be dismissed.

9. Adverting to the contentions raised by the learned counsel for the respective parties, at the outset, let me first deal with the contention regarding the sentence imposed by the learned trial Court.

(i) <u>Whether imposition of 12 (twelve) years sentence was justified</u>:

The learned trial Court on the hearing on the question of sentence, has observed as follows:-

> "Heard on the sentence from the convicts. It is submitted by the learned advocates on behalf of the convicts that a liberal view may be taken while imposing the sentence as they are first offenders having families. On the other hand learned special P.P. urged for imposition of adequate sentence which the facts demand. I have already mentioned that

the menace of drug trafficking is rising day by day affecting the society at large, specially the younger generation contributing to rise the crime graph of the country. However, there is nothing on record to show about any proof of prior involvement of the convicts in drug trafficking.

Considering the facts that the convicts were in possession of 175 kg. 115 gms. of cannabis and transporting the same in nine bags in a concealed manner in the Truck, this Court is inclined to sentence the convicts to undergo Rigorous Imprisonment for 12(twelve) years and to pay fine of Rs.1,00,000/- i.d. R.I. for 1 (one) year each. The period of detention be set off as per the provision of Section 482 Cr.P.C.*"*

In the case of **Sambhulal Tibrewal** (supra), it is held as follows:

"Section 20(b)(ii)(C) of the N.D.P.S. Act prescribes, inter alia, that whoever, in contravention of any provision of the Act or any rule or order made or condition of license granted thereunder possesses cannabis which involves commercial quantity, he shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees. Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

Section 32-B of the N.D.P.S. Act deals with factors to be taken into account for imposing higher than the minimum punishment which reads as follows:- "32-B. Where a minimum term of imprisonment or amount of fine is prescribed for any offence committed under this Act, the Court may, in addition to such factors as it may deem fit, take into account the following factors for imposing a punishment higher than the minimum term of imprisonment or amount of fine, namely:-

(a) the use or threat of use of violence or arms by the offender;

(b) the fact that the offender holds a public office and that he has taken advantage of that office in committing the offence;

(c) the fact that the minors are affected by the offence or the minors are used for the commission of an offence; and

(d) the fact that the offence is committed in an educational institution or social service facility or in their immediate vicinity of such institution or faculty or in other place to which school children and students resort for educational, sports and social activities;

(e) the fact that the offender belongs to organized international or any other criminal group which is involved in the commission of the offence; and

(f) the fact that the offender is involved in other illegal activities facilitated by commission of the offence."

On a bare reading of this section, it is apparent that ordinarily minimum term of imprisonment or fine has to be imposed where it has been so prescribed but if the case comes under any of the clauses i.e. (a), (b), (c), (d), (e) or (f) of section 32-B or any other factors as it may deem fit then the Court may award more punishment than the minimum."

On going through the reasons assigned by the learned trial Court in the impugned judgment, it is clear that none of reasons falls within the category of the

clauses (a), (b), (c), (d), (e) or (f) of section 32-B of the N.D.P.S. Act. The reasons assigned were not sufficient enough to award more punishment than the minimum. It is clear that while imposing a substantive sentence of R.I. for twelve years, the learned trial Court has not kept in view the provision under section 32-B of the N.D.P.S. Act which was inserted in the N.D.P.S. Act w.e.f. 02.10.2001. The occurrence in this case took place on 18.10.2014 and therefore, at the time of imposing sentence, it was the duty of the learned trial Court to take into account the provision under section 32-B of the N.D.P.S. Act. It is the well settled principle of law that substantive provision unless specifically provided for otherwise intended by the Parliament should be held to have a prospective operation. One of the facets of rule of law is also that all statutes should be presumed to have a prospective operation only. Therefore, when the amendment has come in the N.D.P.S. Act and same has not been taken into consideration by the learned trial Court while imposing a punishment higher than the minimum term of imprisonment, I find sufficient force in the contention raised by the learned counsel for the appellants that such higher sentence is not sustainable in the eye of law.

(ii) <u>Non-compliance of section 42 of N.D.P.S. Act</u>:

In case of **Ramakrushna Sahu -Vrs.- State of Odisha reported in (2018) 70 Orissa Criminal Reports 340**, it has been held that total non-compliance with the provisions under sub-sections (1) and (2) of section 42 of the N.D.P.S. Act is impermissible and it vitiates the conviction and renders the entire prosecution case suspect and causes prejudice to the accused. Section 42 (2) of the N.D.P.S. Act states that when an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall send a copy thereof to his immediate official superior within seventy-two hours. Under section 42(1), if the empowered officer receives reliable information from any person relating to commission of an offence under the N.D.P.S. Act that the contraband articles and incriminating documents have been kept or concealed in any building, conveyance or enclosed place and he reasonably believes such information, he has to take down the same in writing. However, if the empowered officer reasonably believes about such aspects from his personal knowledge, he need not take down the same in writing. Similarly recording of grounds of belief before entering and searching any building, conveyance or enclosed place at any time between sunset and sunrise is necessary under the second proviso to sub-section (1) of section 42 of the N.D.P.S. Act if the concerned officer has reason to belief that obtaining search warrant or authorization for search during that period would afford opportunity for the concealment of evidence or facility for the escape of an offender. The copy of information taken down in writing under sub-section (1) or the grounds of belief recorded under the second proviso to sub-section (1) of section 42 of the N.D.P.S. Act has to be sent to his immediate superior official within seventy-two hours.

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

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

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

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

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

> drug or psychotropic substance in a public place where such possession appears to him to be unlawful."

P.W.1 Baba Sankar Saraf, the officer in charge of Gochhapada Police Station, Phulbani stated that on 18.10.2014 at about 9.00 a.m., he got reliable information that three persons were transporting contraband articles in a vehicle bearing Registration No.12-B/3251 and on receipt of the information, he made station diary entry and sent the copy of the station diary to his authorities i.e., S.D.P.O, Phulbani and Superintendent of Police, Kandhamal and he along with other police staff proceeded towards Bunduli Chhak. The station diary entry no.348 dated 18.10.2014 has been marked as Ext.33. The Investigating Officer (P.W.8) has stated in his cross-examination that he has not examined the owner of TATA 407 vehicle nor seized any document of TATA 407 vehicle. Even though the ganja bags were seized from the vehicle during day time and that to in a public place but since there was earlier reliable information which was reduced to writing and there is no material that the vehicle in question was a 'public conveyance' which is included in the expression 'public place' as per the explanation to section 43 of the N.D.P.S. Act, therefore, section 43 of N.D.P.S. Act is clearly not attracted and provisions of section 42 of N.D.P.S. Act were required to be complied with.

In the case of **State of Rajasthan -Vrs.- Jag Raj Singh @ Hansa reported in (2016) 11 Supreme Court Cases 687**, it is held as follows:

> "18. The Explanation to Section 43 defines expression 'public place' which includes any 'public conveyance'. The word 'public conveyance' as used in the Act has to be understood as a conveyance which can be used by public in general. The Motor Vehicles Act, 1939 and thereafter the Motor Vehicles Act, 1988 were enacted to regulate the law relating to motor vehicles. The vehicles which can be used for public are public Motor Vehicles for which necessary permits have to be obtained. Without obtaining a permit in accordance with the Motor Vehicles Act, 1988, no vehicle can be used for transporting passengers.
>
> 19. In the present case, it is not the case of the prosecution that the jeep HR-24 4057 had any permit for transporting the passengers.....
>
> x x x x x x x x x x
>
> 21.....In view of the above, the jeep cannot be said to be a 'public conveyance' within the meaning of Explanation to Section 43. Hence, Section 43 was clearly not attracted and provisions of Section 42(1) proviso were required to be complied with and the aforesaid statutory mandatory provisions having not been complied with, the High Court did not commit any error in setting aside the conviction."

A vehicle would not automatically come within the purview of 'public conveyance' merely it is found in a public place or in transit with any narcotic drug or psychotropic substance or controlled substance. The prosecution must prove that the offending vehicle in respect of which reliable information was received to be carrying such contraband articles and seized with such articles comes within 'public

conveyance' so as to attract the provision under section 43 of the N.D.P.S. Act and to exclude the applicability of section 42 of the N.D.P.S. Act. In the case in hand, since the prosecution has utterly failed to prove that the offending vehicle is a 'public conveyance' one, therefore, the provision under section 43 of the N.D.P.S. Act would not be attracted.

Even though P.W.1 stated to have made the station diary entry no.348 dated 18.10.2014 and further stated to have intimated the same to his authorities i.e. S.D.P.O., Phulbani and S.P., Kandhamal but the relevant two documents i.e, station diary entry (Ext.33) and intimation (Ext.30) have not been proved through P.W.1. P.W.8 has proved those two documents. The station diary entry no.348 dated 18.10.2014 vide Ext.33 reads as follows:-

> "By this time, received information from reliable sources that three persons in a white colour TATA 407 Pick Up Van vide Regd. No.OR-12-B-3251 has procured Ganja and are transporting the same to some other places for wrongful pecuniary gain and are likely to pass through Gochhapada to Balandapada side. The fact is intimated to my senior authority into telephone noted in S.D. for future reference."

The station diary entry no.349 dated 18.10.2014 indicates that with reference to the S.D. No.348, one primary intimation report was prepared and sent to the superior authorities i.e. S.P., Kandhamal and S.D.P.O., Phulbani through constable S.Digal. The intimation which is stated to have been given to Superintendent of police, Kandhamal, Phulbani and marked as Ext.30 reads as follows:

> "To
>
> The Superintendent of Police, Kandhamal, Phulbani
>
> Ref: Station Diary Entry No.350 Dtd.18.04.2011 of Sadar PS, Phulbani
>
> Sub: Intimation regarding proposed raid to explore the possibility of detection and seizure of ganja i.e., flowering and fruiting tops of cannabis plant in compliance to section 42 of the N.D.P.S. Act.
>
> Sir,
>
> In inviting a reference to the subject cited above, I am to intimate you that today i.e. on 18.10.2014 at about 9.30 a.m. on receipt of reliable information that three persons in a white colour TATA 407 Pick Up Van vide Regd. No.OR-12-B-3251 has procured Ganja and are transporting the same to some other place to wrongful pecuniary gain and are likely to pass through Gochhapada-Balandapada road, the persons, namely, (1) Bablu Sahu (21), S/o-Basanta Sahu of village-Rundimahala, P.S.-Kantamal, Dist.-Boudh, (2) Girish Sahu (30), S/o-Sudarsana Sahu of village-Kenkemanji, P.S.-Kantamal, Dist.-Boudh and (3) Abhimanyu Digal (26), S/o- Santosh Digal of village-Salapsahi, P.O.-Kasinipadar, P.S.-Phiringia, Dist.-Kandhamal, one is driver and other two persons were sitting beside the driver and 08 nos. of big plastic bag and one jute bag filled with something, were kept inside the Dala of the vehicle. As from the first look, it seems to

be the one as per the information received, i.e. flowering and fruiting tops of cannabis plant which they have procured early in the morning from the nearby locality. Under the above circumstances, search warrant as per provision 41 N.D.P.S. Act could not be obtained without affording an opportunity to the traders to pass on the contraband article to different hands.

So, it is proposed to conduct an immediate raid without warrant by a raid party comprising of myself to ascertain the veracity of the information and explore the possibility of detection and seizure of ganja.

This is for favour of kind information.

Yours faithfully,

Sd/- (illegible)
Baba Sankar Saraf

OIC, Gochhapada P.S.
Phulbani"

Thus it would be apparent that even though while recording the station diary entry no.348 dated 18.10.2014, the names of the appellants have not been mentioned and even P.W.1 who made such station diary entry has not stated that he was made aware about the names of the persons who were transporting ganja in a vehicle, but surprisingly, the names as well the numbers of bags the appellants were carrying in the vehicle are mentioned in Ext.30. If according to P.W.1, reliable information was received only to the extent that three persons were transporting ganja in a vehicle and who were those three persons was not informed to him nor it was informed in how many plastic bags and jute bag, ganja was being transported, the mentioning of the names of the appellants and number of bags in Ext.30 indicates that it was not prepared prior to proceeding for raid but was prepared after detection and seizure to make out a case of compliance of section 42 of N.D.P.S. Act.

Even though it is stated by P.W.1 that the information was given to S.D.P.O, Phulbani and station diary entry no.349 dated 18.10.2014 indicates that primary intimation report was prepared and sent to the superior authorities i.e. S.P., Kandhamal and S.D.P.O., Phulbani through constable S.Digal, but the relevant document so far as S.D.P.O., Phulbani is concerned has not been proved by the prosecution to corroborate the evidence of P.W.1. The letter (Ext.30) which has been sent to Superintendent of Police, Kandhamal dated 18.10.2014, nowhere mentioned about the station diary entry no.348 dated 18.10.2014, the enclosure to Ext.30 is station diary entry no.350 dated 18.10.2014. The said S.D. Entry No.350 dated 18.10.2014 reads as follows:

"As there is no time to obtain search warrant with regard to provision of section 41 of the N.D.P.S. Act, prepared a raid party comprising of myself along with ASI R.B.R. Reddy, C/19 S. Digal, C/541 M.K. Nayak, C/170 J.M. Nanda, C/520 B.Sahu, C/613 S.D. Sethi, AP/63 Aswini Nayak. Unless a immediate raid is conducted, the ganja cannot be detected and it will pass to other hands for illegal trade. Hence, I along with

above noted team members left P.S. to verify the veracity of the information and to detect ganja and handed over the diary charge to S.I. B.D. Routray with no accused in the P.S. lock up."

Station diary entry no.348 of 2014 was required to be dispatched along with the intimation letter under Ext.30 but the same has not been done. Moreover, the evidence of P.W.1 is silent that any intimation in writing is given to S.D.P.O., Phulbani rather P.W.1 has stated that he had telephoned to the S.D.P.O, Phulbani through his mobile but he could not recollect the telephone number of S.D.P.O., Phulbani. Neither S.P., Kandhamal and S.D.P.O., Phulbani nor any of their staff were examined to prove about receipt of such primary intimation report nor any register from the office of S.P., Kandhamal nor from the office of S.D.P.O.,Phulbani has been proved to substantiate the same.

10. In view of the foregoing discussions, it is apparent that the station diary entry which was made after receipt of the reliable information and was supposed to be sent to the immediate official superior has not been sent rather another station diary entry has been forwarded only to Superintendent of police, Kandhamal. In view of recital of station diary entry no.348 dated 18.10.2014 so also the evidence of P.W.1 wherein the names of the accused persons involved in the crime are not there as per the reliable information, the mention of the names of the appellants in Ext.30 including number of plastic bags and jute bag used for transporting ganja is a suspicious feature and primary intimation report sent to S.D.P.O., Phulbani who is the immediate official superior of P.W.1 having not been proved, it is very difficult to accept that the prosecution has successfully established the compliance of the mandatory provisions under section 42 of the N.D.P.S. Act. In my humble view, the same would itself be a factor to acquit the appellants of the charge in as much as law is well settled that total non-compliance with the provisions under sub-sections (1) and (2) of section 42 of the N.D.P.S. Act is impermissible and it vitiates the conviction and renders the entire prosecution case suspect and causes prejudice to the accused.

In view of the settled principle of law, since there has been non-compliance of section 42 of the N.D.P.S. Act, the impugned judgment and order of conviction of the appellants is not sustainable in the eye of law.

Accordingly, all the criminal appeals are allowed. The impugned judgment and order dated 06.04.2016 passed by the learned Addl. Sessions Judge & Special Judge, Phulbani in G.R. Case No.74 of 2014 is hereby set aside and the appellants are acquitted of the charge under section 20(b)(ii)(C) of the N.D.P.S. Act.

Intimation has been received from the learned trial Court which is dated 13.03.2023 that the appellant Bablu @ Bulu @ Minaketan Sahu in CRLA No. 274 of 2016 is now in judicial custody after he surrendered on 13.03.2013. It further appears from the case record of CRLA No.275 of 2016 that the appellant Girish

Sahu even though was granted interim bail but he has not availed the same and he is now in judicial custody. So far as appellant Abhimanyu Digal in CRLA No.282 of 2016 is concerned, even though he was released on interim bail, but he has not surrendered at right time, for which non-bailable warrant of arrest has been issued against him by the learned trial Court.

The appellant Bablu @ Bulu @ Minaketan Sahu in CRLA No.274 of 2016 and appellant Girish Sahu in CRLA No.275 of 2016 shall be set at liberty forthwith, if their detention is not required in any other case.

So far as appellant Abhimanyu Digal in CRLA No.282 of 2016 is concerned, in view of the acquittal order passed today, the learned trial Court shall recall the non-bailable warrant of arrest issued against him.

Copy of the judgment along with trial Court record shall be sent to the learned trial Court immediately for compliance.

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2023 (II) ILR - CUT- 485

S.K. SAHOO, J.

JCRLA NO. 76 OF 2019

KHUDIA @ KHUDIRAM TUDU .....Appellant

.V.

STATE OF ODISHA .....Respondent

(A) CRIMINAL TRIAL – The appellant found guilty U/s. 376(2)(1) of the I.P.C. by the learned Trial Court – Plea of appellant is that proper opportunity has not been provided to him during trial to defend his case particularly when the evidence of victim was recorded – Effect of – Held, when no proper opportunity has been provided to the learned State Defence Counsel to prepare the case thoroughly and to cross examined the victim, the impugned order of conviction set aside and the matter is remanded to the learned Trial Court.

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 304(1) – Duty of the Court while appointing the State Defence Counsel – Explained with reference to case laws. (Para 7)

Case Laws Relied on and Referred to :-

1. 1971 (1) C.W.R. 636 : Kamala Domen Vs. State.
2. 1971 (2) C.W.R. 422 : Mangulu Behera Vs. State.
3. (2012) 2 SCC 584 : Mohd. Hussain Vs. The State (Govt. of NCT) Delhi.
4. (2019) 20 SCC 196 : Anokhilal Vs. State of Madhya Pradesh.
5. 2022 SCC OnLine SC 1396 : Ramanand Vs. State of Uttar Pradesh.

For Appellant : Mr. Jagannath Kamila

For Respondent : Mr. Rajesh Tripathy, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 22.03.2023

S.K. SAHOO, J.

The appellant Khudia @ Khudiram Tudu faced trial in the Court of learned 3rd Additional Sessions Judge, Balasore in Sessions Trial Case No.22 of 2019 (191 of 2018) for offence punishable under section 376(2)(l) of the Indian Penal Code on the accusation that he being a relative of the son-in-law of the informant (P.W.4) committed rape on the victim (P.W.9), the disabled daughter of the informant.

The learned trial Court vide impugned judgment and order dated 30.08.2019 found the appellant guilty under section 376(2)(l) of the Indian Penal Code and sentenced him to undergo R.I. for a period of ten years and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo R.I. for a further period of one year.

2. The prosecution case, as per the written report submitted by Lepa Hansda (P.W.4) on 17.06.2018 at Jaleswar Police Station, in short, is that on 15.06.2018 in the evening hours, the informant after returning from his work, came to know that during his absence, the victim (P.W.9) who is his elder daughter had gone somewhere with her mobile phone and when he tried to search her in the locality, he could not trace her out in that night. On 17.06.2018 at about 2.00 p.m., his son-in-law Banamali Tudu (P.W.5) informed him that on 15.06.2018, the victim (P.W.9) came to his house and stayed in the night but on the next day i.e. on 16.06.2018, she had gone towards the countryside but did not return in the night. On 17.06.2018 morning, the villagers noticed the victim lying on the village road in an abnormal condition. The villagers informed the family members of victim who shifted her to Jaleswar hospital and found that the victim was deaf and dumb and was under treatment and thereafter the informant (P.W.4) came to know that the appellant had committed rape on the victim causing injuries on her person. Thereafter, P.W.4 lodged the first information report before the Inspector in-charge of Jaleswar police station on 17.06.2018.

On the basis of such written report, Bhaskar Chandra Patra (P.W.12), S.I. of Police, Jaleswar police station registered Jaleswar P.S. Case No.198 dated 17.06.2018 under section 376(2)(f)(l) of the Indian Penal Code and in absence of the Inspector in-charge of Jaleswar police station, he himself took up investigation of the case. He examined the informant and recorded his statement. Even though the I.O. requested one Priyanka Behera, a lady police officer to record the statement of the victim, but since the victim was a deaf and dumb girl and could not explain anything about the occurrence and her signs and gesture was not understandable, therefore, her statement under section 161 of Cr.P.C. could not be recorded. The

father of the victim produced documents relating to her disability which were seized as per seizure list marked as Ext.2. The victim was sent for medical examination and P.W.10, the doctor of F.M.T. Department of Fakir Mohan Medical College and Hospital, Balasore examined her. Thereafter the I.O. prepared the spot map marked as Ext.7. The appellant was arrested on 18.06.2018 and he was also sent for medical examination. The wearing apparels of the victim were seized. Prayer was made to the learned J.M.F.C., Jaleswar for recording of the 164 Cr.P.C. statement of the victim but it could not be possible. After completion of investigation, charge sheet has been submitted against the appellant under sections 376(2)(f)(l)(n) of the I.P.C. on 28.09.2018

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

P.W.1 Gourahari Hui is the scribe of the F.I.R. (Ext.1) and he stated that on 17.06.2018 in the early morning, he noticed the victim lying on the village road in an abnormal condition and her wearing apparels were covered with mud and he further stated that as per his advice, the victim was shifted to the hospital.

P.W.2 Maina Tudu is the younger sister of the victim. She stated that the victim had been to their house during Raja festival on a Friday and on the next day, she had been to the village in the evening and did not return and the appellant had also searched for her in her home in that night. She further stated that on the next day, she got information that the victim was lying unconscious in the field and her wearing apparels were torn. On getting such information, she herself, her husband and other co-villagers arrived there and found the victim in a state of unconsciousness. They took her to the house and thereafter, she was shifted to the hospital. She further stated that when the victim regained her sense, she asked the victim as to who was responsible for her such condition, but she could not tell anything and she asked the victim whether she could recognize the person responsible as she was raped. She further stated that her husband called her father, who is the informant in the case and asked him to lodge the F.I.R. at the police station and then the police brought the appellant to the police station where the victim could recognize him.

P.W.3 Salama Baskey, who is a co-villager of P.W.2, has been declared hostile by the prosecution.

P.W.4 Lepa Hansda, who is the father of the victim, is the informant in the case. He stated that on getting information from his son-in-law Banamali Tudu (P.W.5) that the victim had been raped, he went to the hospital and from the sign, the victim expressed him that the appellant raped her.

P.W.5 Banamali Tudu is the son-in-law of the informant and brother-in-law of the victim and he stated in the same manner as that of his wife (P.W.2).

P.W.6 Shaktipada Mishra was the constable attached to Jaleswar Police Station is a witness to the seizure of copy of the handicapped certificate and xerox copy of Aadhaar card from the possession of P.W.4 as per seizure list Ext.2.

P.W.7 Dangu Paraja was the O.A.P.F., Jaleswar Police Station and he is a witness to the seizure of copy of the handicapped certificate and xerox copy of Aadhaar card from the possession of P.W.4 as per seizure list Ext.2. He is also a witness to the seizure of biological sample of the appellant as per seizure list Ext.3.

P.W.8 Bhabanikanta Swain was the Assistant Teacher of the school and on being summoned by the police, he appeared before the Court of learned J.M.F.C., Jaleswar and he stated that he asked the victim as to what happened to her in sign as she was deaf and dumb but she could not follow his sign.

P.W.9 is the victim and being a deaf and dumb girl, her statement was recorded with the assistance of an interpreter (P.W.4), who is her father. She stated through the interpreter that while she had been to the marital house of her younger sister on the Raja festival and while in the evening, she had been to the countryside to have a pleasure trip, the appellant took her forcibly, physically assaulted her, tore her wearing apparels and committed rape on her. She further stated that she disclosed the incident to her sister who took her to the hospital and she further stated that at the time of occurrence, she was wearing a red colour chudidar and a red pant.

P.W.10 Dr. Motirmay Giri is the Medical Officer who examined the victim on police requisition. He proved his report as per Ext.4.

P.W.11 Tapan Kumar Hazra was the constable attached to Jaleswar police station. He is a witness to the seizure of biological sample of the victim so also the wearing apparels of the appellant as per seizure lists Exts.5 & 6 respectively.

P.W.12 Bhaskar Chandra Patra was the S.I. of police, Jaleswar Police Station and he is the Investigating Officer of this case who on completion of investigation, submitted charge sheet.

P.W.13 Dr. Ganesh Chandra Pal was the Medical Officer who examined the appellant on 18.06.2018 on police requisition and proved the report vide Ext.8.

P.W.14 Dharanidhar Samantray who was the constable attached to Jaleswar police station and he is a witness to the seizure of biological samples of the victim as per seizure list Ext.5.

The prosecution exhibited eleven documents. Ext.1 is the F.I.R., Exts.2, 3, 5 and 6 are the seizure lists, Exts.4 & 8 are the injury reports, Ext.7 is the spot map prepared by the I.O., Ext.9 is the requisition for chemical examination of seized exhibits, Ext.10 is the spot map prepared by the Talasildar, Jaleswar and Ext.11 is the chemical examination report.

The prosecution also proved six material objects. M.O.I is the red colour chudidar shirt, M.O.II is one red colour chudidar pant, M.O.III is one sky blue colour half pant of appellant, M.O.IV is the pubic hair of the appellant, M.O. V is the pubic hair of the victim and M.O. VI is the vaginal swab of the victim.

4. The defence plea of the appellant is one of complete denial. No witness was examined on behalf of the defence.

5. The learned trial Court after assessing the oral and documentary evidence available on record, came to hold that there is no material that the victim had a strong motive to falsely implicate the appellant under the charge in question and in the absence of any evidence showing the possibility of false implication with an ulterior motive, there being no theory of the previous enmity, the argument that the victim falsely implicated the appellant at the instance of her father does not appeal to reason. The learned trial Court further held that there is a ring of truth around the victim's testimony when she deposed about the act committed by the appellant against her body. It is further held that minor contradictions and inconsistencies are bound to occur in a criminal trial and that alone cannot be a basis to suspect the prosecution case as embroidered one. It was further held that except the bald statement of the appellant under section 313 of the Cr.P.C. that he has been falsely implicated and denied to have committed any offence as he is innocent, nothing has been brought on record that the victim (P.W.9) had any motive to falsely implicate him. Further no explanation has been furnished by the appellant as to why the victim had deposed against him in such a heinous crime. Moreover, there is no material to show that there is any inimical relationship between the victim or her family members and the appellant prior to the occurrence and accordingly, it was held that the prosecution has successfully established the charge against the appellant.

6. Mr. Jagannath Kamila, learned counsel for the appellant contended that the appellant has been seriously prejudiced as the State Defence Counsel was engaged by the learned trial Court on the date of examination of the victim (P.W.9), who is a very vital witness for the prosecution and no police papers were supplied to him and the learned trial Court asked the State Defence Counsel to go through the case record and cross-examine the victim. It is submitted that the learned State Defence Counsel must not have got opportunity to go through the case records deeply, to prepare the case thoroughly, to have an interaction with the appellant for such preparation for which he just put few questions to the victim in the cross-examination and closed it on account of pressure of the learned trial Court, which was not proper and justified and therefore, it is a fit case where the impugned judgment and order of conviction should be set aside and the matter be remanded to the learned trial Court for affording opportunity to the appellant to engage his own counsel, if he so likes and in case he expresses his inability, then to engage an experienced counsel well versed in criminal law and expertised in conducting criminal trial and to give sufficient time to him for preparation of the case. Learned

counsel for the appellant further submitted on merit of the case that mentioning the name of the appellant in the F.I.R. which was lodged on 17.06.2018 is a doubtful feature inasmuch as the evidence of P.W.2, the sister of the victim indicates that the victim could not recognize the person who was responsible for commission of rape on her. It is argued that though P.W.2 has stated that when the police brought the appellant to the police station, the victim could recognize him, but the same is not corroborated by the evidence of the I.O. Learned counsel further argued that though the appellant was arrested on 18.06.2018, the I.O. has not stated that at any point of time, the victim was called upon to the police station and was asked to identify the appellant. Learned counsel further submitted that in view of the evidence of the doctor (P.W.10) that there was no recent sign and symptom of penetrative sexual assault and intercourse on the victim, it is difficult to accept the evidence of victim regarding commission of rape on her. He further submitted that though the victim stated in her cross-examination that she bit the appellant in his two hands forcibly, but the doctor (P.W.13), who examined the appellant on 18.06.2018, specifically stated that he had not noticed any bite mark on both the hands of the appellant and even if the statement of the victim that the appellant took her forcibly, physically assaulted and tore her wearing apparels is accepted but bereft of any clinching evidence regarding commission of rape on the victim, it may at best make out a case under section 354 of the Indian Penal Code.

Mr. Rajesh Tripathy, learned Addl. Standing Counsel for the State, on the other hand, argued that it seems that the victim has been cross-examined on every aspects and therefore, it cannot be said that the learned State Defence Counsel could not get opportunity to prepare the case. He further argued that even though the medical evidence does not corroborate the statement of the victim regarding rape committed on her, but that cannot be a ground to disbelieve the prosecution case. Learned counsel further submitted that though during the course of investigation, the I.O. tried to record the statement of the victim through one lady police officer, namely, Priyanka Behera, but it could not be successful as the lady police officer could not understand the sign of the victim and therefore, the learned trial Court has rightly engaged the father of the victim as he was the best person to follow the sign given by the victim and interpret before the Court. He further submitted that the victim has testified through his father as interpreter that she had been to the marital house of her sister at village Mahisamunda on account of Raja festival and on the next day evening, she had been to the countryside to have a pleasure trip and the appellant took her forcibly, physically assaulted her, tore her wearing apparels and committed rape on her, which has not been shaken in the cross-examination. Learned counsel further argued that the material objects were called for by this Court and it was received and opened and it is found that in fact the statement of the victim that the appellant tore her wearing apparels, which are marked as M.O. I and M.O.II is found to be correct and therefore, the learned trial Court has rightly

convicted the appellant under section 376(2)(l) of the I.P.C. as the documentary evidence as well as oral evidence indicates that the victim was a disabled lady.

Whether proper opportunity has been provided to the appellant during trial to defend his case:

7. Adverting to the contentions raised by the learned counsel for the respective parties, let me first deal with the point raised whether proper opportunity has been provided to the appellant during trial to defend his case particularly when the evidence of the victim (P.W.9) was recorded. The victim was examined on 11.04.2019. The order sheet dated 11.04.2019 of the learned trial Court is extracted herein below:-

> "The accused Khudiram Tudu is produced from Dist. Jail, Balasore through escort parties. The victim girl is present in the Court. The learned A.P.P and learned S.D.C. are also present. The interpreter, namely, Bhabani Kanta Swain who was summoned by this Court, is also present. The interpreter was examined on oath. He stated that earlier he was appointed as such in the Court of J.M.F.C, Jaleswar but he could not be able to interpret the signs of the victim and the victim was also unable to follow his sign due to lack of formal education. The interpreter was cross-examined and discharged as P.W.8. The learned A.P.P. files a petition to appoint the father of the victim girl as interpreter in this case as he is acquainted with the signs of the victim who is admittedly deaf and dumb. The learned S.D.C. was directed to file the objection to the petition but he sought for time and submitted that the accused is behind the bar and an opportunity is to be provided to him to file objection. Admittedly, the accused is behind the bar. It is 10 past 11 O' clock. Sufficient opportunity is given to the accused to file objection to the petition filed on behalf of the prosecution by the learned A.P.P. by 12 O' clock. As the accused has been in custody, his case is to be considered. Similarly, the victim girl who is a deaf and dumb who hails from Jaleswar which is a distance of 50 km. from this Court, is coming to the Court time and again knocking the door of the Court for justice. So, in such backdrop of the case, the Court should not act as a mute spectator. It has some duty towards the accused, victim girl so also to the society. In such backdrop of the case, the conscience of the Court clinches not to return the victim girl again without her examination. Put up later at 12 O' clock. The learned Addl. P.P. is directed to serve the copy of the petition upon the learned S.D.C. forthwith.
>
> Sd/-
> 3rd Addl. Sessions Judge, Balasore
>
> **Later/11.04.19**
>
> The learned S.D.C., namely, Radha Kanta Mohapatra files a memo on behalf of the U.T.P. mentioning therein that the petition for the first time was filed by the learned Addl. P.P. The copy was served with objection and the prayer of the learned S.D.C. seeking time to file objection was turned down by the Court for which the U.T.P. shall be highly prejudiced. It goes without saying that prior to today, the victim girl who is admittedly a dumb has come to the Court several times. The Court feels that it has also some duty towards the victim and the victim should not come to the Court time and again for her deposition. After filing the memo, the learned S.D.C. Sri Radha Kanta Mohapatra left the Court room and after call, he did not appear to cross-examine the victim girl. Since the learned S.D.C. did not turn to cross-examine the victim girl who

was discharged from this case and learned counsel Sri Bidyadhar Sahu whose name finds place in the list of S.D.C., was appointed afresh who has given sufficient time to inspect the case record and to thoroughly go through it. After inspecting and going through the record, the learned counsel Mr. B.D. Sahu became ready to cross-examine the victim girl and gave his consent to complete the cross-examination the victim girl today. Accordingly, the victim girl was examined and cross-examined through interpreter and discharged as P.W.9. Issue summons to the rest of the charge sheeted witnesses. This Court expresses its happiness and gives thank to the learned Advocate Sj. Bidyadhar Sahu for his abrupt action extending assistance to the Court and also ensuring justice, is being done to the victim. Put up on 18.04.19 for further trial.

Sd/- (Illegible)
3rd Addl. Sessions Judge, Balasore"

The order sheet thus indicates that the learned Addl. Public Prosecutor filed a petition on 11.04.19 to appoint the father of the victim girl as interpreter to the evidence likely to be given by the victim and copy of the petition was handed over to the learned S.D.C. and time was granted by the Court to the learned S.D.C. from 11.10 a.m. till 12 noon to file objection to such petition and when learned S.D.C. sought for time to file objection, the learned trial Court rejected the same mainly on the ground the victim girl had come to the Court several times. Then the learned S.D.C. left the Court room and did not appear for the recording of the evidence of the victim and since he did not turn up, another counsel Mr. Bidyadhar Sahu, whose name found place in the list of State Defence Counsel was appointed and he was given time to inspect the case record and after inspecting the record, learned counsel Mr. Bidyadhar Sahu got ready to cross-examine the victim and gave his consent to complete the cross-examination of the victim on that day and accordingly, the evidence of victim girl was recorded taking the assistance of her father as interpreter and she was discharged.

On going through the order sheet of the learned trial Court dated 11.04.2019, it appears that the Court was bent upon to complete the recording of the evidence of the victim on that day itself. Though it is observed in the order dated 11.04.2019 that prior to that date, the victim had come to the Court several times, but I have gone through the order sheet and it appears that after the charge was framed on 15.02.2019, the date of trial was fixed to 11.03.2019 and on that day, P.W.1, P.W.2 and P.W.3 were examined and on the next date i.e. on 20.03.2019, P.W.4 and P.W.5 were examined and then on 25.03.2019, P.W.6 and P.W.7 were examined. The order sheet does not indicate that after framing of the charge and prior to 11.04.2019, on any date the victim had appeared to give her evidence. Therefore, the observation made by the learned trial Court that prior to that day, the victim girl had come to the Court several times is not acceptable.

Potter Stewart quotes, "Fairness is what justice really is". The engagement of State defence counsel in the trial Court should not be a mere compliance of provisions of law or an empty formality. It must not be a sham or an eye-wash but

with all intent, purpose and sincerity, the lawyer must conduct the case of the accused. The due process of law incorporated in our constitutional system demands that a person not only be given an opportunity of being heard before being condemned, but also that such opportunity be fair, just and reasonable. If the conducting counsel engaged for an accused appears to be superfluous and there is real contest, right to fair trial would be denied. It is the duty of the Court while appointing the State defence counsel to supply him all relevant papers and to give sufficient time to him for preparing the defence, otherwise such defence would only be a farce without its real purpose.

In the case of **Kamala Domen -Vrs.- State reported in 1971 (1) C.W.R. 636**, it is held that the duty of the Sessions Judge in appointing State Defence Counsel is to give sufficient time to the counsel for preparing the defence and supply him all the relevant papers, otherwise there cannot be a proper and fair trial. In an appropriate case, there should be a remand for fresh trial.

In the case of **Mangulu Behera -Vrs.- State reported in 1971 (2) C.W.R. 422**, where the State defence counsel was appointed when the Court began its sitting for taking evidence in a sessions trial and no time was there for the counsel to be acquainted with the facts of the case and to find out what defence is to be taken, it was held that there was no scope for the counsel to get instruction for cross-examination of the prosecution witnesses and the trial was therefore held to be vitiated and retrial was ordered.

In the case in hand, the State Defence Counsel refused to act when the learned trial Court did not grant time to file objection to the petition filed by the Addl. Public Prosecutor seeking permission for taking assistance of the father of the victim as an interpreter and left the accused undefended. In such a situation, it was the duty of the trial Judge to provide him legal assistance at State's expense by appointing a State Defence Counsel, who would faithfully, diligently and to the best of his abilities discharge his duties in defence of the accused. The words employed in section 304(1) Cr.P.C. i.e. "...the accused is not represented by a pleader", do not and cannot mean a kind of paper and sham representation as distinguished from a substantial, bonafide and diligent representation. Not ensuring the reasonable and diligent representation by counsel or pleader to the accused would not relieve the State of its obligation under section 304(1) Cr.P.C. and could not pass the test of fairness which every action of the State must withstand in keeping with the obligation under Articles 14 and 21 of the Constitution.

In the case of **Mohd. Hussain -Vrs.- The State (Govt. of NCT) Delhi reported in (2012) 2 Supreme Court Cases 584**, it is held as follows:-

> "51. In my opinion, the right of a person charged with crime to have the services of a lawyer is fundamental and essential to fair trial. The right to be defended by a legal practitioner, flowing from Article 22(1) of the Constitution has further been fortified by

the introduction of the directive principles of State policy embodied in Article 39-A of the Constitution by the Forty-second Amendment Act of 1976 and enactment of sub-section (1) of Section 304 of the Code of Criminal Procedure. Legal assistance to a poor person facing trial whose life and personal liberty is in jeopardy is mandated not only by the Constitution and the Code of Criminal Procedure but also by International Covenants and Human Rights Declarations. If an accused too poor to afford a lawyer is to go through the trial without legal assistance, such a trial cannot be regarded as reasonable, fair and just. The right to be heard in criminal trial would be inconsequential and of no avail if within itself it does not include right to be heard through counsel.

52. One cannot lose sight of the fact that even intelligent and educated men, not trained in law, have more than often no skill in the science of law if charged with crime. Such an accused not only lacks both the skill and knowledge adequately to prepare his defence but many a time loses his equilibrium in face of the charge. A guiding hand of counsel at every step in the proceeding is needed for fair trial. If it is true of men of intelligence, how much true is it for the ignorant and the illiterate or those of lower intellect! An accused without the lawyer faces the danger of conviction because he does not know how to establish his innocence."

In the case of **Anokhilal -Vrs.- State of Madhya Pradesh reported in (2019) 20 Supreme Court Cases 196**, the Hon'ble Supreme Court taking into account Articles 39-A and 21 of the Constitution of India, held as follows:-

"**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 counsel, who is appointed as Amicus Curiae on behalf of the accused must normally be granted to have meetings and discussion with the concerned accused. Such interactions may prove to be helpful as was noticed in **Imtiyaz Ramzan Khan -Vrs.- State of Maharashtra : (2018) 9 Supreme Court Cases 160**."

In the case of **Ramanand -Vrs.- State of Uttar Pradesh reported in 2022 SCC OnLine SC 1396**, it is held as follows:-

"120. It is by far now well-settled for a legal proposition that it is the duty of the Court to see and ensure that an accused put on a criminal trial is effectively represented by a defence counsel, and in the event on account of indigence, poverty or illiteracy or any other disabling factor, he is not able to engage a counsel of his choice, it becomes the duty of the Court to provide him appropriate and meaningful legal aid at the State expense. What is meant by the duty of the State to ensure a fair defence to an accused is not the employment of a defence counsel for namesake. It has to be the provision of a counsel who defends the accused diligently to the best of his abilities. While the quality of the defence or the caliber of the counsel would not militate against the guarantee to a fair trial sanctioned by Articles 21 and 22 of the Constitution, a threshold level of

> competence and due diligence in the discharge of his duties as a defence counsel would certainly be the constitutional guaranteed expectation. The presence of counsel on record means effective, genuine and faithful presence and not a mere farcical, sham or a virtual presence that is illusory, if not fraudulent."

When the learned Additional Public Prosecutor filed a petition on 11.04.2019 to appoint P.W.4, the father of the victim girl as an interpreter to the recording of evidence of the victim and the copy was served on the learned State Defence Counsel Mr. Radha Kanta Mohapatra and he was given time only from 11.10 a.m. till 12 noon to file objection to such petition, he filed a memo on behalf of the U.T.P. seeking time to file objection but that was turned down by the learned trial Court and the reason assigned that the victim had come to the Court several times is not borne out from the record. When the learned State Defence Counsel did not appear when the evidence of the victim was recorded with the help of her father as interpreter, the learned trial Court not only engaged another State Defence Counsel, namely, Shri Bidyadhar Sahu whose name found place in the panel of State Defence Counsel, but also obtained consent from him to complete the cross-examination of the victim on that day itself. This is clearly not in consonance with law in view of the settled principle enunciated in different decision of this Court as well as the Hon'ble Supreme Court. When the accused was facing trial for an offence which carries punishment of rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of his natural life and he shall also be liable to fine, the learned trial Court should not have hurriedly recorded the evidence of the victim without giving proper opportunity to the learned State Defence Counsel to prepare the case, obtain instruction from the accused and file objection to the petition filed by the learned Addl. Public Prosecutor. Engaging a new State Defence Counsel without providing him police papers and just asking him to inspect the case record and to cross-examine the victim and also taking consent from him to conclude the cross-examination on that day itself, in my humble view, is a gross illegality and the accused has been seriously prejudiced by such action of the trial Court. *A criminal trial is not an IPL T20 match where every 'substitute player' can be an 'impact player'*.

In view of the foregoing discussions, I am of the humble view that no proper opportunity has been provided to the learned State Defence Counsel to prepare the case thoroughly and to cross-examine the victim. Accordingly, the impugned judgment and order of conviction of the appellant under section 376(2)(l) of the Indian Penal Code is hereby set aside and the matter is remanded to the learned trial Court.

The trial shall now commence from the stage of giving opportunity to the learned defence counsel for further cross-examination of the victim (P.W.9). The learned trial Court shall give due opportunity to the appellant to engage his own

counsel, if he so likes and if the appellant expresses his inability to engage his own counsel, a State Defence Counsel shall be engaged to defend the accused. While engaging the State Defence Counsel, the learned trial Court shall see that a competent counsel who is having extensive practice in criminal law particularly having vast experience in conducting sessions trial and ability to provide meaningful assistance to the accused is engaged. The copies of complete police papers and other documents as required to be supplied to the accused under section 207 of Cr.P.C., copy of heading of charge in Form No.32, the deposition copies of all the witnesses, copies of exhibited documents be supplied to the engaged counsel at least a week before the date is fixed for recording further cross-examination of the victim for preparation and opportunities shall be granted to the counsel to have meetings and discussion with the accused so that the accused would feel confident that the counsel chosen by the Court has adequate time and material to defend him properly. The learned defence counsel shall be provided opportunity not only to further cross-examine the victim but also the other witnesses, who have been examined by the prosecution, if the learned counsel so desires by filing a petition under section 311 of Cr.P.C. for recall indicating specific questions to be put to the witnesses and thereafter opportunity shall be provided to adduce defence evidence, if any and then argument shall be heard and after assessing the evidence on record, fresh judgment shall be pronounced in accordance with law. The evidence of the victim shall be recorded in Vulnerable Witness Deposition Centre, Balasore. The case is remanded to the Court of learned trial Court with a direction to dispose of the case as early as possible preferably within a period of three months from the date of receipt of copy of this judgment.

Since I have remanded the matter to the learned trial Court for fresh adjudication and the appellant is in judicial custody since 19.06.2018, he shall be released on bail on such terms and conditions as may deem just and proper by the learned trial Court with a specific condition that he shall appear before the Court on each date when the case would be posted for trial and shall not try to tamper with the evidence.

The original lower Court records, which have been received along with the material objects, be sent down to the learned trial Court immediately.

Before parting with the case, I would like to put on record my appreciation to Mr. Jagannath Kamila, the learned counsel for rendering his valuable help and assistance towards arriving at the decision above mentioned.

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2023 (II) ILR - CUT- 497

KRUSHNA RAM MOHAPATRA, J.

CRP NO. 3 OF 2019

KALINGA INSTITUTE OF MINING ENGINEERING & TECHNOLOGY TRUST (KIMET), CHHENDIPADA, & ANR. …….Petitioners

.V.

Dr. BIPIN BIHARI BEHERA & ORS. …….Opp. Parties

(A) CODE OF CIVIL PROCEDURE, 1908 – Section 92(1) – Whether leave granted by the learned District Judge U/s. 92(1) CPC is administrative or judicial order ? – Held, in the course of adjudication, learned District Judge issue notice to the parties and after hearing both the parties, by application of mind, examine the ingredients of section 92(1) of CPC. – Thus an order passed U/s. 92(1) of CPC is a judicial order. (Para 8)

(B) CODE OF CIVIL PROCEDURE, 1908 – Section 92(1) r/w Section 115 – Whether revision U/s. 115 is maintainable against an order passed U/s. 92(1) of CPC? – Held, Yes – Reason indicated with reference to case laws. (Para 9.1)

Case Laws Relied on and Referred to :-

1. AIR 1988 Orissa 100 : Kintali China Jaganadham & Ors. Vs. K.Laxmi Naidu & Ors.
2. (1991) 1 SCC 48 : R.M.Narayana Chettiar & Anr. Vs. N.Lakshmanan Chettiar & Ors.
3. (1969) 2 SCC 201 : Baldevdas Shivlal and another Vs. Filmistan Distributors (India) P. Ltd. & Ors.
4. AIR 1989 Allahabad 194 : Ambrish Kumar Singh Vs. Raja the Abhushan Bran Bramhsah & Ors.
5. 2000 AIHC 3834 : Ranganatha Swamy & Ors. Vs. K. V. Ramesh kumar & Ors.
6. AIR 1975 SC 371 : Charan Singh Vs. Darshan Singh.
7. AIR 1952 SC 143 : Pragdasji Vs. Ishwarlala Bhai.
8. AIR 1995 Madras 253 : Raju Pillai & Ors. Vs. V. P. Paramasivan & Ors.
9. (AIR 1982 P & H 137) : Prithipal Singh Vs. Magh Singh
10. AIR 1964 SC 497 : Major S.S. Khanna Vs. Brig. F.J. Dillon
11. (1974) 2 SCC 695 : Swami Paramatamanand Saraswati & Anr Vs. Ramji Tripathi & Anr
12. (2008) 4 SCC 115 : Vidyodaya Trust Vs. Mohan Prasad R & Ors.

For Petitioners : Mr. Amit Prasad Bose

For Opp. Parties : Mr. Banshidhar Baug (O.P.Nos. 1 to 6)
Mr. Swayambhu Mishra, ASC (O.P.Nos. 8 & 9)

JUDGMENT Date of Judgment : 25.05.2023

KRUSHNA RAM MOHAPATRA, J.

1. This matter is taken up in hybrid mode.

2. Judgment dated 14th March, 2019 (Annexure-4) passed in CMA No. 25 of 2017 is called in question in this CRP, whereby learned District Judge, Angul allowed an application under Section 92(1) of the Code of Civil Procedure, 1908 (for brevity 'CPC') granting leave to Opposite Party Nos.1 to 6 to institute the suit against the Petitioner No.1-Trust.

3. The Petitioner No.1-Trust was created by executing Trust Deed registered on 22nd August, 1989 on the terms and conditions more-fully described therein. The Trust was created for purpose of establishing an educational institution at Chhendipada for imparting education in different disciplines of Diploma in Engineering for the betterment of the local students, who face difficulty to pursue their study due to lack of funds and availability of seats. Accordingly, Kalinga Institute of Mining Engineering and Technology (KIMET) (for brevity 'Institution') was founded. After few years of creation of such Trust as well as foundation and establishment of Institution, dissension arose amongst the Trustees. There were allegations of mismanagement of the Trust and Institution. The Petitioner No.2, who is managing the Trust, allegedly misappropriating funds of the Trust as well as institution. He has also inducted trustee at his own will without following the provisions of Bye-law. Hence, the villagers, namely, Opposite Party Nos.1 to 6, who have purported interest in the Trust filed an application under Section 92(1) C.P.C. seeking leave to file the suit being accompanied by the proposed plaint. The Opposite Party Nos.1 to 6 in the proposed plaint sought for the following relief:-

> *"(1) Let an order be passed removing the Defendant No.2 (Petitioner No.2) from the trusteeship of Defendant No.1-Trust i.e. Kalinga Institute of Mining Engineering and Technology Trust;*
>
> *(2) Let an order be passed declaring the appointment of Defendant No.3 as substituted trustee of Defendant No.1-Trust is illegal and void ab initio; or*
>
> *In the alternative, let an order be passed removing the Defendant No.3 from the trusteeship of Defendant No.1-Trust.*
>
> *(3) Let an order be passed directing the Defendant No. No.2 to render accounts of the trust property and income received by him at different time.*
>
> *(4) Let an order be passed appointing a new Board of Trustees for proper administration and management of Defendant No.1-Trust and Defendant No.4-Institution.*
>
> *(5) Let an order be passed setting a scheme for proper administration and management of the KIMET Trust, its property and KIMET Institution.*
>
> *(6) Let such further or other reliefs be granted in favour of Plaintiffs as your Hon'ble Court deems fit and proper to do complete justice in this case."*

The application under Section 92(1) of the C.P.C. was registered as CMA No. 25 of 2017 on the board of learned District Judge, Angul. Upon receipt of the application, notices were issued to the Petitioners along with other Opposite Parties therein. Learned District Judge, Angul vide judgment under Annexure4 allowed the said application granting leave to the Opposite Party Nos.1 to 6 to file the suit as proposed against the Petitioners and Opposite Party Nos.7 to 9. As such, the Petitioners, who are arrayed as Defendant Nos.1 and 2 in the suit, being aggrieved by the said order under Annexure-4, have filed this CMP.

4. Mr. Bose, learned counsel for the Petitioners submitted that the Institution is a private Engineering School managed by KIMET Trust (for brevity, 'Trust'), wherein the Petitioner No.2 is one of the founder trustees and Chairman of the Trust Board. The said Institution has been affiliated to All India Council for Technical Education, New Delhi (AICTE). The Institution was established in the year 1989 at Chhendipada in the district of Angul for imparting technical education in different branches of Diploma in Engineering, such as Civil, Electrical, Mechanical, Computer Science and Mining etc. There were seven trustees of the Trust Board. Litigations with regard to constitution and continuance of the Trust Board was under challenge in Civil Court. Ultimately, it came to an end by judgment dated 18th November, 2014 passed by this Court in RSA No.47 of 2007 confirming the judgment passed by learned trial Court as well as appellate Court. Thus, the validity of the constitution and continuance of the Trust Board has already been set at rest, wherein, the Petitioner No.2 is one of the trustees. Although the judgment passed in RSA No.47 of 2007 was sought to be assailed before the Hon'ble Supreme Court in SLP (Civil) No.35678 of 2014, but it was dismissed vide order dated 6th January, 2015.

4.1 During pendency of the Civil Suit as well as appeal before this Court, the Collector, Angul was appointed as receiver to manage the affairs of the Institution, but in view of the judgment passed by this Court in RSA No.47 of 2007, the Collector, Angul handed over the entire management of the Institution to the Petitioner No.2 on 15th January, 2015. As such, the Petitioner No.2 being the Managing Trustee is in management of both the Trust and the Institution since then. One Gobinda Chandra Nayak was also the member of the Trust Board, which is declared to be a valid one by this Court in RSA No.47 of 2007.

4.2 Pursuant to the judgment passed by this Court in the aforesaid appeal, the Collector, Angul issued notice to Petitioner No.2 as well as said Gobinda Chandra Nayak to take over the charge of management of the Institution as well as the Trust, but said Govinda Chandra Nayak did not respond to the same. Ultimately, Gobinda Chandra Nayak died on 26th September, 2017 and after his death, the Petitioner No.2 being the sole surviving trustee inducted one Somya Ranjan Pandit (Proforma Opposite Party No.10) as one of the members of the Trust Board. Said induction is made as per the provisions of the Bye-law of the Trust. Thus, at present, there are

two trustees in the Trust Board, namely, the Petitioner No.2 and Proforma Opposite Party No.10.

4.3 The Governing Body of the Institution has been constituted as per the norms of AICTE and the Petitioner No.1 has been approved as Chairman of the said Governing Body by the State Government, vide its order dated 31st January, 2015. When the matter stood thus, the Opposite Party Nos.1 to 6, who are complete strangers and have no *locus standi* in the management of either the Trust or the Institution, made several communications to different authorities, which was against the interest of both Trust and Institution. In furtherance of their attempt to defame and paralyze the Trust as well as the Institution, they moved learned District Judge, Angul in CMA No. 25 of 2017 under Section 92(1) CPC read with Section 151 CPC with a prayer to grant leave to institute a suit against the Trust Board. A draft plaint was also enclosed to the said petition with the afore-quoted prayers.

4.4 Upon receipt of such application, notices were issued to the Opposite Parties therein including the Petitioners, who entered appearance and filed their objection, questioning the maintainability of the said CMA. It was specifically stated therein that the CMA is not maintainable for non-compliance of the provisions under Order I Rule 8 CPC. In view of the judgment passed in RSA No.47 of 2007, the issue with regard to constitution of the Trust Board cannot be re-opened as it has already been set at rest. The dispute raised in the CMA does not come under the purview of Section 92(1) CPC, as the Trust is neither charitable nor a religious one. Rather, the Trust has been created to impart technical education, which is a Public Trust. The case laws relied upon by the Petitioners in the objection was not taken into consideration by the learned District Judge. The description of the Petitioners in the District Court was also misleading. Although the Opposite Party Nos.1 to 6 claimed to be the representatives of the villagers of Chhendipada but there is no consent of the villagers before filing of the application under Section 92 (1) CPC. As such, they have no *locus standi* to maintain such an application.

4.5 Learned District Judge, without taking note of such objection raised, as aforesaid, allowed the application by order under Annexure-4, which is not sustainable in the eye of law. Learned District Judge, while adjudicating the petition, has not followed the basic principles for adjudication of petition under Section 92(1) CPC. As such, the impugned order is not sustainable and is liable to be set aside. It is his submission that there is no finding in the impugned order to the effect that the Trust is charitable or religious in nature. This being the basic requirement to entertain an application under Section 92(1) CPC, learned District Judge has erred in law in allowing such application granting leave to Opposite Party Nos.1 to 6 to institute a suit against the Petitioners as well as Opposite Party No.10. He, therefore, prayed for setting aside the order under Annexure-4, reserving his right of reply to the submission to be made by learned counsel for Opposite Party No.1 to 6.

5. Mr. Baug, learned counsel for the Opposite Parties 1 to 6 although admitted execution of the Trust Deed and initial constitution of the Trust Board with seven Trustees, but seriously disputed continuance of Petitioner No.2 as a Trustee of the Trust Board and induction of Opposite Party No.10 as a Trustee. It is his submission that the object of creation of the Trust as stated in the Trust deed itself clearly stipulates that it is a public charitable Trust to impart technical education in diploma engineering courses to the poor students of Chhendipada as most of the students due to lack of funds and non-availability of seats are not able to prosecute diploma engineering course in different disciplines. He further submitted that the Petitioner No.2 was one of the members of the Trust, but due to his highhandedness not only founder of the Trust late Purna Chandra Pradhan but also some other Trustees resigned from the Trust. Few of them also expired in the meantime. The Petitioner No.2 has inducted Proforma Opposite Party No.10 as a member of the Trust Board, who is none other than his driver. As the public of Chhendipada donated funds and their lands for establishment of the institution they have interest in the functioning of the Trust as well as the Institution. As such, the Opposite Party Nos.1 to 6 have *locus standi* to institute a suit against the Trust. Learned District Judge, while adjudicating the matter, has taken note of the averments and relief sought for in the proposed plaint, trust deed, Bye-laws, petition under Section 92 CPC as well as objection filed by the Petitioner No.2. Learned District Judge also took note of the fact that due to action of Petitioner No.2, the Institution has been put in '*no admission category*', which has seriously affected the people of Chhendipada, more particularly the poor students who were intending to pursue their studies.

5.1 It is his submission that the impugned order under Annexure-4 being an administrative order no revision under Section 115 CPC is maintainable. The impugned order cannot be placed in the category of '*case decided*'. Thus, Section 115 CPC is not attracted in the instant case. No prejudice has been caused to the Petitioners, more particularly the Petitioner No.2, in view of leave granted to institute the suit. In support of his submission to the effect that the order impugned herein is an administrative one, Mr. Baug, learned counsel for Opposite Party Nos.1 to 6 relied upon the decision in the case of ***Kintali China Jaganadham and others Vs. K. Laxmi Naidu and others***, reported AIR 1988 Orissa 100, in para-8 of which it has been held as under:-

> "***8.*** *……. The consensus of opinion amongst the High Courts is that the jurisdiction of the Court under S. 92(1) while granting leave is administrative in nature and notice on the other side need not be issued. But, the Court must give reasons for its decision either granting or refusing leave….."*

In the case of ***R. M. Narayana Chettiar and Anr. Vs. N.Lakshmanan Chettiar and others***, reported in (1991) 1 SCC 48, at para-11 of which it has been held as under;-

> *"11. In Prithipal Singh v. Magh Singh [AIR 1982 P & H 137 : 1982 Rev LR 48] a learned Single Judge of the Punjab and Haryana High Court held that the grant of leave to file a suit is not a mere irregularity which can be cured but is a condition precedent. The provisions of Section 92 are mandatory in nature in that respect. He further held that in granting leave under Section 92 of the Code, the court does not have to write a reasoned order. It does not even have to give a notice to the defendant of an application for leave to file a suit as the order granting leave is of an administrative nature. The same view was taken by a Division Bench of the Punjab and Haryana High Court in Lachhman Dass Udasi v. Ranjit Singh [AIR 1987 P & H 108 : (1986) 2 Rent LR 505 : (1986) 2 HLR 364] wherein it was held that no notice is necessary to be issued to the defendants prior to the granting or refusing of leave under Section 92 of the Code as at that stage it is only the subjective satisfaction of the court that is required and, thus, the order is an order of administrative nature."*

It is categorically stated that the order under section 92 being administrative in nature**,** no civil revision is maintainable against the said order.

5.2 He, therefore, submitted that Civil Revision under Section 115 CPC is not maintainable.

5.3 He also raises an objection to maintainability of the Civil Revision submitting that the impugned order does not come under the category of the '*case decided*'. Section 115 CPC (as amended) provides that the District Judge or the High Court, as the case may be, may call for the record of any case, which has been decided by any Court subordinate to it in which no appeal lies subject to satisfaction of other requirements of the said Section. In the instant case, Sub-Clause (a) and (b) of Sub-section (1) of Section 115 CPC are not at all attracted since learned District Judge has jurisdiction to entertain an application under Section 92 (1) CPC and to decide the same. Sub-clause (c) of Sub-section (1) provides that a revision may be maintainable, if the Court subordinate while passing the impugned order has exercised its jurisdiction illegally or with material irregularity. Thus, in all events, the revision Petitioner must satisfy the Court that the impugned order has decided a case. As decided by various High Courts as well as Hon'ble Supreme Court that while granting leave to institute a suit under Section 92 CPC, the District Judge does not adjudicate the right of the parties. Learned District Judge only records a *prima facie* finding as to its satisfaction for granting or refusing to grant leave to file a suit. In the case of ***Baldevdas Shivlal and another Vs. Filmistan Distributors (India) P. Ltd. And others***, reported in (1969) 2 SCC 201, Hon'ble Supreme Court has explained the '*case decided*' as follows:-

> *"11. …The expression "case" is not limited in its import to the entirety of the matter in dispute in an action. This Court observed in Major S.S. Khanna v. Brig. F.J. Dillon [(1964) 4 SCR 409] that the expression "case" is a word of comprehensive import: it includes a civil proceeding and is not restricted by anything contained in Section 115 of the Code to the entirety of the proceeding in a civil Court. To interpret the expression "case" as an entire proceeding only and not a part of the proceeding imposes an unwarranted restriction on the exercise of powers of superintendence and may result in certain cases in denying relief to the aggrieved litigant where it is most needed and may result in the perpetration of gross injustice. But it was not decided in Major S.S. Khanna case [(1964) 4 SCR 409] that every*

> *order of the Court in the course of a suit amounts to a case decided. A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy; every order in the suit cannot be regarded as a case decided within the meaning of Section 115 of the Code of Civil Procedure." (emphasis supplied)*

In the case of ***Ambrish Kumar Singh Vs. Raja the Abhushan Bran Bramhsah and others***, reported in AIR 1989 Allahabad 194, it is held as under:-

> *"10. Section 92, C.P.C. was amended by the Code of Civil Procedure (Amendment) Act, 1976. Before this amendment suit could be filed either by the Advocate-General or two or more persons having interest in the trust and having obtained consent in writing of the Advocate-General. After the amendment the words "the consent in writing of the Advocate-General" were substituted by the words "leave of the court."*
>
> *While granting leave the court does not decide the rights of the parties. No right is adjudicated at this stage. The Court has merely to see whether there is a prima facie case for granting leave to file a suit. This order does not in any way affect the final decision which will be given on merit after the parties have led evidence in the suit."*

The Karnataka High Court, in the case of ***Ranganatha Swamy and others Vs. K. V. Ramesh kumar and others***, reported in 2000 AIHC 3834, discussing the case law in ***Charan Singh Vs. Darshan Singh,*** reported in AIR 1975 SC 371, ***Pragdasji Vs. Ishwarlala Bhai,*** AIR 1952 SC 143 and 55 Indian Appeals 96 (Privy Council), observed as under:-

> *"13……..So if prima facie plaint allegations show the case to be covered by Section 92 CPC the Court can grant the permission. The plea of the defence is not to be looked and considered at that stage. It means that no right of the parties which right is lawfully pleaded in the suit or agitated or in contested in the suit is decided by the granting of the leave, those questions are yet open to be decided and, as such order granting the leave cannot be said to decide the rights of the parties inter se and when no rights of the parties inter se have been decided, order also cannot be said to amounts to a case decided."*

Mr. Baug, learned Counsel also relied upon the decision of the Madras High Court in the case of ***Raju Pillai and others Vs. V. P. Paramasivan and others*** reported in AIR 1995 Madras 253, which lays down the ratio as under;-

> *"25. …….. The effect is, though it is an Order of the Court, it is not discharging a judicial or quasi-judicial function. It only authorises a party to institute a suit in the place of the Advocate-General. The effect is, whether the Advocate-General instituted the suit, or the authorised persons institute the suit, the rights of the proposed defendants are not affected. The rights of the parties are also not determined. If no rights of the parties are affected, and there is no decision rendered by the Court, it follows that it is not a case decided, and hence a Revision under Section 115 of the code of Civil Procedure is not maintainable."*

He, therefore, submits that on a conspectus of the aforesaid case laws, it can be safely held that while granting the application under Section 92 (1) CPC, the Court need not go into the details of the contentions of the parties. It has to see, on application of mind, and record a *prima facie* finding that the ingredients of Section 92 (1) CPC are satisfied. Thus, the Court entertaining an application under Section 92(1) CPC does not delve into the issue of rights of the parties involved in the

proposed suit. Thus, an order granting leave to file a suit under Section 92 CPC does not decide a case. As such, the Civil Revision assailing the impugned order under Annexure-4 is not maintainable and is liable to be decided.

6. Replying to the submissions made by Mr. Baug, learned counsel for Opposite Party Nos.1 to 6, Mr. Bose, learned counsel for the Petitioners submitted that the case law in the case of ***Raju Pilai (supra)*** does not state that a revision would not be maintainable against an order passed under Section 92 (1) CPC. At para-25 of the said case law, it has only been held that if rights of the parties are not affected, no revision would be maintainable, as it is not a '*case decided*'. He also submitted that other case laws relied upon by learned counsel for Opposite Parties 1 to 6 do not specifically lay down that a revision would not be maintainable against an order passed under Section 92(1) CPC.

6.1 The contention of learned counsel for the Petitioners that no notice is required to be issued to the Opposite Parties while adjudicating a petition under Section 92(1) CPC is not sustainable, inasmuch as no leave is required if a Trustee sues against the trust, but persons interested intending to file a suit against a Trust have to seek leave under Section 92(1) CPC to sue the Trust. Although the Opposite Parties claimed that the Trust to be a public charitable one, but no satisfactory material was placed on record in support of the same. The word '*charitable*' means a trust created for the benefit of certain section from whom nothing is taken in return. Neither the trust deed nor the Bye-law reflects that Trust is charitable one and the purpose of creation of a trust would be achieved without receiving anything in return. Neither the Trust deed nor the Bye-law states that the students will be imparted education free of cost. Thus, the Trust being not a charitable one, Section 92 CPC is not attracted.

6.2 Mr. Bose, learned counsel for the Petitioners further submitted that in order to opine *prima facie* that leave should be granted the Court must specifically state that the Trust is created for public charitable purpose. Merely observing that the Trust was created for noble purpose, i.e., for poor students and there is in-fight among the Trust members putting the institution in no admission category will not suffice the requirements of Section 92 CPC. Thus, leave could not have been granted. While granting leave under Section 92 (1) CPC, the Trust and its Trustees have a right to be heard. Thus, by no stretch of imagination, it can be held that the revision would not be maintainable. A party should not go remediless, if he is aggrieved by any order of a Court subordinate. Thus, revision under Section 115 CPC is maintainable, more particularly when the order impugned is not appealable one and it would have disposed of the entire proceeding, had the impugned order been passed in favour of the revision petitioners. As such, the Court should exercise the power under Section 115 CPC to examine as to whether the impugned order is an outcome of flagrant miscarriage of justice or the Court has exceeded its

jurisdiction or has failed to exercise its jurisdiction while entertaining the application under Section 92(1) CPC. As such, the impugned order is liable to be set aside.

7. Upon hearing learned counsel for the parties at length and on a close scrutiny of materials on record, this Court frames the following points for its adjudication.

i) Whether the revision in its present form is maintainable? And

ii) If so, whether the impugned order is sustainable in the eye of law?

8. In order to answer the point (i), this Court went through the ratios decided in the case of ***Kintali Chinna Jagannathm (supra)*** in which it is held that an order granting leave under Section 92(1) CPC is administrative in nature and notice on the other side need not be issued. In the case of ***Ambarish Kumar Singh (supra),*** Allahabad High Court at Para-10 observing that while granting leave no right of the parties is decided proceeded to hold at Para-11 that proceeding under Section 92 CPC are judicial proceedings and the order of the District Judge is a judicial order. Thus, the Court should pass the order after hearing the Defendants. The issue as to whether leave granted under Section 92(1) CPC is an administrative or judicial order, has significance for answering this point. Admittedly, learned District Judge, Angul was moved under Section 92 (1) CPC for grant of leave for institution of the suit. The moment an application under Section 92(1) is filed, a judicial proceeding is set in motion before the District Judge. In course of adjudication, learned District Judge examines by application of mind as to whether the ingredients of Section 92 (1) CPC is satisfied in the petition or not. Although Rule 431 of GRCO (Civil), which provides list of miscellaneous judicial cases, does not include an application under Section 92(1) CPC, but the provision is inclusive in nature in view of the language used therein to the extent that *'…… and it is intended that such other case, only as required a judicial enquiry or order should be included…….'*. In the case of ***R. M. Narayana Chettiar (supra),*** Hon'ble Supreme Court at para-18 observed as under:-

> "*17. ….. Having in mind the objectives underlying Section 92 and the language thereof, it appears to us that, as a rule of caution, the court should normally, unless it is impracticable or inconvenient to do so, give a notice to the proposed defendants before granting leave under Section 92 to institute a suit. The defendants could bring to the notice of the court for instance that the allegations made in the plaint are frivolous or reckless. Apart from this, they could, in a given case, point out that the persons who are applying for leave under Section 92 are doing so merely with a view to harass the trust or have such antecedents that it would be undesirable to grant leave to such persons. The desirability of such notice being given to the defendants, however, cannot be regarded as a statutory requirement to be complied with before leave under Section 92 can be granted as that would lead to unnecessary delay and, in a given case, cause considerable loss to the public trust. Such a construction of the provisions of Section 92 of the Code would render it difficult for the beneficiaries of a public trust to obtain urgent interim orders from the court even though the circumstances might warrant such relief being granted. Keeping in mind these considerations, in our opinion, although, as a rule of caution, court should normally give notice to the defendants before*

> *granting leave under the said section to institute a suit, the court is not bound to do so. If a suit is instituted on the basis of such leave, granted without notice to the defendants, the suit would not thereby be rendered bad in law or non-maintainable. The grant of leave cannot be regarded as defeating or even seriously prejudicing any right of the proposed defendants because it is always open to them to file an application for revocation of the leave which can be considered on merits and according to law."* (*emphasis supplied*)

In this case, the question as to whether the Petitioners should have been given an opportunity or not before granting leave under Section 92(1) CPC is not in issue as notices have been issued to the Petitioners and they have contested the petition for grant of leave.

8.1 A close reading of Section 92 CPC also does not suggest that a proceeding under Section 92(1) will be an administrative one. Though a proceeding under Section 92(1) CPC is not strictly an adversarial one, but the language of ***R. M. Narayana Chettiar (supra)*** makes it obligatory on the Court to issue notice to the proposed Defendants to avoid frivolous and reckless litigation against a Trust. Thus, as held in ***Ambarish Kumar Singh (supra),*** a proceeding under Section 92(1) CPC is a judicial proceeding and the order passed on such an application is a judicial order. Further, by way of amendment of CPC, Clause (*ff-a)* has been inserted in Section 104 (1) CPC providing an appeal against an order refusing to grant leave under Section 92(1) CPC. This Court, in the case of ***Kintali China Jagatham (supra)***, while holding that the leave granted under Section 92(1) CPC is administrative in nature, did not assign any reason thereto. It only observed that the consensus of opinion of the High Courts is that jurisdiction of the Court under Section 92(1) is administrative in nature. Hence, it cannot be treated to be a precedent. Hon'ble Supreme Court in ***R. M. Narayana Chettiar (supra),*** although referred to the case of ***Prithipal Singh v. Magh Singh (AIR 1982 P & H 137),*** wherein, it is held an order under Section 92(1) to be administrative in nature, but did not record any finding on the same and opined that it is obligatory on the part of the Court entertaining such application to issue notice to the proposed Defendants. Hence, the proposed Defendants including the present Petitioners are required to be heard in the matter before taking a decision on the petition filed under Section 92(1) CPC and thus an order passed under Section 92(1) of CPC is a judicial order.

9. The next question that arises as to whether a revision lies against an order passed under Section 92(1) CPC.

9.1. It is contented by Mr. Baug, learned counsel for Opposite Party Nos.1 to 6 that by granting leave to file a suit, no right of the parties, is decided. Thus, it cannot be said to be a '*case decided*'. As such, a revision under Section 115 CPC will not be maintainable. In the case of ***Major S.S. Khanna v. Brig. F.J. Dillon,*** reported in AIR 1964 SC 497, it has been held as under:-

> *"**6.** The section consists of two parts, the first prescribes the conditions in which jurisdiction of the High Court arises i.e. there is a case decided by a subordinate Court in which no*

> *appeal lies to the High Court, the second sets out the circumstances in which the jurisdiction maybe exercised. But the power of the High Court is exercisable in respect of "any case which has been decided". The expression "case" is not defined in, the Code, nor in the General Clauses Act. It is undoubtedly not restricted to a litigation in the nature of a suit in a civil court: Balakrishna Udayar v. Vasudeva Aiyar [LR 44 IA 261]; it includes a proceeding in a civil court in which the jurisdiction of the Court is invoked for the determination of some claim or right legally enforceable."*

In the case of ***Baldevdas Shivlal (supra)***, Hon'ble Supreme Court discussing the ratio in the case of ***Major S.S. Khanna (supra)***, held that '*to interpret the expression "case" as an entire proceeding only and not a part of the proceeding, imposes an unwarranted restriction on the exercise of power of superintendence and may result in certain cases in denying a relief to the aggrieved litigant, where it is most needed and may result in perpetration of gross injustice*'. Thus, the '*case decided*' must not be looked through a narrow compass. It should be given a broader meaning. In the instant case, a right of the parties, i.e., Opposite Party Nos.1 to 6 to institute a suit was being considered by learned District Judge. Thus, the impugned order squarely falls within the definition of '*case decided*'. Sub-section (2) of Section 115 CPC clearly provides that '*the High Court or the District Court, as the case may be, shall not under this section, vary or reverse any order, including an order deciding an issue, made in the course of a suit or other proceedings, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings'*. Rejection of an application under Section 92(1) CPC would have resulted in disposal of the said proceeding itself. Thus, the case of the Opposite Party Nos.1 to 6 squarely falls under Section 115 (2) CPC. Section 104 (1) (ff-a) CPC provides an appeal shall lie against an order under Section 91 or 92 CPC refusing to institute a suit. When the party seeking leave of the Court to file a suit has a remedy of appeal under Clause (ffa) of Section 104(1) CPC, there is no justification in denying a remedy to a party, who is aggrieved by grant of leave under Section 92(1) CPC. Of course, the Petitioners had a remedy to seek for revocation of the impugned order. But, that does not preclude the Petitioners to file a revision under Section 115 CPC. Thus, a revision against an order granting leave to file an appeal, is maintainable.

9.2. Accordingly, the point (i), as framed by this Court, is answered in favour of the Petitioners.

10. The next vital point is to be adjudicated as to whether impugned order under Annexure-4 is sustainable. On perusal of the impugned order under Annexure-4, it appears that learned District Judge has considered in detail, the rival contentions of the parties. While adjudicating an application under Section 92(1) CPC, learned District Judge is not required to delve into merit of the allegations made in the petition. On perusal of the petition under Section 92(1) CPC at Annexure-2 filed by Opposite Party Nos.1 to 6, it appears that they have made out a case to be considered for grant of leave. Annexure-3, the reply filed by the Petitioners and Opposite Party No.10, mainly deals with the factual averments as narrated in the present CRP. From

the submission of Mr. Bose, learned counsel for the Petitioners, it appears that an objection to such application was raised mainly on the ground that the Opposite Party Nos.1 to 6 have no *locus standi* to file such an application; in view of the decision rendered in RSA No.47 of 2007, the relief sought for in the proposed plaint suffers from *res judicata* and thirdly, the Trust though public is not a charitable one.

10.1 Mr. Bose, learned counsel for the Petitioners submits that while adjudicating an application for grant of leave, learned District Judge should be extremely careful so that the purpose of special provision under Section 92 CPC is not frustrated. In support of his submission, he relied upon the case of ***Swami Paramatamanand Saraswati and another Vs. Ramji Tripathi and another,*** reported in (1974) 2 SCC 695, it has been held as under;-

> *"10. …… It is, therefore, clear that if the allegation of breach of trust is not substantiated or that the plaintiff had not made out a case for any direction by the court for proper administration of the trust, the very foundation of a suit under the section would fail; and, even if all the other ingredients of a suit under Section 92 are made out, if it is clear that the plaintiffs are not suing to vindicate the right of the public but are seeking a declaration of their individual or personal rights or the individual or personal rights of any other person or persons in whom they are interested, then the suit would be outside the scope of Section 92 (see N. Shanmukham Chetty v. V.M. Govinda Chetty [AIR 1938 Mad 92: 176 IC26 :1937 MWN 849], Tirumalai Devasthanams v. Udiavar Krishnayya Shanbhaga [AIR 1943 Mad 466 : (1943) 56 LW 260] , Sugra Bibi v. Hazi Kummu Mia [AIR 1969 SC 884 : (1969) 3 SCR 83 : (1969) 2 SCJ 365] and Mulla: Civil Procedure Code (13th edn.) Vol. 1, p. 400)……..."*

He also relied upon the case law in the case of ***Vidyodaya Trust v. Mohan Prasad R and others***, reported in (2008) 4 SCC 115, wherein, it has been held as under;-

> ***"26.*** *To put it differently, it is not every suit claiming reliefs specified in Section 92 that can be brought under the section; but only the suits which besides claiming any of the reliefs are brought by individuals as representatives of the public for vindication of public rights. As a decisive factor the Court has to go beyond the relief and have regard to the capacity in which the plaintiff has sued and the purpose for which the suit was brought. The courts have to be careful to eliminate the possibility of a suit being laid against public trusts under Section 92 by persons whose activities were not for protection of the interests of the public trusts. In that view of the matter the High Court was certainly wrong in holding that the grant of leave was legal and proper. The impugned order of the High Court is set aside. The appeal is allowed but without any order as to costs"*

10.2 He accordingly, submitted that these material aspects were brushed aside by the learned District Judge, while adjudicating the matter. Admittedly, the relief claimed in the proposed suit relates to appointment of new Trustee and defalcation of money of the public Trust. There is nothing in the petition under Section 92(1) CPC which would suggest that the Opposite Party Nos.1 to 6 are seeking declaration of their personal or individual right. Opposite Party Nos.1 to 6 claim themselves to be the villagers of Chhendipada where the institution situates. Since the Trust has been created for imparting technical education to the students of the locality, the Petitioners have interest in the said Trust. Oder I Rule 8 CPC, as alleged by Mr.

Bose, learned counsel for the Petitioners is not required to be complied with, as the Opposite Party Nos.1 to 6 have described themselves to be persons having interest in the Trust. Thus, the suit falls within the scope of Section 92 CPC.

11. Applicability of principles of *res judicata* is a mixed question of fact and law. Since learned District Judge has only recorded a *prima facie* satisfaction while adjudicating the petition under Section 92(1) CPC, he is not required to delve into veracity of the allegation at that stage. Thus, the issue of *res judicata*, if raised, can be adjudicated in the suit itself.

12. It is also submitted by Mr. Bose, learned counsel for the Petitioners that learned District Judge has not recorded any finding that the Trust in question is charitable one. It is his submission that neither in the Trust deed nor in the Bye-law, it has been stated that Petitioner No.1 is a public charitable Trust. No doubt, the Petitioner is a public Trust, but it is not charitable one as it is not rendering any service free of cost. It only facilitates the poor students of the locality to pursue their technical education. Thus, it cannot be said that the Trust has been created for the charitable purpose. As per Oxford and Chambers Dictionary, meaning of '*charity*' is *giving voluntarily to those in need.* From the above, it is clear that if benevolence to a less fortunate is shown by providing goods, money or otherwise, the same will be a charity. In the instant case, the Trust has been created for a noble purpose for imparting technical education to the poor students. Only because the word '*charitable*' is absent in the trust deed as well as Bye-law, it cannot be said that the Trust is not created for charitable purpose. As discussed, the objective of creation of the Trust is meant for charitable purpose. In the impugned order under Annexure-4, discussion has been made about requirement of Section 92(1) CPC. Learned District Judge has discussed the relevant facts including the objective of the Trust and opined that the Trust has been created for noble purpose, i.e., for imparting technical education to the poor students of the locality. Only because no free education is being facilitated in the said institution, it cannot be said that the Trust is not created and the Institution has not been established for charitable purpose. When any benevolence is shown to a less fortunate, that action becomes a charitable one.

13. Thus, in my opinion, learned District Judge has committed no error in granting leave to Opposite Party Nos.1 to 6 to file the suit as proposed. Accordingly, point No.(ii) is answered against the Petitioner and in favour of Opposite Party Nos.1 to 6 holding that there is no infirmity in the impugned order under Annexure-4.

14. As such, the Civil Revision petition being devoid of any merit stands dismissed, but in the facts and circumstances, there shall be no order as to costs.

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2023 (II) ILR - CUT- 510

KRUSHNA RAM MOHAPATRA, J.

C.M.P NO.1193 OF 2022

SHREEDATT DASH .....Petitioner

.V.

M/s. Z. ESTATE PRIVATE LTD. (ZEPL) & ANR. .....Opp. Parties

ARBITRATION AND CONCILIATION ACT, 1996 – Section 37(1)(a) r/w Section 10(3) of Commercial Court Act, 2015 – Whether the applications and appeals find place under Section 10(3) of the CC Act would include an appeal U/s. 37(1)(a) of the Arbitration & Conciliation Act ? – Held, Yes – Commercial Court has the jurisdiction to entertain all arbitration proceedings involving commercial disputes of specified value as provided U/s. 10(2) of the CC Act.

Case Laws Relied on and Referred to :-

1. 2022 SCC OnLine Orissa 1070 : M/s M.G. Mohanty & Anr Vs. State of Odisha & Ors.
2. MANU/MH/2578/2020 : Gaurang Mangesh Suctancar Vs. Sonia Gaurang Mangesh Suctancar.
3. (2023) 1 SCC 549 : Jaycee Housing Private Limited and Ors Vs. Registrar (General), Orissa High Court, Cuttack and Ors.
4. 2023 SCC OnLine 1392 : M/s Beta Exim Logistics (P) Ltd. Vs. M/s Central Rail side Warehouse Co. Ltd.

For Petitioner : Mr. Rajjeet Roy

For Opp. Parties : Mr. Banshidhar Baug

JUDGMENT Date of Judgment: 30.05.2023

KRUSHNA RAM MOHAPATRA, J.

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

2. Order dated 22nd July, 2021 (Annexure-1) passed by learned District Judge, Khurda at Bhubaneswar in ARBP No.2 of 2021 (appeal) and subsequent order dated 6th September, 2022 (Annexure-2) passed by learned Civil Judge, Senior Division (Commercial Court), Bhubaneswar in the said appeal are under challenge in this CMP.

3. By order under Annexure-1, learned District Judge transferred ARBP No.2 of 2021 to the designated Commercial Court, namely, Senior Civil Judge (Commercial Court), Bhubaneswar (for brevity 'the Commercial Court'). Order under Annexure-2 relates to rejection of an application filed by the Petitioner assailing the jurisdiction of the said Court to entertain the appeal.

4. This CMP finds its origin from Civil Suit No.1295 of 2020 filed by the Petitioner for declaration that the letters and e-mails dated 12th August, 2020 issued

by Defendants as void and not binding on the Petitioner and also for a decree of permanent injunction to restrain the Defendants from creating any third party interest over the suit schedule properties along with cost.

5. Since the issue involved in the CMP is a pure question of law, detailed narration of fact is not necessary. Briefly stated the parents of the Plaintiff during their lifetime had entered into an agreement with Defendant No.1-Z Estate Private Limited on 14th March, 2012 to purchase two numbers of flats, i.e., Flat-702 at 7th floor of 8th tower and Flat-1203 at 12th floor of the said 8th tower in Z-1 Housing Project. Father of the Plaintiff/Petitioner, namely, Sreedhar Dash died on 28th December, 2015 and his mother, namely, Sobhamayee Dash had pre-deceased her husband on 9th August, 2013 leaving behind the Petitioner and his siblings, namely, Siddharth Dash (son) and two daughters, namely, Smt. Shampashree Mund and Dr. Swatishree Panda. After death of their parents, dissensions arose between the Petitioner and his siblings in respect of their immovable properties. Plaintiff/ Petitioner claimed right over the suit property by virtue of a Will for which Test Case Nos.21 of 2017 and 22 of 2017 are pending in the Court of learned District Judge, Khurda at Bhubaneswar. At this juncture, alleging non-payment of outstanding dues in respect of the aforesaid two flats, the Defendant/Opposite Party No.1 cancelled the agreement executed by parents of the Petitioner, vide letter and e-mail dated 12th August, 2020. Hence, the suit was filed for the aforesaid relief. The Defendants/Opposite Parties on their appearance filed an application on 6th January, 2021 under Section 8 of the Arbitration and Conciliation Act, 1996 (for brevity 'Arbitration Act') with a prayer to refer the parties to arbitration. Learned Senior Civil Judge, Khurda rejected such application vide order dated 18th February, 2021 (Annexure-5). Being aggrieved, the Defendants preferred appeal in ARBP No.2 of 2021 under Section 37(1)(a) of the Arbitration Act before learned District Judge, Khurda at Bhubaneswar.

5.1 When the matter stood thus, learned District Judge, vide its order dated 22nd July, 2021 (Annexure-1), transferred the appeal to the Court learned Senior Civil Judge (Commercial Court), Bhubaneswar, i.e., the Commercial Court, for disposal in accordance with law. The case record of ARBP No.2 of 2021 was received by the Commercial Court on 12th August, 2021. Subsequently, the Petitioner filed an application before the Commercial Court on 16th August, 2022 contending that the said Court lacks jurisdiction to try the appeal and prayed for return of the file to the Court of learned District Judge, Khurda at Bhubaneswar for its adjudication. Said application was rejected vide order dated 6th September, 2022 (Annexure-2), holding that such an application is not maintainable. Hence, this CMP has been filed assailing the said orders under Annexures-1 and 2.

6. Facts narrated above are not disputed by learned counsel for the parties.

6.1 Mr. Roy, learned counsel for the Plaintiff-Petitioner, in course of his argument, referred to several provisions of the Arbitration Act and Commercial

Courts Act, 2015 (for brevity 'CC Act'). It is his submission that Government of Odisha in consultation with High Court of Orissa, vide its notification dated 13th November, 2020, conferred the jurisdiction and power of Commercial Court on the Court of Civil Judge (Senior Division) in different districts. Similarly, vide notification dated 11th January, 2021, State Government designated District and Sessions Judges of different districts as Commercial Appellate Courts for the purpose of exercising jurisdiction and powers on those Commercial Courts with effect from the date those Commercial Courts became functional. High Court of Orissa vide its memo dated 27thApril, 2021 notified Senior Civil Judge (Commercial Court), Bhubaneswar to be functional with effect from 3rd May, 2021 and directed transfer of the case records pertaining to commercial disputes under the CC Act to the Commercial Court for its smooth functions. The notification dated 13th November, 2020 was under challenge in the case of ***M/s M.G. Mohanty and another Vs. State of Odisha*** and other batch of cases, reported in 2022 SCC OnLine Orissa 1070. In the said case, the challenge was with regard to transferring of cases pending before learned District and Sessions Judge, Khurda at Bhubaneswar to the Senior Civil Judge (Commercial Court). Holding the notification dated 13th November, 2020 to be valid, this Court held that Senior Civil Judge (Commercial Court), Bhubaneswar has jurisdiction to try the commercial disputes. Relying upon ***Gaurang Mangesh Suctancar Vs. Sonia Gaurang Mangesh Suctancar***, reported in MANU/MH/2578/2020, this Court also held that if there is any conflict between the two Acts, Arbitration Act would prevail as regards substantial provision and CC Act shall cover the procedural niceties. View taken in the case of ***M/s M.G. Mohanty (supra)*** has been confirmed by the Hon'ble Supreme Court in the case of ***Jaycee Housing Private Limited and others Vs. Registrar (General), Orissa High Court, Cuttack and others***, reported in (2023) 1 SCC 549. It is his submission that in all these aforesaid case laws, the jurisdiction of the Commercial Court to adjudicate applications under Sections 9, 14 and 34 of the Arbitration Act was in question. The instant case is a departure in the sense that an appeal pending in the Court of learned District Judge, Khurda at Bhubaneswar was being transferred to the Commercial Court. In the case of ***Jaycee Housing Private Limited (supra)***, Hon'ble Supreme Court, while upholding the notification dated 13th November, 2020, observed as under:-

> *"26. Therefore, considering the aforestated provisions of the 2015 Act and the Objects and Reasons for which the 2015 Act has been enacted and the Commercial Courts, Commercial Division and Commercial Appellate Division in the High Courts are established for speedy disposal of the commercial disputes including the arbitration disputes, Sections 3 & 10 of the 2015 Act shall prevail and all applications or appeals arising out of arbitration under the provisions of the 1996 Act, other than international commercial arbitration, shall be filed in and heard and disposed of by the Commercial Courts, exercising the territorial jurisdiction over such arbitration where such Commercial Courts have been constituted.*

> *27. If the submission on behalf of the appellants that all applications/appeals arising out of arbitration under the provisions of the 1996 Act, other than the international commercial arbitration, shall lie before the Principal Civil Court of a district, in that case, not only the Objects and Reasons of enactment of the 2015 Act and establishment of Commercial Courts shall be frustrated, even Sections 3, 10 & 15 shall become otiose and nugatory.*
>
> *28. If the submission on behalf of the appellants is accepted, in that case, though with respect to other commercial disputes, the applications or appeals shall lie before the Commercial Courts established and constituted under Section 3 of the 2015 Act, with respect to arbitration proceedings, the applications or appeals shall lie before the Principal Civil Court of a district. There cannot be two fora with respect to different commercial disputes."* (*underlined for emphasis*)

6.2 In view of the above, the Court of learned District Judge, Khurda being the designated Commercial Appellate Court by the State Government in exercise of its power under Section 3A of the CC Act should hear appeals in terms of Section 13 of the said Act. He further submitted that the applications and '*appeals*' finds place under Section 10(3) of the CC Act would not include an appeal under Section 37 (1)(a) of the Arbitration Act challenging an order refusing an application under Section 8 of the Arbitration Act. The appeal of present nature was not the subject matter of disputes in the above referred case laws. Although Section 10(3) of the CC Act provides that all applications and appeals arising out of an arbitration, other than international commercial arbitration, shall be filed and disposed of by a Commercial Court exercising territorial jurisdiction over such arbitration, the same by no stretch of imagination include the appeal under Section 37 of the Arbitration Act, more particularly an appeal under Section 37 (1)(a) of the said Act. It is his submission that Section 37 of the Arbitration Act has been divided into two parts. Section 37(1) deals with an appeal against orders under three contingencies, viz., *firstly* against an order refusing to refer parties to arbitration under Section 8 of the said Act; *secondly* against an order granting or refusing to grant any measure under Section 9 and *thirdly* against an order setting aside order refusing to set aside an arbitral award under Section 34 of the said Act. Commercial Courts being conferred with jurisdiction of hearing an application under Sections 9, 14, 29(A) and 34 of the Arbitration Act, an appeal against said order would lie to the District Judge being designated as Commercial Appellate Court by the State Government. Similarly, an order rejecting an application under Section 8 of the Arbitration Act by the Commercial Court could be challenged under Section 37 (1)(a) of Arbitration Act read with Section 13 of the CC Act before the Principal Civil Court, or a designated Commercial Appellate Court. Section 10 of the CC Act does not include an appeal of the present nature. Therefore, the substantive right of appeal as envisaged under Section 37(1) of the Arbitration Act read with Section 13 of the CC Act cannot be abridged and hearing of the appeal filed by the Opposite Party by a Commercial Court would be inconsistent with the legislative mandate. When the District Judge, Khurda at Bhubaneswar has been designated as Commercial Appellate Court by the

State Government in consultation with the High Court of Orissa, there was no reason to transfer the appeal under Section 37 (1) (a) of the Arbitration Act to the Commercial Court.

6.3 He also relied upon the case law in the case of ***M/s Beta Exim Logistics (P) Ltd. Vs. M/s Central Rail side Warehouse Co. Ltd.,*** reported in 2023 SCC OnLine 1392, wherein Kerala High Court, while dealing with an order passed by the District Judge in transferring the Execution Case to the Commercial Court, held that the execution petition cannot be included within the ambit of word '*application*' under Section 15 of the CC Act. Further, the appeal has been valued at Rs.55,000/-. As such, the valuation being less than Rs.3.00 lakh, the subject matter cannot be a commercial dispute under Section 2(1) (i) of the CC Act. Learned District Judge, without considering all these legal aspects, transferred the appeal to the Commercial Court and in turn, the Commercial Court without applying its mind, rejected the petition vide order under Annexure-2 by a cryptic and non-speaking order. Hence, the impugned orders under Annexures-1 and 2 are not sustainable and are liable to be set aside.

7. Mr. Baug, learned counsel for the contesting Opposite Party No.1 submitted that the argument advanced **by** Mr. Roy, learned counsel for the Petitioner is contrary to the principles of law. It is his submission that in view of the clear and unambiguous language of Section 10 (1) of the CC Act, the Commercial Court has the jurisdiction to entertain the appeal transferred to it by learned District Judge, Khurda under Annexure-1. He further submitted that law has already been elaborately discussed in the case of ***M/s M.G. Mohanty (supra)*** and ***Jaycee Housing Private Limited (supra)***. Thus, there can be no iota of doubt or confusion with regard to maintainability of the appeal (ARBP No.2 of 2021) in the Commercial Court. He, therefore, prays for dismissal of the CMP.

8. Learned counsel for the parties were heard at length. Perused the materials on record placed before me**.** Also gone through the relevant provisions of the Arbitration Act and CC Act and the case laws cited**.** Section 37 of the Arbitration Act deals with *'appealable orders'*. By virtue of Amendment Act, 2015 Clause (a) to Sub-section (1) of Section 37 was substituted by incorporating order refusing to refer the parties to arbitration under Section 8 of the said Act as an appealable order. Thus, an appeal lies against an order refusing to refer to the parties to arbitration under Section 8 of the Arbitration Act. Accordingly, the Opposite Parties filed appeal (ARBP No.2 of 2021) in the Court of learned District Judge. By virtue of notification dated 13th November, 2020, Government of Odisha established four numbers of Courts of Civil Judge (Senior Division) at different places mentioned in the said notification and designated the same to be Commercial Courts. One such Court has been established at Bhubaneswar in the judgeship of Khurda and designated as Senior Civil Judge (Commercial Court), Bhubaneswar. The said Court was made functional with effect from 3rd May, 2021. Pursuant to direction of this

Court, the records pertaining to commercial disputes under the CC Act in the judgeship of Khurda were transferred to the Commercial Court. Accordingly, the case record in ARBP No.2 of 2021 pending in the Court of learned District Judge, Khurda at Bhubaneswar was transferred to the Commercial Court vide District Court's order No. 146/2021 dated 19th July, 2021. Thereafter, the Petitioner filed an application challenging the jurisdiction of the Commercial Court to entertain the appeal (ARBP No.2 of 2021) and prayed for returning the case record to the Court of District and Sessions Judge, Khurda at Bhubaneswar.

9. Contention of Mr. Roy, learned counsel for the Petitioner was that Section 10 of the CC Act does not include an appeal under Section 37 (1)(a) of the Arbitration Act. It was submitted that in view of Section 13 of the CC Act, the appeal should have been entertained and adjudicated by learned District and Sessions Judge, Khurda at Bhubaneswar, which has been designated as Commercial Appellate Court within the meaning of Section 2 (1)(a) of CC Act. It is more so in view of the provision under Section 15 (2) of the CC Act, which deals with transfer of pending cases. Section 15 (2) of the CC Act reads as under:-

> *"15.* ***Transfer of pending cases;***
>
> *(1) xx xx xx*
>
> *(2) All suits and applications, including applications under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of a Specified Value pending in any civil court in any district or area in respect of which a Commercial Court has been constituted, shall be transferred to such Commercial Court:*
>
> *Provided that no suit or application where the final judgment has been reserved by the Court prior to the constitution of the Commercial Division or the Commercial Court shall be transferred either under sub-section (1) or sub-section (2)."*

Section 10 of the CC Act deals with jurisdiction of a Commercial Court in respect of arbitration matters. Sub-section (3) of Section 10 provides as under:-

> *"10.* ***Jurisdiction in respect of arbitration matters.***
>
> *Where the subject-matter of an arbitration is a commercial dispute of a Specified Value and—*
>
> *(1) xx xx xx*
> *(2) xx xx xx*
>
> *(3) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted."*

A close reading of Sub-section (3) as above, would make it clear that all applications or appeals (other than the international commercial arbitration) arising out of arbitration in a commercial dispute of a specified value, which would ordinarily lie

before principal Civil Court of the original jurisdiction in a district (not being a High Court), shall be filed in and heard and disposed of by Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Courts have been established. It thus makes clear that after establishment of Commercial Court, appeal under Section 37 (1)(a) of Arbitration Act arising out of an arbitration shall be filed before the Commercial Court having territorial jurisdiction over such arbitration. As the instant appeal was filed before establishment of the Commercial Court, Principal Civil Court, namely, District Judge, Khurda at Bhubaneswar was competent to entertain the same. After establishment of the Commercial Courts, the Court of learned District Judge, Khurda lacked jurisdiction to entertain such an appeal more particularly in view of the provision of Section 10 of the CC Act. Although Section 15 of the CC Act does not specifically spell out transfer of appeals, but a harmonious reading of Sections 10 and 15 of the CC Act makes it abundantly clear that an appeal pending in the Court of Principal Civil Court of the District shall also be transferred to the Commercial Court having territorial jurisdiction over it. The Hon'ble Supreme Court in the case of ***New India Assurance Company Limited Vs. Smt. Shanti Mishra***, reported in (1975) 2 SCC 840 held that a procedural law has retrospective application. Although right of the parties to litigation to an appeal/revision/review etc. gets crystallized on the date of launching of the litigation, but the party does not have any vested right with regard to the forum as provided in the statute under which parties are litigating, as it is procedural in nature. In the instant case, the Opposite Parties have a right of appeal under Section 37 (1)(a) of the Arbitration Act against an order refusing the prayer under Section 8 of the said Act. But neither of the parties have a choice of forum of appeal. Since the procedural law operates retrospectively the person aggrieved has to go to the new forum even if its cause of action or right of action arose prior to change of forum. In the case of ***Gaurang Mangesh Suctancar (supra)***, Bombay High Court held as under:-

> *"92. Evidently, the Commercial Courts Act is a later enactment, but it does not work at cross purpose with the Arbitration Act. In fact, both aim at speedy adjudication. The Commercial Courts Act covers all the commercial disputes, whereas the Arbitration Act covers only those disputes that involve arbitration. As Kandla Export Corporation has held, both the enactments call for a harmonious interpretation. If at all there is any conflict, as to the substantive provisions, the Arbitration Act prevails; but it has left the procedural niceties to the Commercial Courts Act." (underlined for emphasis)*

Considering the above, this Court in ***M/s M.G. Mohanty (supra)*** at para-50, held as under:-

> *"50. The Court finds merit in the contention on behalf of the Opposite Parties that the A&C Act must yield to the CC Act and not vice versa given that the objective of both enactments is the speedy disposal of the cases and the CC Act was a later enactment. There is no apparent conflict between the A&C Act and the CC Act for being resolved. The objective of both is the speedy resolution of the disputes. As far as challenge to the vires of Section 10 of the CC Act is concerned, indeed no ground has been made out*

> *before this Court to show how Section 10 of the CC Act is ultra vires the legislative powers of the Parliament or how it is 'manifestly arbitrary'. The identification of commercial disputes as distinct from ordinary civil disputes is based on an intelligible differentia and subjecting them to a special expedited procedure can neither be considered to be arbitrary nor ultra vires the A&C Act. That prayer, therefore, has to be rejected."*

It has been further made clear in the case of ***Jaycee Housing Private Limited (supra)*** in which, Hon'ble Supreme Court, after discussing different provisions of the CC Act, more particularly Sections 3, 10, 15 and 21 together with Section 2(1)(c) of the Arbitration Act including 253rd report of the Law Commission held that Sections 3 and 10 of the CC Act, 2015 shall prevail and all '*applications* or *appeals*' arising out of arbitration under the provisions of the Arbitration Act (other than international commercial arbitration), shall be filed in and heard and disposed of by the Commercial Court exercising jurisdiction over such arbitration where such Commercial Courts have been established. It is further held that if two fora in respect of different commercial disputes would be allowed to prevail, it would frustrate the object and purpose of enactment of the CC Act. Law Commission in its 253rd report made the following recommendation qua arbitration matters involving commercial disputes.

> *"3.24.4 Second, in the case of domestic arbitrations concerning a commercial dispute of more than Rupees One Crore, applications or appeals may lie either to the High Court or a Civil Court (not being a High Court) depending upon the pecuniary jurisdiction. It is recommended that all applications or appeals arising out of such arbitrations under the A& C Act, that have been filed on the original side of the High Court shall be heard by the Commercial Division of the High Court where such Commercial Division is constituted in the High Court. However, in the absence of a Commercial Division being constituted, the regular Bench of the High Court will hear such applications or appeals arising out of domestic arbitration. If the application or appeal in such domestic arbitration is not within the jurisdiction of the High Court and would ordinarily lie before a Civil Court (not being a High Court) and there is a Commercial Court exercising territorial jurisdiction in respect of such arbitration, then such application or appeal shall be filed in and heard by such Commercial Court."*

Thus, the procedure provided under the CC Act shall undisputedly prevail over the Arbitration Act. Resultantly, applications or appeals filed under the Arbitration Act including an appeal under Section 37 (1)(a) of the Arbitration Act filed before commencement of CC Act shall stand transferred and be entertained and adjudicated by the designated Commercial Court having jurisdiction over the arbitration in which the Commercial Court has been established. The case law in the case of ***M/s Beta Exim Logistics (P) Ltd.(supra)*** has no application to the case at hand as it deals with an execution proceeding and hence is of no assistance to the case of the Petitioner.

10. A further argument was advanced by Mr. Roy, learned counsel for the Petitioner to the effect that when the suit has been valued at Rs.55,000/- and the

valuation being less than Rs.3.00 lakh, i.e., the '*Specified Value'* as envisaged under Section 2(1)(i) of the CC Act, it cannot be treated to be a commercial dispute to be adjudicated under the CC Act. Such an argument has no substance, as Section 2(1)(i) deals with a commercial dispute in respect of a suit as determined in accordance with Section 12 of the CC Act. Section 12 (1)(c) read with 12 (2) of the CC Act, which read thus:-

> *"**12. Determination of Specified Value-***
>
> *(1) The Specified Value of the subject-matter of the commercial dispute in a suit, appeal or application shall be determined in the following manner:—*
>
> *(a) xx xx xx*
> *(b) xx xx xx*
>
> *(c) where the relief sought in a suit, appeal or application relates to immovable property or to a right therein, the market value of the immovable property, as on the date of filing of the suit, appeal or application, as the case may be, shall be taken into account for determining Specified Value; [and]*
>
> *(d) xx xx xx*
>
> *(2) The aggregate value of the claim and counterclaim, if any as set out in the statement of claim and the counterclaim, if any, in an arbitration of a commercial dispute shall be the basis for determining whether such arbitration is subject to the jurisdiction of a Commercial Division, Commercial Appellate Division or Commercial Court, as the case may be.*
>
> *(3) xx xx xx "*

10.1. The Plaintiff-Petitioner at para- 8 of the plaint has stated that his parents had paid the full consideration of Rs.77,64,730/- of 'A' schedule property and Rs.60,37,932/- of 'B' schedule property. Thus, the market value of the suit schedule property, as stated by the Petitioner, was well above Rs.3.00 lakh.

10.2. Commercial Court has the jurisdiction to entertain all arbitration proceedings involving commercial dispute of Specified Value, as provided under Section 10 (2) of the CC Act. It is more so, in view of the ratio decided in the case of ***Jaycee Housing Private Limited (supra) and M/s M.G. Mohanty (supra)***. Hence, the submission of Mr. Roy, learned counsel for the Petitioner to the effect that the subject matter of the case is not a commercial dispute of specified value is also not sustainable.

11. Accordingly, the CMP being devoid of any merit stands dismissed, but in the facts and circumstances, there shall be no order as to costs.

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2023 (II) ILR - CUT- 519

B.P. ROUTRAY, J.

MACA NO. 835 OF 2015

RAMANI MANDAL & ORS. …….Appellants

.V.

BRAJABANDHU PANDA …….Respondent

COMPENSATION – Motor accident claim case – What standard of proof required in a claim application to prove the accident? – Held, it would be enough on the part of the claimants to produce the police investigation report to substantiate their case with corroboration to their evidence. (Para 13)

Case Laws Relied on and Referred to :-

1. (2013)14 SCC 345 : Bimal Devi & Ors. Vs. Satbir Singh & Ors.
2. (2009)13 SCC 530 : Bimala Devi & Ors. Vs. Himachal Road Transport Corporation & Ors.
3. (2020) 13 SCC 484 : Sunita & Ors. Vs. Rajasthan State Road Transport Corporation & Ors.
4. (2021) 1 SCC 171 : Anita Sharma & Ors. Vs. New India Assurance Company Limited and Anr.
5. 2022 SCC OnLine SC 994 : Janabai & Ors. Vs. I.C.I.C.I. Lambord Insurance Company Ltd.

For Appellants : Mr. P.K. Mishra

For Respondent : None

JUDGMENT Date of Judgment:16 .05.2023

B.P. ROUTRAY, J.

1. The matter is taken up through hybrid mode.

2. Heard Mr. P.K. Mishra, learned counsel for the claimant – Appellants. None appears on call for the Respondent though the matter was passed over earlier.

3. Present appeal by the claimant - Appellants is directed against the impugned judgment dated 7th May, 2015 of learned 4th MACT, Baripada passed in MAC Case No.102 of 2013, wherein the tribunal has refused to grant any compensation in favour of the claimants by disbelieving involvement of the offending motor cycle bearing Registration Number OR-11-A-7400 in the accident.

4. The claimants have filed the claim application under Section 166 of the MV Act stating that the deceased namely, Kalipada Mandal while going on the road by walk, the offending motor cycle being driven by its owner, present Respondent namely Brajabandhu Panda, dashed him being driven rash and negligently with high speed. Admittedly, the offending motor cycle did not have any insurance policy on the date of accident.

5. The accident took place on 4th July 2023 and the deceased died on 31st July 2013. The F.I.R. was lodged by son of the deceased namely, Sudhansu Mandal (claimant No.2) on 13th July 2013, which was registered as Baripada Sadar P.S. Case No.81 dated 24th July 2013. Initially the F.I.R. was lodged before Baripada Town P.S. and the same was subsequently transferred to Sadar P.S. on the ground of jurisdiction.

6. The claim application was highly contested by the owner – Respondent. Three witnesses from the side of the claimants were examined and two witnesses from the side of the owner were examined. While the owner did not adduce any documentary evidence, the claimants proved the copies of police papers including the F.I.R., charge-sheet, inquest report and the original discharge certificate issued by SCB Medical College and Hospital, Cuttack and the statement of the deceased as well as his pension book.

7. The Tribunal upon analyzing the evidence adduced from both sides came to the conclusion that the involvement of offending vehicle in the accident allegedly driven by the Respondent is doubtful, since the evidence of P.W.2 as an eye witness cannot be believed and the evidences of the owner – Respondent reveals that he brought the deceased to the hospital. The tribunal disbelieved the evidence of P.W.2 as an eye-witness on the ground that it is not possible on his part to see the accident from a distance of 50 meters when the darkness was approaching. The tribunal has assigned further reason that on medical examination of the Respondent (driver-cum-owner) no injury was found on his person and the offending motor cycle was not damaged in the accident.

8. As per the contents of the F.I.R. and the case of claimants, the accident took place at around 6 pm during evening time. The claimants did not adduce the copy of post mortem examination report to substantiate the injuries on the person of the deceased and his cause of death. However, as seen from the copy of inquest report and as mentioned in the charge-sheet, the deceased had injuries on his elbow, ankle and backside of his head. The cause of death as per the opinion recorded in the post mortem examination report is due to intra cranial haemorrhage. So it is established that the deceased sustained injuries due to the accident and died out of such injuries.

9. Here I would like to deal with the evidences of O.P.W.1 and O.P.W.2 at first instance. O.P.W.2 is the owner-cum-driver of the offending motor cycle. He is a Bank Manager and O.P.W.1 is an officer sub-ordinate to him in the same branch. Both these witnesses examined from the side of the Respondent have stated their innocence that being good Samaritans when they saw the deceased lying on the road, they called 108 Ambulance and took the deceased to hospital for treatment. As per them the deceased fell down on the road on his own due to sparkling flash light of the passing-by vehicles on the road.

10. But the admitted fact remains that the Respondent was medically examined on 4th July, 2013 at District Headquarters Hospital, Baripada. This is the admitted

statement of O.P.W.2 made in his cross-examination. The Respondent is a Bank Manager and according to him he took the deceased to Baripada DHH. So if his version is accepted that he was a Good Samaritan then the scope of his examination in the hospital does not arise. The Respondent (O.P.W.2) does not explain about necessity of his examination in the hospital on the same day of accident at the same time. So far as non-finding of any injury on his person is concerned, in the circumstances when a motor cycle dashed a pedestrian, the motor cyclist is less likely to sustain any injury and also there is less likelihood of any damage inflicted to the motor cycle. Therefore in absence of any corroborating material brought on record to establish the oral statement of O.P.W.1 and O.P.W.2 and the admitted medical examination of O.P.W.2 in the hospital at the same time after the accident took place, their version as Good Samaritans who brought the deceased to the hospital with helping attitude is not found believable. Rather it is possible that to avoid payment of compensation in absence of any insurance policy, the respondent has resorted to such false plea. It is important to note here that had the claimants chosen to plant a vehicle then they would have chosen a vehicle validly insured and not a vehicle without an insurance policy.

11. Now coming to the evidence of P.W.2 and P.W.3 who stated themselves to be the eye witnesses to the accident, no reason is found to disbelieve the statement of P.W.2 to be an eye witness. It is not impossible on the part of a human being to see the accident from a distance of 50 meters. It is important to mention here that P.W.2 has never stated in his evidence that at the time of accident there was darkness at the spot, but darkness was approaching only. The court can take judicial notice of the fact that around 6 pm in the evening in the 1st week of July in the coastal areas of Odisha the darkness is not so deep but it was a twilight time. Therefore the conclusion arrived by the tribunal that it is impossible on the part of P.W.2 to see the accident in the darkness from a distance of 50 meters away is not found with good rational. So far as the evidence of P.W.3 is concerned he is stated to be a local resident near the spot of accident and saw the accident. His statement as an eye-witness has not been assailed. P.W.3 has stated about the details of registration number and model of the motor cycle in his evidence.

12. Moreover, the statements of P.W.2 and P.W.3 have been supported with the findings in the police investigation. Police have submitted the charge-sheet against the Respondent for commission of offences under Section 279/304-A of the I.P.C. and also seized the offending motor cycle. The same is not disputed by the Respondent. Further it is admitted by O.P.W.2 that he was examined medically on 4th July 2013 on police requisition after the accident. It is not that the Respondent is not saying involvement of any other vehicle in the accident but as per him the deceased fell down of his own to sustain such injuries.

13. Again as per the standard of proof required in a claim application to prove the accident, it would be enough on the part of the claimants to produce the police investigation report to substantiate their case with corroboration to their evidence.

In ***Bimal Devi and others vrs. Satbir Singh and others, (2013)14 SCC 345,*** it has been observed that it is difficult to get witnesses in claim cases, much less eyewitnesses, thus extremely strict proof of facts in accordance with provisions of the Evidence Act may not be adhered to religiously and some amount of flexibility has to be given to those cases. In ***Bimala Devi and others vrs. Himachal Road Transport Corporation and others ((2009)13 SCC 530,*** the Supreme Court has observed, *"11. While dealing with a claim petition in terms of Section 166 of the Motor Vehicles Act, 1988, a tribunal strict sensus is not bound by the pleadings of the parties; its function being to determine the amount of fair compensation in the event an accident has taken place by reason of negligence of that driver of a motor vehicle. It is true that occurrence of an accident having regard to the provisions contained in Section 166 of the Act is a sine qua non for entertaining a claim petition but that would not mean that despite evidence to the effect that death of the claimant's predecessor had taken place by reason of an accident caused by a motor vehicle, the same would be ignored only on the basis of a post-mortem report vis-à-vis the averments made in a claim petition."*

Further, in ***Sunita and others vrs. Rajasthan State Road Transport Corporation and others, (2020) 13 SCC 484,*** it is observed that the claimants are merely to establish their case on the touchstone of preponderance of probability where the standard of proof beyond reasonable doubt cannot be applied by the tribunal. In the case of ***Anita Sharma and others vs- New India Assurance Company Limited and another***, (2021) 1 SCC 171, the relevant observations are reproduced below:

> "16. It is quite natural that such a person, who had accompanied the injured to the hospital for immediate medical aid, could not have simultaneously gone to the police station to lodge the FIR. The High Court ought not to have drawn any adverse inference against the witness for his failure to report the matter to the police. Further, as the police had themselves reached the hospital upon having received information about the accident, there was perhaps no occasion for AW 3 to lodge a report once again to the police at a later stage either.
>
> 17. Unfortunately,the approach of the High Court was not sensitive enough to appreciate the turn of events at the spot, or the appellant-claimants' hardship in tracing witnesses and collecting information for an accident which took place many hundreds of kilometers away in an altogether different State. Close to the facts of the case in hand, this Court in *Parmeshwari v. Amir Chand, viewed that: (*SCC p. 638, para12*)*
>
> "12. The other ground on which the High Court dismissed the case was by way of disbelieving the testimony of Umed Singh, PW1. Such disbelief of the High Court is totally conjectural. Umed Singh is not related to the appellant but a good citizen, Umed Singh extended his help to the appellant by helping her to reach the doctor's chamber in order to ensure that an injured woman gets medical treatment. The evidence of Umed Singh cannot be disbelieved just because he did not file a complaint himself. We are constrained to repeat our observation that the total approach of the High Court, unfortunately, was not sensitized enough to appreciate the plight of the victim.
>
> * * *

> 15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied."

In the case of ***Janabai and others vs- I.C.I.C.I. Lambord Insurance Company Ltd., 2022 SCC OnLine SC 994,*** it has been stated that the rule of evidence to prove charges in a criminal trial cannot be used while deciding an application under Section 166 of the Motor Vehicles Act, 1988 which is summary in nature. There is no reason to doubt the veracity of the statement of Appellant No.1 who suffered injuries in the accident. The application under the Act has to be decided on the basis of evidence led before it and not on the basis of evidence which should have been or could have been led in a criminal trial.

14. So in light of afore-stated principles and upon analysis of entire evidences brought on record from both the sides, the preponderance of probability is seen in favour of the contention of the claimants that the accident took place due to rash and negligent driving of the Respondent while driving his motor cycle bearing registration number OR-11-A-7400 and the deceased died out of such injuries sustained in the accident involving the offending motor cycle.

15. The deceased was a pension-holder aged about 60 years on the date of accident. He retired on superannuation as a peon from the office of the Executive Engineer, RWD, Baripada.Considering the fact that the offending vehicle was driven in public road without insurance policy, and further considering that the owner is liable to pay the compensation for death of the deceased, this court instead of remanding the matter back to the tribunal for determination of compensation amount, determines the compensation amount at Rs.5,00,000/-, payable along with interest @ 6% per annum, keeping in view the multiplier method but at a reduced rate. Mr. Mishra, learned counsel for the claimants agrees to the same.

16. In the result the appeal is disposed of with a direction to the Respondent to deposit total compensation of Rs.5,00,000/- (five lakhs) before the tribunal along with interest @ 6% per annum from the date of filing of the claim application, within a period of two months from today; where-after the same shall be disbursed in favour of the claimant– Appellants on such terms and proportion to be decided by learned tribunal. Failing to deposit the compensation amount within the stipulated period, the claimants are at liberty to realize the same from the Respondent in accordance with law.

17. The copies of evidence and exhibits as produced in course of hearing are kept on record.

18. Urgent certified copy be issued as per rules.

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2023 (II) ILR - CUT- 524

B.P. ROUTRAY, J.

MACA NO. 1121 OF 2018

D.M, M/s. NATIONAL INSURANCE CO.LTD. …….Appellant

.V.

SURA DAS & ORS. ……Respondents

MOTOR VEHICLES ACT,1988 – Sections 147(4), 147(5) & 149(1) – Cancellation of insurance policy issued by insurer on receipt of cheque towards the payment of premium and such cheque is returned dishonoured – The intimation of such cancellation has not reached the insured and to the concerned Registering Authority – Effect of – Held, in absence of an intimation, the insurer is liable to pay the awarded compensation amount to the claimants, with the right to recover the same from the owner of the vehicle. (Para 10)

Case Laws Relied on and Referred to :-

1. (2012) 5 SCC 234 : United India Insurance Company Limited Vs. Laxmamma & Ors.
2. (1998) 1 SCC 371 : Oriental Insurance Co. Ltd. Vs. Inderjit Kaur.
3. (2000) 3 SCC 195 : New India Assurance Co. Ltd. Vs. Rula.
4. (2001) 3 SCC 151 : National Insurance Co. Ltd. Vs. Seema Malhotra.
5. 2016 (I) OLR 989 : Rashmita Mohanty & Ors. Vs. Santosh Kumar Padhi & Anr.

For Appellant : Mr. B.Dasmohapatra

For Respondents : Mr. D.Patnaik, for Respondent No.4
Mr. A.Garnaik, for Respondent No.5

JUDGMENT Date of Judgment :18.05.2023

B.P.ROUTRAY, J.

1. Heard Mr. Dasmohapatra – learned counsel for the Appellant, Mr.Patnaik – learned counsel for the Respondent No.4 and Mr. Garnaik, learned counsel for Respondent No.5.

2. Present appeal by the Insurer is directed against judgment dated 17th February, 2018 of Additional District Judge-cum-4th MACT, Cuttack in M.A.C. Case No.235 of 2007/314 of 2017, wherein compensation to the tune of Rs.3,32,400/- has been granted along with interest @ 6% per annum with effect from the date of filing of the claim application on account of death of the deceased in the motor vehicular accident on 16th March, 2007.

3. The sole dispute is on the question of liability on the Insurer for cancellation of the insurance policy. According to the Insurer-Appellant, the policy issued in respect of the offending vehicle i.e. passenger Bus bearing registration No. OR-05-E-7455 was cancelled for dishonour of the cheque given towards premium amount

from the date of inception and therefore, the Insurer is not at all liable to indemnify the owner.

4. The accident took place on 16th March 2007. Admittedly, Insurance Policy No 163100/31/06/6300000011 was issued by the Appellant i.e. National Insurance Co. Ltd. valid from 4th April 2006 to 3rd April 2007. The cheque for Rs.17,269/- submitted towards payment of the premium dated 31st March 2006 was returned by the bank for insufficient fund. Then the Insurance Company claims to have sent the letter of cancellation of policy dated 17th April 2006 to the owner as well as the RTO, Cuttack intimating the fact of cancellation of the insurance policy from the date of inception. Copies of those letters dated 17th April, 2006 have been exhibited under Ext.D & E.

5. The owner did not come to contest before the Tribunal and he was set ex-parte. Before this Court, Mr. S.K. Garnaik though appears on behalf of the owner-Respondent No.5, but he is unable to justify his non-appearance before the Tribunal. He is also unable to answer regarding cancellation of policy and dishonour of the cheque submitted by him.

6. As seen from the copies of Ext.D & E, it is mentioned at the top of those letters that the same were sent by registered post with A.D. But admittedly, no such postal receipts in proof of sending those letters, either to the insured or to the Registering Authority, have been produced on record. The acknowledgment cards, if any, satisfying service of the letter of cancellation dated 17th April 2006 on the owner and the RTO have not been filed.

7. The law is well-settled on this point. The Hon'ble Supreme Court in the case of ***United India Insurance Company Limited vs. Laxmamma and others, (2012) 5 SCC 234*** by discussing several other decisions rendered in the cases of ***Oriental Insurance Co. Ltd. vs. Inderjit Kaur, (1998) 1 SCC 371, New India Assurance Co. Ltd. vs. Rula, (2000) 3 SCC 195*** and ***National Insurance Co. Ltd. vs. Seema Malhotra, (2001) 3 SCC 151,*** have held as follows:-

> "26. In our view, the legal position is this: where the policy of insurance is issued by an authorized insurer on receipt of cheque towards the payment of premium and such a cheque is returned dishonoured, the liability of the authorized insurer to indemnify the third parties in respect of the liability which that policy covered subsists and it has to satisfy the award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the MV Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonoured and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof."

8. This Court in the case of ***Rashmita Mohanty and others vs. Santosh Kumar Padhi and another, 2016 (I) OLR 989*** has held as follows:-

> "Accordingly, no material had been produced by the Insurance Company before the learned Tribunal to show that such intimation regarding cancellation of policy had been given to the concerned Registering Authority. Therefore, in absence of an intimation to the concerned Registering Authority regarding cancellation of the Insurance Policy issued in respect of the offending vehicle, as required under section 147(4) of the M.V. Act, the insurer is liable to pay the awarded compensation amount to the claimants, with the right to recover the same from the owner of the vehicle."

Further, this Court in a recent judgment dated 20th March, 2023 passed in MACA No. 128 of 2021, have observed that in absence of proof of service of intimation of cancellation of the policy on the insured (owner) as well as the Registering Authority, the insurance company cannot be absolved from its liability under the insurance policy.

9. In the case at hand, the issuance of policy in respect to the offending vehicle with effect from 4th April 2006 to 3rd April 2007 is not disputed. Nothing has also been produced on record to substantiate the contention of the Insurer regarding service of such intimation of cancellation on the insured and the Registering Authority. Though the insurance company has examined its officer as O.P.W.1, but he is found silent regarding mode of service of the letter of cancellation on the insured and the Registering Authority. Mr. Dasmohapatra submits that since O.P.W.1 was not cross-examined by the Claimants, his statements made in the Examination-in-Chief that the intimation of cancellation has been sent to the insured as well as the RTO stands proved being unrebutted. But I fail to agree with the submission. It is for the reason that the owner did not come to context the claim before the Tribunal and the Claimants have limited scope to dispute this specific point regarding service of letter of cancellation of policy on the owner and the the RTO. The burden is on the insurer to prove their contention satisfactorily. Poor claimants cannot be allowed to suffer for the same. Since the owner did neither contest the claim before the Tribunal nor was able to submit anything in his support before this Court, the Insurer is at liberty to recover the amount of compensation form the owner.

10. In view of the discussions made above, while concluding against the Appellant-Insurer that they are liable to indemnify the compensation amount and pay the same to the Claimants, they are granted with right of recovery of the compensation of amount from the owner.

11. No further dispute is raised with regard to involvement of the offending vehicle in the accident or negligence on the part of the driver. No challenge is also advanced regarding quantification of compensation amount.

12. In the result, the appeal is disposed of with a direction to the Insurer-Appellant to deposit entire compensation amount along with interest before the Tribunal as per its direction within a period of two months from today; where-after the same shall be disbursed in favour of the claimants on same terms and proportion contained in the impugned judgment. As stated above the right of recovery is granted in favour of the Insurer-Appellant.

13. The statutory deposit made by the Appellant with accrued interest thereon be refunded to him on proper application and on production of proof of deposit of the award amount before learned Tribunal.

14. Urgent certified copy of this order be granted on proper application.

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2023 (II) ILR - CUT- 527

Dr. S.K. PANIGRAHI, J.

WPC (OA) NO.2604 OF 2018, W.P.(C) NOS.16366 OF 2019 AND 17742 OF 2019

Dr. BIJAY KUMAR PATTNAIK & ORS. …….Petitioners

.V.

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

SERVICE LAW – Zone of consideration for selection – In order to come under zone of consideration for selection, to be appointed as an Asst. Professor, Ophthalmology in any of the Govt. Medical College, the candidate should have Post-Graduate degree in the concern broad, specialty with three years experience as Senior Resident before 18.12.2013 – Whether person having experience certificate as S.R. after the cut off date (18.12.2013) will come under the zone of consideration for the post ? – Held, No – It is settled law that the qualification should have been seen which the candidate possessed on the date of recruitment and not at a later stage unless rules to that regard permit it. (Paras 26 - 28)

Case Laws Relied on and Referred to :-

1. (1995) 1 SCC 138 : Ravinder Sharma (Smt.) and Anr. Vs. State of Punjab & Ors.
2. JT 2006 (1) SC 331 : Mohd.Sartaj and Anr. Vs. State of U.P. & Ors.

For Petitioners : Mr. S.N Pattanaik
Mr. Sameer Kumar Das

For Opp. Parties : Mr. H.K. Panigrahi, ASC, Mr. Sashibhusan Jena
Mr.P. K. Mishra

Mr. Mahendra Ku. Mohapatra

Mr. Pradipta Kumar Mohanty, Mr. Mahendra Ku. Mohapatra
Mr. S.K. Dash & Mr. A.K. Otta.

JUDGMENT Date of Hearing:29.03.2023 : Date of Judgment:06.04.2023

Dr. S.K. PANIGRAHI, J.

1. Since all the above mentioned three Writ Petitions have been filed by the same Petitioner, this Court proposed to hear all the Writ Petitions together and pass a common order.

2. W.P.(C) No.16366 of 2019 is filed by four petitioners including Dr. Bijay Kumar Pattnaik, challenging the decision/notice dated 05.09.2019 of the OPSC under Annexure-5 inviting Opposite Party No.3 (Dr. Jitendra Kumar Panda) to appear the viva voce test for recruitment to the post of Asst. Professor in Ophthalmology in Group-A of Odisha Medical Education Services (OMES) Cadre pursuant to the Advertisement No.15 of 2015-16 (Annexure-1), on the ground that the Opposite Party No.3 is ineligible for such post in view of the stipulation made in the eligibility clause of the advertisement under Annexure-1 and Rule-4 of the OMES Rules, 2009 and also in the light of the order dated 10.08.2015 passed by the Supreme Court in Civil Appeal Nos.6157-6158 of 2015.

3. However, during pendency of the said Writ Petition, the Opposite Party No.3 (Dr. J.K. Panda) was selected and appointed as Asst. Professor in Ophthalmology pursuant to the advertisement under Annexure-1 despite he was ineligible. Hence, the Petitioner (Dr. Bijay Kumar Pattnaik) challenged the order of such selection and appointment of Dr. J.K. Panda as Asst. Professor in Ophthalmology in W.P.(C) No.17742 of 2019. Accordingly, both the cases were tagged together and placed before this Court for consideration.

4. The Opposite Party No.3 had also approached the Odisha Administrative Tribunal, Cuttack Bench, Cuttack (for short "the Tribunal") in O.A No.142 (C) of 2012 seeking direction to antedate his appointment as Senior Resident with effect from 05.11.2009. The said O.A. was allowed by the Tribunal vide order dated 03.05.2013 directing the Opposite Parties therein to allow the Opposite Party No.3 to apply for the post of Asst. Professor in any advertisement to be issued and to accept his candidature as that the 2009 Senior Resident batch. The said order dated 03.05.2013 of the Tribunal was challenged by the Petitioner (Dr. Bijay Kumar Pattnaik) and others in O.A No.2604 of 2018 and the said Original Application

having been transferred to this Court was numbered as WPC(OA) No.2604 of 2018 for hearing the cases together.

I. FACTS OF THE CASE:

5. The Petitioner (Dr. Bijay Kumar Pattnaik) was qualified for the post of Asst. Professor in the Department of Ophthalmology and had applied pursuant to Advertisement No.4 of 2010-2011 and Advertisement No.8 issued by the OPSC for recruitment to the post of Assistant Professor on regular basis. Owing to series of litigation before the Tribunal and this Court, no regular recruitment was made and appointments were made on ad-hoc basis by the Director. The Petitioner was also selected and appointed as Ad hoc Assistant Professor in Ophthalmology and posted in S.C.B. Medical College and Hospital, Cuttack.

6. This Court vide judgment dated 24.04.2015 passed in W.P.(C) No.11985 of 2013 and batch of cases upheld the advertisement dated 20.08.2010 and advertisement dated 09.12.2011 and inter alia directed the State Government to conduct the selection process for Assistant Professor posted on Ad-hoc basis but in strict terms of the prevailing Rules and the selection process was to be concluded within a period of 2 months.

7. The aforesaid judgment of this Court was challenged before this Supreme Court in six different Special Leave Petitions. The Supreme Court vide a common order dated 10.08.2015 set-aside the final order passed by this Court and inter alia directed as under:

> *"(1) The Commission shall fill up the posts which had arisen or fallen vacant prior to 18.12.2013 in accordance with Rules, 2009.*
>
> *(2) The post which arose from 18.12.2013 onward will be filled up in accordance with Rules, 2013.*
>
> *(3) Advertisement shall be issued accordingly.*
>
> *(4) We make it clear that in both the kinds of advertisements, the Assistant Professor already working on ad- hoc/contractual basis as well as others shall have right to apply and be considered for the post."*

8. Pursuant to the direction dated 10.08.2015 passed by the Supreme Court, the OPSC published Advertisement No.15 of 2015-16 and the Petitioner (Dr. Bijay Kumar Pattnaik) who was otherwise eligible for the post of Asst. Professor applied in the prescribed manner. It is needles to mention here that the Petitioner had passed his post graduate course Ophthalmology and had also been appointed/ joined as Senior Resident in S.C.B. Medical College and Hospital, Cuttack in July, 2009. The Petitioner continued as Senior Resident till July, 2012 and acquired three years experience, which is a requirement for being appointed to the post of Assistant Professor.

9. Though selection in respect of other Departments were made pursuant to the advertisement, the appointment to the Department of Ophthalmology was stayed by the Odisha Administrative Tribunal in O.A. No.511(C) of 2016, O.A No.472 (C) of 2017 and O.A. No.291 (C) of 2017. The said original applications were dismissed by a common judgment dated 27.02.2019 by the Tribunal. However, against the order dated 27.02.2019, one Dr. Laxmidhar Jena filed W.P.(C) No.9805 and 9807 of 2019, one Dr. Sujata Padhi filed W.P.(C) No.9927 of 2019. Though an order of stay was granted in those Writ Petitions but later the interim order was modified/ clarified by this Court to the extent that if any appointment is made pursuant to the impugned advertisement, the same shall be subject to result of the Writ Petitions.

10. Accordingly, the OPSC proceeded in the matter of recruitment to the post of Asst. Professor in Ophthalmology and a notice No.5723/PSC dated 05.09.2019 was issued calling upon the candidates to appear the viva-voce test scheduled to be held on 16.09.2019. The Petitioner having Roll No.242 being eligible for the post was called to appear the test. Whereas the Opposite party No.3 bearing Roll No.245 was also called to appear the test along with the Petitioner even though his eligibility for such post was contested by the Petitioner, in view of the judgment of the Supreme Court and the OMES Rules, 2009. The Opposite Party No.3 had completed three years SR and had acquired the experience as a Senior Resident from 01.06.2014. Since, the Opposite Party No.3 had acquired experience as Senior Resident after 18.12.2013, his eligibility under Advertisement No.15 of 2015-16 was challenged in a series of Writ Petitions before this Court.

11. Being aggrieved by the decision of the OPSC, the Petitioner along with three other eligible candidates approached this Court in W.P.(C) No.16366 of 2019. This Court, having considered the facts and law was pleased to issue notice in the matter vide order dated 12.09.2019 passed in W.P.(C) No.16366 of 2019. The relevant portion of the order is quoted hereinbelow for ready reference:

> *"Heard Mr. S.K. Das, learned counsel for the petitioner and Mr. A.R. Das, learned Addl. Government Advocate appearing for the State opposite parties no:1 and 2.*
>
> *The petitioner files this writ application seeking to quash notice dated 05.09.2019 issued by opposite party no.2 under Annexure-5 so far as it relates to inviting opposite party no.3 to appear in the viva voce test for recruitment to the post of Asst. Professor in Ophthalmology in Group-A of Odisha Medical Education Services in pursuance of the advertisement no, 15 of 2015-16.*
>
> *Mr. S.K. Das, learned counsel for the petitioner has contended that opposite party no.3 is eligible to be considered for being appointed as Asst. Professor in Ophthalmology, as he has not acquired the required qualification by the cutoff date, Le., prior to 18.12.2013, thereby, he should not have been called upon to appear in the interview.*
>
> *In the opinion of this Court, the matter requires consideration.*
>
> *Hence, issue notice.*
>
> *Two extra copies of the writ petition be served within three days on Mr. A.R. Das, learned Addl. Government Advocate, who accepts notice for opposite parties no.1 and 2.*

Steps for issuance of notice to opposite party no.3 shall be taken by register post with A.D. with three days. Office shall send notice to the said opposite party fixing a short returnable date."

12. After receipt of the notice, the OPSC allowed the Opposite Party No.3 to appear the selection test and the result was also published by the OPSC declaring the Opposite Party No.3 as selected for the post of Asst. Professor in Ophthalmology pursuant to Advertisement No.15 of 2015-16. The position of the Opposite Party No.3 was at Sl. No.2 in the select list published by OPSC.

II. SUBMISSIONS ON BEHALF OF THE PETITIONERS:

13. It is submitted by the learned Counsel for the Petitioners that the order of the Supreme Court is unambiguous and clear with regard to the eligibility of the candidate for the post of Assistant Professor. In conclusion no.(1) the Supreme Court had directed the OPSC to fill up the posts which had fallen vacant prior to 18.12.2013 in accordance with OMES Rules, 2009. The present posts in question in Advertisement No.15 of 2015-16 are the posts vacant prior to 18.12.2013 and thereby, the recruitment was directed to be conducted as per the order of the Supreme Court in accordance with OMES Rules, 2009.

14. The eligibility criteria for the post of Asst. Professor requires three years experience as Senior Resident. From the aforesaid provision of law read with the direction of the Supreme Court, it is abundantly clear that only the person who has acquired three years experience as Senior Resident with P.G. Degree before 18.12.2013 can participate in the selection to the post of Asst. Professor so advertised under Advertisement No.15 of 2015-16. But, in the instant case, the Opposite Party No.3 did not have the requisite three years experience as Senior Resident before 18.12.2013. Therefore, he is not eligible for selection against the vacancies arising prior 18.12.2013. But, unfortunately and surprisingly, from the notice No.5723 dated 05.09.2019, it can be found that the Opposite Party No.3 had been invited to appear the recruitment test i.e. viva voce test along with the Petitioners on 16.09.2019.

15. It is further contended by Learned Counsel for the Petitioners that as per the OMES Rules, 2009 and the advertisement, the selection is to be made on the basis of the career assessment followed by viva voce test. But, in the instant case, since the Opposite Party No.3 was not eligible for the post due to lack of requisite experience by cutoff date 18.12.2013 as fixed by the Supreme Court, he should not have been called to appear the interview. Under such circumstances, the decision of the OPSC and the notice dated 05.09.2019 allowing the Opposite Party No.3 to participate in the process of selection along with the petitioners is illegal, arbitrary and clear violation of the judgment of the Supreme Court on the issue. Hence, the consequential selection of the Opposite Party No.3 in notice dated 21.09.2019 under Annexure-6 is illegal and liable to be set aside.

16. Moreover, the Opposite Party No.3 had filed O.A No.142 (C) of 2012 in the Tribunal to antedate his appointment as Senior Resident on 05.11.2009 in order to make him eligible to apply for the post of ad-hoc Asst. Professor in Ophthalmology. Such a prayer is absurd, unreasonable and illegal. In that original application, the present Petitioner (Dr. Bijay Kumar Pattnaik) was not made a party. However, the said case was allowed on 03.05.2013 by directing the Opposite Parties therein to allow the Opposite Party No.3 to apply for the post of Asst. Professor in any advertisement to be issued and to accept his candidature as that of the 2009 Senior Resident batch. It was further directed that the Opposite Party No.3 shall be permitted to appear in the selection to the post of Asst. Professor being the Senior Resident of the year 2009 batch and to grant the experience for the period he has not served as Senior Resident. By virtue of such order of the Tribunal, the Opposite Party No.3 had applied for the post of Ad hoc Assistant Professor in pursuance to an advertisement issued by the Director of Medical Education and Training (DMET). Therefore, when the modality of selection had already been decided by the Supreme Court vide order dated 10.08.2015, the OPSC could not have relaxed the qualification or experiences required for the purpose and allowed the Opposite Party No.3 to appear in the selection test. The Petitioner along with others have also assailed the order dated 03.05.2013 of the Tribunal passed in O.A. No.142 (C) of 2012 in T. No.248 of 2018 in order to preclude the Opposite Party No.3 to appear the test as per OMES Rules, 2009.

III. SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTIES

17. Per Contra, it is submitted by the learned Counsel for the Opposite Party No.2 that in response to the Advertisement No.15 of 2015-16, the Petitioner and Opposite Party No.3 had applied for recruitment to the post of Assistant Professor in Ophthalmology along with eleven others. While considering the candidature of the Opposite Party No.3, it was found that the Opposite Party No. 3 had done M.S in Ophthalmology in the year, 2009 from V.S.S. Medical College and Hospital, Burla. The experience certificate issued by Dean and Principal, S.C.B Medical College and Hospital, Cuttack indicated that he had served in the College as Senior Resident in the Department of Ophthalmology from 01.06.2011 to 19.06.2014. In terms of the advertisement, he was not having 3 years teaching experience as Senior Resident as on 18.12.2013. But the Opposite Party No. 3 had prayed to consider his case as per the orders of the Tribunal passed in O.A. NO. 142(C) of 2012 wherein it was directed that "the applicant (Opposite Party No.3) shall be entitled for all service benefits as Senior Resident with effect from the date all other similarly placed candidates who appeared in the 2009 selection test and joined the post keeping in view the fact that his belated joining as Senior Resident was because of the conduct of the authority concerned in conducting the counselling one day prior to the date fixed".

18. Considering the above facts, the Commission on 31.05.2016 had ordered that the period of Senior Residentship should be counted with effect from December, 2009 and he is continuing on ad hoc appointment. Hence, his candidature is to be accepted. So, the Opposite Party No.3 was called to the Viva Voce test held on 16.09.2019 along with the Petitioner and others and the result of the test was published on 21.09.2019 (Annexure-6 of the Writ Petition) in which the name of the Opposite Party No.3 was recommended. The Petitioner could not find place in the final select list due to his lesser merit in the career Assessment and Viva Voce marks taken together.

IV. COURT'S ANALYSIS AND REASONS:

19. In view of the order dated 03.05.2013 passed in OA No.142 (C) of 2012 of the Tribunal, the Opposite Party No.3 was allowed to participate in the process of selection and got selected and appointed. The same has been challenged by the present Petitioner and others.

20. Firstly, the bare perusal of the necessary section of the OMES Rules, 2009 is pertinent under which the advertisement was issued and the impugned selection to the post of Asst. Professor in Ophthalmology proceeded and appointment was made.

> *"**4. Eligibility criteria for the Post of Assistant Professor:***
>
> *(1) Selection shall be made through the Orissa Public Service Commission, from amongst the Tutors and Senior Residents having P.G., Degree in the same discipline with three years experience as such:*
>
> *Provided that, the recruitment may also be made from amongst the Assistant Professors in any other Speciality or Higher Speciality subject to the condition that seniority in the Speciality or Higher Speciality, as the case may be, shall be determined from the date of appointment in the new discipline in accordance with the placement given by the Commission, and accepted by the Government:*
>
> *Provided further that, in the Department of Anatomy, Physiology, Pharmacology and Microbiology, non-medical teachers may be appointed to the extent of 30% of the total number of posts and in the department of Bio-Chemistry; non-medical teachers may be appointed to the extent of 50% of the total number of posts.*
>
> *(2) No person shall be eligible to be considered for appointment as an Assistant Professor unless he has acquired a post graduate degree in the concerned Speciality or any other equivalent degree or qualification prescribed by the Council.*
>
> *(3) Selection of candidates shall be made with due regard to the candidates' academic attainment, teaching experience, aptitude, ability to teach, Performance Appraisal Report and such other modalities as may be decided by the Commission."*

21. In accordance to the OMES Rules, 2009, Advertisement No.15 of 2015-16 and the corrigendum thereof were issued. The relevant portion of the said Advertisement is mentioned hereunder:

> *"**METHOD OF SELECTION**: Selection of candidates shall be made as per the Odisha Medical Education Service (Method of Recruitment and Conditions of Service) Rues,*

2009 taking into account the academic career and performance of candidates in the Viva Voce Test.

ELIGIBILITY: *The following categories of persons are eligible to apply for the post of Assistant Professor in different disciplines (Speciality, Super Speciality and Dentistry):-*

(i) Those who has been working as Assistant Professor in the three Government Medical Colleges and SCB Dental College on Adhoc/Contractual basis since the period prior to 18.12.2013 in the concerned disciplines,

(ii) Assistant Professors of any other Speciality or Super Speciality appointed as such prior to 18.12.2013 subject to the condition that seniority in the new discipline shall be determined from the date of appointment in accordance with the placement given by the Commission, and accepted by Government;

(iii) Persons other than the Ad hoc/Contractual Assistant Professor who have acquired the following qualification and teaching experience from any Medical Institutions recognized by the MCI/DCI prior to 18.12.2013.

(a) Post Graduate Degree with three years of teaching experience as Tutor or Senior Resident in the concerned discipline from any medical institution recognized by the Medical Council of India (MCI)Dental Council of India(DCI) for the post of Assistant Professor in Speciality or Dentistry;

(b) D.M/M. Ch. Degree with three years of teaching experience as Tutor or Senior Resident in the concerned discipline from a MCI recognized institutions for the post of Assistant Professor in Super Speciality disciplines,

NOTE: "Teaching Experience means the period of service rendered in teaching in any Speciality in a medical college or teaching institution recognized by the MCUDCI to be reckoned from the date of appointment to the junior or senior teaching post."

22. From a bare perusal of the above mentioned portion of the Advertisement, it is clear that a candidate should have three year experience as S.R. in Ophthalmology in order to be eligible for appointment to the post of Asst. Professor in Ophthalmology. It is not a matter of dispute that Opposite Party No.3 did not have the said eligibility by 18.12.2013.

23. Additionally, the learned counsel for the Petitioners has also relied on the findings in the concluding paragraph of the judgement of the Supreme Court dated 10.08.2015 passed in Civil Appeal No. 6157-6158 of 2015, which runs as follows:

"Keeping in view the aforesaid position in mind, we set aside the final directions contained in the impugned judgement and substitute the same with the following directions:-

(1) The Commission shall fill up the posts which had arisen or fallen vacant prior to 18.12.2013 in accordance with Rules, 2009.

(2) The posts which arose from 18.12.2013 onwards will be filled up in accordance with Rules, 2013.

(3) Advertisement shall be issued accordingly.

(4) We make it clear that in both the kinds of advertisements, the Assistant Professor already working on ad hoc/contractual basis as well as others shall have right to apply and be considered for the post."

24. Learned Counsel for the Petitioners has further submitted that the Supreme Court while clarifying the position has categorically held that in order to make an application under any of these two rules i.e. (i) OMES Rules, 2009 or (ii) OMES Rules, 2013, the candidate has to qualify the eligibility criteria of the aforesaid Rules. The Supreme Court has also directed that Asst. Professors continuing on ad hoc or contractual basis can also be eligible to apply in both kind of advertisement as aforesaid, subject to fulfilling the criteria fixed in the OMES Rules not otherwise. In this case, the Opposite Party No.3 was appointed as Asst. Professor in Ophthalmology on ad hoc basis only vide Government Notification No.15961 dated 17.06.2014 and joined on 20.06.2014.

25. Accordingly, in order to come under the zone of consideration for selection to be appointed as an Asst. Professor in Ophthalmology in any of the Government Medical Colleges, the candidates should have post-graduate degree in the concern broad Specialty with three years teaching experience as SR before 18.12.2013.

26. However, the teaching experience certificate issued in favour of the Opposite Party No.3 as SR by the Dean and Principal, SCB Medical College and Hospital, Cuttack is for the period from 01.06.2011 to 19.06.2014. Therefore, the Opposite Party No.3 is ineligible for the post of Assistant Professor in Ophthalmology pursuant to the Advertisement No.15 of 2015-16.

27. A similar case has been confronted by the Supreme Court in ***Ravinder Sharma (Smt.) and Another V. State of Punjab and Ors.***[1] *wherein a Judges' Bench held;*

"12. The appellant was directly appointed. In such a case, the qualification must be either :

(i) A Graduate /Intermediate second class or,

(ii) Matric first class.

Admittedly, the appellant did not possess this qualification.That being so, the appointment is bad. The Commission recommended to the Government for relaxation of the qualification under Regulation 7 of the Regulations . The Government rejected that recommendation.

Where, therefore, the appointment was clearly against Regulation 7, it was liable to be set aside. That being so, no question of estoppels would ever arise. We respectfully agree with the view taken by the High Court.

28. Almost to the same effect is the decision of the Supreme Court in ***Mohd.Sartaj and Anr. V. State of U.P. and Others,***[2] wherein it was held that;

1. (1995) 1 SCC 138, **2.** JT 2006 (1) SC 331

"It is settled law the qualification should have been seen which the candidate possed on the date of recruitment and not at a later stage unless rules to that regard permit it. The minimum qualification prescribed under Rule 8 should be fulfilled on the date of recruitment. Equivalence of degree of Moallium-e-Urdu, Jamia Urdu Aligarh with that of B.T.C. in the year 1994 would not entail the benefit to the appellants on the date they were appointed. The appellants could not have been appointed to the post of Asstt. Teachers without having training required under Rule 8. That being the case, the appointments of the appellants were de hors the Rules and could not be treated to be continued. For the aforesaid reasons, we do not find any substance in the appeals and are, accordingly, dismissed."

29. Following the provisions contained in Rule-4 of the OMES Rules, 2009, the advertisement No.1 and the judgment of the Supreme Court read with the experience certificate of Senior Resident issued in favour of the Opposite Party No.3 in W.P.(C) No.17742 of 2019, the Opposite Party No.3 is ineligible for the post of Asst. Professor in Ophthalmology and, hence, his selection and appointment are liable to be quashed.

30. With the aforesaid observations, all the above mentioned three Writ Petitions are disposed of.

31. Interim order, if any, passed in any of the aforesaid Writ Petitions stands vacated.

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2023 (II) ILR - CUT- 536

MISS. SAVITRI RATHO, J.

CRLMC NO. 1990 OF 2023

BHASKAR NAYAK .....Petitioner

.V.

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 311 r/w Section 33(5) of the POCSO Act – Commission of offence U/s. 363/366/376 I.P.C. r/w Section 3(1)(w)(i)/3(2)(va) of the SC & ST (POA) Act and Section 4 & 8 of the POCSO Act. – The power and discretion of Trial Court while deciding a petition U/s. 311 of Cr.P.C – Indicated with reference to case laws. (Paras 15 -17)

Case Law Relied on and Referred to :-

1. (2022) 88 OCR 672 : Pidika Sambaru Vs. State of Odisha.
2. (2013) 14 SCC 461 : Rajaram Prasad Yadav Vs. State of Bihar.

For Petitioner : Mr. Sk. Zafarulla
For Opp. Party : Ms. S. Patnaik, A.G.A.

JUDGMENT Date of Judgment 05.05. 2023

MISS. SAVITRI RATHO, J.

This application under section 482 of the Code of Criminal Procedure has been filed by the petitioner, challenging the order dated 24.03.2023 passed by the learned ADJ -cum- Special Judge under POCSO Act, Nayagarh in T.R. Case No. 170 of 2022 arising out of Chandapur P.S. Case No. 111 of 2021 rejecting the application of the petitioner under Section 311 Cr.P.C. to recall the P.W.1 the victim- informant (herein after referred to as "*the victim"*) for cross examination.

BACKGROUND FACTS

2. The petitioner is facing trial for commission of offences punishable under Sections 363/366/376 of IPC read with Section 3(1)(w)(i)/3(2)(va) of the SC & ST (POA) Act and Sections 4 and 8 of the POCSO Act.

3. Chandpur P.S. Case No. 111 of 2021 was registered on.07.08.2021 on the basis of the detailed written report of the victim. Copy of the FIR has been annexed as **Annexure 1** to the petition.

4. The victim had been examined as P.W.1 in the trial on 17.01.2023 and was cross examined the same day. In her examination in chief, she has interalia stated that the accused had said that he would marry her on 05.08.2021 in the temple at Village – Giridharipur and to come to Ranpur on 05.08.2021. She was a minor then and being influenced by the accused, she went to Ranpur on 05.08.2021 with a pair of dress and her mobile phone without informing her parents. There the accused had sexual intercourse with her against her will after tying her hands and gagging her. When he removed the gag, she shouted and a cowherd came to the spot but the accused drove him away. The accused hit her when she asked about marriage and gave a cigarette burn on her right hand and threatened that if she told anybody about the incident, she would be thrown out from the house after being beaten. The accused told her that they would go to Visakhapatnam for their marriage after a few days and till then she should stay in her parents's house. She was taken to the house of her grandfather in village Godikala by one Chittaranjan Routray, friend of the accused. Her grandfather did not accept her so she went to village Boulabandha to her other grandfather's house from where she was rescued by her brother and brother in law. After she told them about the incident, a meeting was called in village Dakhina Parikheta. There the family members of the accused offered them cash to compromise the case. But when they refused, they were abused saying she could not be their daughter in law because of her low caste – dhoba. She lodged FIR on 7.08.2021 and was medically examined and her statement was recorded under Section – 164 Cr.P.C.

5. During cross examination, the victim has stated that she has studied upto +2 Arts and completed her study in December 2022 and got married on 20.11.2022 when she was eighteen years old . She had fifteen days relationship with the accused when the incident happened. She had been to the village of her sister on 20.06.2021 to attend a marriage scheduled for 21st and 22nd June 2021. She had love with the accused for one month and fifteen days. Copy of the deposition of the victim P.W.1 is annexed as **Annexure 2** to the petition.

6. On 24.03.2023, while the trial was continuing, an application under Section – 311 Cr.P.C. was filed on behalf of the petitioner for recalling the victim for further cross examination indicating fourteen questions and suggestions to be put to her and contending interalia that her further cross examination was necessary as even a suggestion that she was giving false evidence could not be put to her. Copy of the petition dated 24.03.2023 has been annexed as **Annexure 3** to the petition.

IMPUGNED ORDER

7. The learned trial court has referred to about 6-7 questions and suggestions and found them to be irrelevant and not required for a just decision in the case. Referring to Section – 33 (5) of the POCSO Act, it rejected the application stating that the questions and suggestions are not relevant for just adjudication of the case and posted the case to 06.04.2023 for evidence of other witnesses. Copy of the impugned order dated 24.03.2023 is annexed as **Annexure- 4**

SUBMSSIONS

8. Mr. Zafarulla, learned counsel for the petitioner submits that during investigation, the statements of the victim had been recorded under Section – 161 Cr.P.C. and Section 164 Cr.P.C., she had been examined as P.W.1 in the case on 17.01.2023 and cross-examined by the defence lawyer who was present. But various important questions and suggestions could not be put to the witness on that day. This was detected a few days while trial was in progress. So an application under Section 311 of the Cr.P.C. to recall her for further cross-examination along with the list of questions/suggestions proposed to be asked her was filed. But vide order dated 24.03.2023 this application has been rejected erroneously by the learned trial court, misinterpreting the provisions of Section 33(5) of the POCSO Act, holding that the Special Court shall ensure that *"the child is has not called repeatedly to testifying the Court"*. He submits that the victim had been called to the Court only on one day i.e. 17.01.2023 for her examination in chief and she had been cross-examined on that day. Section 311 Cr.P.C. provides that a witness can be recalled at any stage if it deemed necessary for a just decision in the case, and the petitioner had filed the application for recall promptly while recording of evidence was going on. He further submits that cross-examination of a witness is the valuable right of the accused and his application should have been allowed but it has been rejected on untenable and illegal grounds which is liable for interference. He relies on the decision in the case

of ***Pidika Sambaru vs. State of Odisha*** reported in ***(2022) 88 OCR 672*** in support of his submission.

9. Ms. S. Patnaik, learned Addl. Govt. Advocate opposed the said prayer stating that the victim who was a minor on the date of incident has in the meanwhile got married and recalling her for cross-examination will cause embarrassment to her and cause disruption in her marital life. She further submits that under guise of further cross examination, the victim cannot be permitted to disown what she has deposed in Court during her examination in chief. She has also submitted that a number of unnecessary questions and suggestions have been mentioned in the application for which the application has been rightly rejected by the learned trial Court.

STATUTORY PROVISIONS

10. The two provisions necessary for deciding this application are Section – 311 of the Code of Criminal Procedure and Section 33 (5) of the Prevention of Sexual Offences against Children Act, which are extracted below :

> ***Section -311. Power to summon material witness, or examine person present****. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case."*
>
> ***Section 33 (5) of the Prevention of Sexual Offences against Children Act.***
>
> ***Section 33 Procedure and powers of Special Court:***
>
> *1….*
> *2…..*
> *3…..*
> *4……*
> *5. The Special Court shall ensure that the child is not called repeatedly to testify in the Court.*

EARLIER DECISIONS

11. In the case of ***Rajaram Prasad Yadav vs. State of Bihar : (2013) 14 SCC 461***, a witness who had already deposed in favour of the accused wanted to resile from his earlier evidence and wanted to be re examined on account of an incident which had occurred after he had deposed in Court. His application had been rejected by the trial Court by a reasoned order. The High Court had set aside the order of the trial court which was challenged.While setting aside the order of the High Court the Supreme Court held as follows:

> *"14. A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance*

though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

After referring to its earlier decisions, it laid down the following principles to be kept in mind by the Courts :

"17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?

17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.
17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

It further held :

"28. We find that the factors noted by the trial Court and the conclusion arrived at by it were all appropriate and just, while deciding the application filed under Section 311 Cr.P.C. We do not find any bonafides in the application of the second respondent, while seeking the permission of the Court under Section 311 Cr.P.C. for his re-examination by merely alleging that on the earlier occasion he turned hostile under coercion and threat meted out to him at the instance of the appellant and other accused. It was quite apparent that the complaint, which emanated at the instance of the appellant based on the subsequent incident, which took place on 30.5.2007, which resulted in the registration of the FIR in Khizersarai Police Station in case No.78/2007, seem to have weighed with the second respondent to come forward with the present application under Section 311 Cr.P.C., by way of an afterthought…."

In the case of ***Pidika*** (supra), the accused was facing trial for commission of offences punishable under Sections 376(2)(n)/ 450/ 506 I.P.C read with Section 4 of POCSO Act. He had challenged the order passed by the learned trial court rejecting his application under Section 311 of the Code to recall P.Ws.1, 2 and 3 for their cross-examination. The witnesses examined by the prosecution could not be cross

examined as the accused was in custody and had not engaged any counsel. The application was rejected stating that there is a bar under Section 33(5) of the POCSO Act for recalling witnesses more particularly the victim of crime. Referring to various decisions of the Supreme Court and the Delhi High Court, this Court set aside the impugned order holding as follows :

> *"9. In that view of the aforesaid, this Court is of the view that cross-examination of the prosecution witnesses being an essential right of the accused, it is evident that non-cross-examination of the said witnesses will put the petitioner to prejudice. In such circumstances, it is not unjust to afford an opportunity to the petitioner to cross-examine P.Ws.1 to 3 by recalling them.*
>
> *10. In view of the peculiar facts and circumstances of the instant case, the CRLREV is disposed of directing that the learned Additional District and Sessions Judge (FTSC), Jeypore shall recall P.Ws.1 to 3 and the department shall make all endeavours to produce P.Ws.1 to 3 as early as possible for cross-examination by the petitioner preferably within a period of one month from the date of production of certified copy of this order. After giving the petitioner an opportunity to cross-examine P.Ws.1 to 3, the trial court shall proceed for expeditious disposal of the case. It is further clarified that the Court shall take steps to recall the child witness at one go without disturbing him/her again and again."*

ANALYSIS

12. Perusal of the evidence of the victim reveals that she has been examined on 17.01.2023 and after her examination in chief, the defence counsel has cross-examined her. She has given a detailed account of the conduct of the petitioner as well as her own reactions and actions during her examination in chief. In her cross examination apart from replying to the questions of the defence counsel , she has stated that she has got married in December 2022 when she was eighteen years old and she was aged seventeen years at the time of occurrence No suggestions have apparently been put to her. After perusal of her evidence in chief and the questions and suggestions which are mentioned in the application and the impugned order, I find that the learned trial court has referred to some of the questions and suggestions and found them unnecessary and peculiar, and rightly so. But there were other questions and suggestions in the petition which have not been referred to by the learned trial court.

13. From a careful reading of the provision of Section 311 Cr.P.C. and the decisions of the Supreme Court, it is apparent that the object of the provision is for achieving a just decision in the case and can be exercised at any stage.

14. From a careful reading of the provisions of Section 33 (5) of the POCSO Act, it is apparent that it is more in the nature of a safeguard than a bar. It provides that a child should not be called repeatedly to testify in the Court but it does not prohibit her / his recall.

15. Therefore while considering an application to recall a victim where the accused is facing trial for commission of offences under the POCSO Act, apart from the mandate of Section 33 (5) of the POCSO Act (protection of a child victim from harassment), the provisions of Section 311 Cr.P.C. (for a just decision in the case) have also to be kept in mind .The trial court has to be very cautious while considering such application and in deserving cases (where it finds that recall is necessary for a just decision in a case) can allow the application. It is therefore important that the questions sought to be asked to the victim should be indicated in the petition so that the trial court can examine the questions and suggestions and allow only those which have not been asked earlier to the witness or are irrelevant, as these will not be necessary for a just decision in the case but may frustrate the object behind Section – 311 Cr.P.C. by allowing a witness to resile from her evidence due to subsequent events or efflux of time.

CONCLUSION

16. Perusal of the questions reveal that a number of unnecessary and irrelevant suggestions and questions have been mentioned in the petition. Allowing such questions and suggestions to be put to the victim would amount to harassment and abuse of the process of the Court and would frustrate object behind the mandate of Section 33 (5) of the POCSO ACT. But at the same time in view of the nature of cross examination done on 17.01 2023, the petitioner may be prejudiced if he is not allowed to cross examine the victim further. Therefore, keeping the mandate of Section 33(5) of the POCSO Act in mind as well as the right of the accused to a fair trial, I think the interest of justice would be served, if the petitioner is permitted to file another application under Section 311 Cr.P.C. confining the questions and suggestions to essential aspects only, so that the same can be examined by the learned trial court.

17. If such an application is filed by 30.05.2023, the learned trial Court shall do well to examine the questions and suggestions in accordance with law and after examining the questions and suggestions, allow only those which it finds are relevent and necessary for a just decision in the trial. The trial court has the power and discretion to allow the questions it finds are necessary for a just decision in the case and reject the rest. It is also made clear that in the event, the learned trial court decides to allow such application and the informant P.W.1 is recalled, her cross examination should be completed on the same day without fail. The prosecution is also given the liberty to put questions to her if it is found necessary in the interest of justice on the same day, so that she is not unnecessarily detained in the Court.

18. The CRLMC is accordingly disposed of.

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2023 (II) ILR - CUT- 544

MISS. SAVITRI RATHO, J.

CRLMC NO. 3482 OF 2016

DEEPAK ORAM .....Petitioner

.V.

STATE OF ORISSA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – The petitioner had been arrested and released on bail during investigation of the case – He did not appear in the case on subsequent date for which NBW was issued against him – He remained at large for almost ten years – After acquittal of five Co-accused the petitioner filed discharge petition – The learned Trial Court dismissed the same – Whether, the Court should exercise extraordinary power U/s. 482 of Cr.PC ? – Held, No – The absconding accused who have scant regard for the legal process should not be shown any indulgence while exercising the extraordinary power U/s. 482 Cr.P.C. (Para 22)

Case Laws Relied on and Referred to :-

1. (2005) 30 OCR (SC) 201 : Central Bureau of Investigation Vs. Akhilesh Singh.
2. 2012 (II) OLR 961 : Premananda Sahu Vs. State of Orissa.
3. (2016) 63 OCR 87 : Satyaban Pradhan @ Kuna Pradhan Vs.State of Odisha.
4. 2005 2005 SCC OnLine Ker 605 : (2006) 1 KLT 552 (FB): 2006 Cri LJ 1922 (FB) Moosa Vs.Sub Inspector of Police on 23 December.
5. 2005 (II) OLR 386 : Kanhu Behera Vs.State of Orissa.
6. (2017) 68 OCR 945 : Hidayat Khan @ Hidayatullah Khan Vs. State of Orissa.

For Petitioner : Mr. L.N. Patel

For Opp. Party : Mr. J. Katikia, A.G.A.

JUDGMENT Date of Judgment : 06.06.2023

MISS. SAVITRI RATHO, J.

I have heard Mr. L.N. Patel, learned counsel for the petitioner and Mr. J. Katikia, learned Addl. Govt. Advocate for the State.

2. This application under Section - 482 of the Cr.P.C. had originally been filed on 27.10.2016 with a prayer for "*setting aside / quashing the order dated 29.09.2005 passed by the learned S.D.J.M., Sambalpur in C.T. Case No. 2058 of 2011 arising out of Jujumara P.S. Case No. 57 of 2004"*.

On 11.01.2017, M.C. No. 129 of 2017 for amendment was filed in Court for amendment of the prayer portion. It was allowed on the same day .The consolidated petition was filed in court on the same day.

On 13.01.2017, this Court directed the learned counsel for the petitioner to get the up-to-date ordersheet in C.T. Case No.2058 of 2011 from the Court of the Learned S.D.J.M., Sambalpur after which M.C. No. 509 of 2017 was filed on 01.03.2017 for amendment of the case number mentioned as "C.T. Case No 2058 of 2011" in paragraphs 1, 9, 13 and the prayer portion to "C.T. Case No.2058 (A) of 2004". Prayer for amendment/correction was allowed on 07.03.2017 and consolidated petition was filed in court on the same day.

3. In the consolidated application filed on 07.03.2017 of the Code of Criminal Procedure, prayer has been made for " *quashing the entire proceeding pending in the Court of the learned S.D.J.M., Sambalpur in C.T. Case No. 2058(A) of 2004 arising out of Jujumara P.S. Case No. 57 of 2004"*.

Copy of the order dated 29.09.2005 passed in C.T. Case No.2058 of 2011 has been annexed as Annexure-1. Copy of the FIR in Jujumara P.S. Case No.57 of 2004 has been annexed as Annexure-2. Copy of the judgment in S.T. Case No.183/76 of 2011 has been annexed as Annexure-3 and copies of the depositions of P.W.1 to P.W.6 have been annexed as Annexure-4 series to the CRLMC.

4. After 07.03.2017, the matter was listed after more than five years on 17.10.2022. It was adjourned on that day on the prayer of the learned counsel for the petitioner. It was again adjourned on 28.10.2022 and on 22.11.2022. On 8.12.2022, this Court found that although prayer had been made to quash the entire proceeding in C.T. Case No. 2058(A) of 2004 arising out of Jujumara P.S. Case No. 57 of 2004 but not a single document of such case had been filed nor had the uptodate ordersheet in C.T. Case No. 2058 of 2004 been filed inspite of order passed earlier. The petitioner was directed to produce the latest ordersheet in C.T. case No. 2058 (A) of 2004 and the case was posted to 13.12.2022. The matter was adjourned on 13.12.2022, 04.01.2023, 01.02.2023, 24.02.2023 and 04.05.2023 by the learned counsel for the petitioner.

5. On 04.05.2023 it was adjourned to 05.05.2023 as a last chance and the learned counsel for the petitioner had undertaken to produce the documents and complete his arguments on that day. As up-to-date order sheet in the case had not been filed, on 04.05.2023 this Court called for a report from the learned trial court through the Registry asking for the present status of the case. On 04.05.2023, the learned counsel for the petitioner had filed copies of the decisions relied on by him.

6. On 05.05.2023, a Memo had been filed by learned counsel for the petitioner where it was stated that a true copy of order dated 21.03.2023 had been filed but the document annexed to the Memo was a typed copy of the order dated 07.01.2023. As the learned counsel for the petitioner submitted that the date in the Memo was a typographical error, the Memo and the document were taken on record. Perusal of the typed copy of order dated 07.01.2023 reveals that S.T. case No. 14/33 of 2018 was posted for hearing on 07.01.2023 and on that day, accused Ganga Sahu and

Deepak Oram were present but no chargesheet witnesses were present and summons was directed to be sent to the witnesses and the case was posted to 21.01.2023 for hearing.

7. The report vide letter No. 477 dated 05.05.2023 of the in Charge Additional Sessions Judge (LR & LTV) Sambalpur sent via email was received on 05.05.2023 and taken on record. Perusal of the same reveals that case record had been committed to the Court of Sessions on 20.01.2018 and was registered as S.T. Case No 14 of 2018 and was received on transfer on 17.01.2020 in that Court and renumbered as S.T. Case No. 14/33 of 2018. A discharge petition had been filed by Ganga Sahu and Deepak Oram and the same was rejected on 22.03.2021 and charge had been framed in the case on 22.03.2021 and thereafter hearing of the case had commenced. Till 05.05.2023 no witness had been examined and the case had been adjourned to 06.05.2023 for hearing.

OTHER RELEVENT FACTS

8. It is apparent from the photocopies of order dated 11.08.2004 and order dated 05.04.2006 passed in C.T. No 2058 of 2004 by the learned SDJM Sambalpur, that the petitioner was released on bail pursuant to order passed by the Sessions Judge, Sambalpur and on 05.04.2006, he was not present in the Court which was in violation of conditions imposed in the bail order.

9. Five co-accused persons stood trial in ST Case No. 183/75 of 2011 in the Court of the learned Adhoc Additional District and Sessions Judge (Fast Track), Sambalpur. They were acquitted by judgment dated 28.04.2012.

10. Two years after the judgment dated 28.04.2012 was passed in S.T. Case No.183/75 of 2011, the petitioner filed this application under Section 482 of Cr.P.C., on 27.05.2016. During pendency of this CRLMC, he filed CRLMC No. 4169 of 2016 before this Court challenging the order dated 05.04.2006 passed by the learned SDJM Sambalpur. The application was disposed of by order dated 10.03.2017. Operative portion of the order corrected vide order dated 22.03.2017 passed in M.C. No. 650 of 2017 is extracted below:

> *"5. Considering the submissions of the learned counsel for the parties and in order to give an opportunity to the accused to face the trial , it is directed that in the event the petitioner surrenders before the learned SDJM Sambalpur in C.T.Case No. 2058 (A) of 2004 within a period of two weeks hence and moves for bail , he shall be released on bail on such terms and conditions as the learned magistrate may deem just and proper"…* (emphasis supplied)

PROSECUTION CASE

11. The brief facts of the prosecution case as per the FIR dated 26.07.2004 lodged at the Jujumara Police Station by one Saroj Kumar Oram, elder brother of deceased Panchanan Oram is that that in the night of 25/26.07.2004 at about 1.00 a.m. while he was on duty at Jhankarpali Check Gate, Kanta Oram, Shyam Oram, Bal Oram and Pramod Oram of his village came to him and told that in the same

night while they were present on NH-42 near Pahadi Dhaba along with the deceased Panchanan Oram, a Maruti van came from Rairakhol side at high speed and dashed against Panchanan Oram causing his instant death and fled away towards Sambalpur side. On the basis of such report, Jujumura P.S. Case No. 57 of 2004 registered under Sections 279/304-A of IPC against the driver of the unknown Maruti Van. During investigation, the I.O. A.S.I. visited the spot, examined the informant and some other witnesses, conducted inquest over the dead body of the deceased Panchanan Oram, prepared the inquest report and also sent the body for post mortem examination.

Further developments in the case (as narrated in the judgment in S.T. Case No. 183/75 of 2011 - Annexure 3) is that during further investigation by the I.O., it was ascertained that on 25.07.2004 at about 6.00 p.m. while the accused Balaram Oram Kanta Oram, Promod Kujur and Shyam Oram were sitting near the betel shop situated at Jhankarpali Check gate, the accused Durga @ Surubabu Munda along with the other accused came there in some vehicles and all of them planned to commit theft of aluminum wires from near the electric tower of Lambdunguri jungle of village Sitlenpali. To execute their plan they talked to the deceased Panchanan Oram who agreed to climb the tower, which was 100 feet in height to cut the electric line for a consideration amount of eight hundred rupees. Accordingly, when the deceased Panchanan Oram was cutting the high voltage electric line after climbing the tower he lost his balance and fell down on the ground sustaining severe injuries on his head and died at the spot. To give the death the colour of a vehicular accident, the accused persons shifted the dead body of the deceased Panchanan Oram towards NH-42 near Pahadi Dhaba, informed Saroj Kumar Oram, the bother of the deceased that the deceased has died due to an accident caused by an unknown Maruti Van. After completion of the investigation charge sheet dated 13.05.2005 was submitted under Sections 304/379/ 511/201/34 of IPC against nine accused persons including the present petitioner.

PROSECUTION WITNESSES

12. The prosecution has examined six witnesses, in S.T. Case No. 183/75 of 2011 to prove its case. P.W.1 is the informant and the elder brother of the deceased, P.W.2 was the local Sarpanch, P.W.3 is a witness to the inquest, P.W.4 is the medical officer who has conducted the post mortem examination over the dead body of the deceased and P.W.5 and P.W.6 are two local witnesses. Ext.1 to Ext.5 has also been tendered into evidence on behalf of the prosecution. On the other hand, no evidence, either oral or documentary has been adduced from the side of the defence. P.Ws.1, 2, 3, 5 and 6 did not support the prosecution case and were cross examined under Section 154 of the Evidence Act by the prosecution.

13. The learned trial Court found that the prosecution has failed to prove a case under Section 304/34 of IPC against the five accused persons who were facing trial and acquitted them.

SUBMISSIONS

14. Mr. L.N. Patel, learned counsel for the petitioner submits that FIR had been lodged against driver of unknown Maruti van and charge sheet has been submitted under Sections 304/379/511/201/34 of the IPC against nine persons including the petitioner, namely : 1) Shyam Oram, 2) Pramod Kujur, 3) Kanta Oram, 4) Balaram Oram. 5) Deepak Oram, 6) Ganga Sahu, 7) Kalachand @ Natua @ Ananda Saha, 8) Dharmendra Suna and 9) Durga @ Surubabu Munda. The petitioner had been granted bail on 11.08.2004 by the learned Sessions Judge, Sambalpur and during course of the trial, the petitioner could not appear before the Court below and on 05.04.2006 the learned Magistrate issued fresh NBW against him. The case against him was split up. The NBW issued against him has been quashed on 10.03.2017 in CRLMC No. 4169 of 2016 by this Court and he was directed to be released on bail. The five co-accused persons who faced trial have been acquitted vide judgment dated 30.04.2012. As the allegations against the acquitted persons and the petitioner is the same, no useful purpose will be served if the petitioner is made to face trial for which the proceedings against him should be quashed. In support of his submissions, he relies on the decisions of this Court in the case of ***Central Bureau of Investigation vs.Akhilesh Singh*** reported in ***(2005) 30 OCR (SC) 201***, ***Premananda Sahu vs. State of Orissa*** reported in ***2012 (II) OLR 961*** and ***Satyaban Pradhan @ Kuna Pradhan vs. State of Odisha*** reported in ***(2016) 63 OCR 87***.

15. Mr. J. Katikia, learned Addl. Govt. Advocate for the State has submitted that the present petitioner should not be shown any indulgence as he absconded for almost ten years since 2006 for which the case had to be split up and five co accused persons stood trial. Although the judgment of acquittal has been passed in 2014, he has approached this Court in the year 2016 but did not move this application for which during the pendency of this CRLMC, the case has been committed and to the Court of Sessions and charge has been framed against the petitioner and another co-accused and summons have been issued to the prosecution witnesses. As the petitioner has not come to the Court with clean hands, the CRLMC should be dismissed.

JUDICIAL PRONOUNCEMENTS

16. Apart from the decisions relied on by the learned counsel for the petitioner there are various other decisions of Supreme Court and different High Court on this point. It would be apposite to refer to them.

16.1 The Full bench of the Kerala High Court in the case of ***Moosa vs. Sub Inspector Of Police on 23 December, 2005*** reported in ***2005 SCC OnLine Ker 605 : (2006) 1 KLT 552 (FB): 2006 Cri LJ 1922 (FB)*** had been called upon to decide the question whether acquittal of a co-accused in a prior trial meant that the absconding accused who is subsequently tried is also entitled to an acquittal. After an exhaustive discussion of various decisions, the Full Bench summarized the legal position as follows:

". In the light of the above discussions, we may summarise the legal position as follows:

(i) The inherent powers of the High Court reserved and recognised under Section 482 of the Code of Criminal Procedure are sweeping and awesome; but such powers can be invoked only.

(a) to give effect to any order passed under the Code of Criminal Procedure or

(b) to prevent abuse of process of any court or

(c) otherwise to secure the ends of justice. Such powers may have to be exercised in an appropriate case to render justice even beyond the law.

(ii) Considering the nature, width and amplitude of the powers, it would be unnecessary, inexpedient and imprudent to prescribe or stipulate any straight jacket formula to identify cases where such powers can or need not be invoked.

(iii) But such powers can be invoked only in exceptional and rare cases and cannot be invoked as a matter of course. Where the Code provides methods and procedures to deal with the given situation, in the absence of exceptional and compelling reasons, invocation of the powers under Section 482 of the Code of Criminal Procedure is not necessary or permissible.

(iv) The fact that an accused can seek discharge/dropping of proceedings/acquittal under the relevant provisions of the Code in the normal course would certainly be a justifiable reason, in the absence of exceptional and compelling reasons, for the High Court not invoking its extraordinary powers under Section 482 Cr.P.C.

(v) In a trial against the co-accused the prosecution is not called upon, nor is it expected to adduce evidence against the absconding co-accused. In such trial the prosecution cannot be held to have the opportunity or obligation to adduce all evidence against the absconding co-accused. The fact that the testimony of a witness was not accepted or acted upon in the trial against the co-accused is no reason to assume that he shall not tender incriminating evidence or that his evidence will not be accepted in such later trial.

(vi) On the basis of materials placed before the High Court in proceedings under Section 482 of the Code of Criminal Procedure (which materials can be placed before the court in appropriate proceedings before the subordinate courts) such extraordinary inherent powers under Section 482 of the Code of Criminal Procedure cannot normally be invoked, unless such materials are of an unimpeachable nature which can be translated into legal evidence in the course of trial.

(vii) The judgment of acquittal of a co-accused in a criminal trial is not admissible under Sections 40 to 43 of the Evidence Act to bar the subsequent trial of the absconding co-accused and cannot hence be reckoned as a relevant document while considering the prayer to quash the proceedings under Section 482 Cr.P.C. Such judgments will be admissible only to show as to who were the parties in theearlier proceedings or the factum of acquittal.

(viii) While considering the prayer for invocation of the extraordinary inherent jurisdiction to serve the ends of justice, it is perfectly permissible for the court to consider the bona fides - the cleanliness of the hands of the seeker. If he is a fugitive from justice having absconded or jumped bail without sufficient reason or having waited for manipulation of hostility of witnesses, such improper conduct would certainly be a justifiable reason for the court to refuse to invoke its powers under Section 482 of the Code of Criminal Procedure.

(ix) The fact that the co-accused have secured acquittal in the trial against them in the absence of absconding co-accused cannot by itself be reckoned as a relevant circumstance while considering invocation of the powers under Section 482 of the Code of Criminal Procedure.

(x) A judgment not interparties cannot justify the invocation of the doctrine of issue estoppel under the Indian law at present.

(xi) Conscious of the above general principles, the High Court has to consider in each case whether the powers under Section 482 of the Code of Criminal Procedure deserve to be invoked. Judicial wisdom, sagacity, sobriety and circumspection have to be pressed into service to identify that rare and exceptional case where invocation of the extraordinary inherent jurisdiction is warranted to bring about premature termination of proceedings subject of course to the general principles narrated above.

16.2 In the case of ***Akhilesh Singh*** (supra), the respondent was one of the accused in a case Section 120 B of the IPC read with Section -302 IPC and Section 109 of the IPC. The allegations against him were that he had entered into a conspiracy with the main accused Dr Sanjay Singh and in furtherance of the common object of the conspiracy joined hands with the other accused to commit the murder of Syed Modi. He was admittedly not present in Lucknow on the date of occurrence but had been implicated on the basis of conspiracy with Dr Sanjay Singh, the original accused. Dr Sanjay Singh and Ms. Ameeta Kulkarni were discharged by the Sessions Court and this order was challenged unsuccessfully in the High Court as well as the Supreme Court by the C.B.I. After the order of discharge attained finality which was eight years after discharge of the main accused, Akhilesh Singh challenged the order framing charge against him in the High Court. The Single Judge allowed the application and quashed the charges against him. The Supreme Court did not interfere with the orders either on merits or on the ground that the accused had approached the High Court at a belated stage, holding that the order had attained finality only in 1994 after which the accused had approached the High Court by filing the application under Section 482 Cr.P.C. It further held that once the main accused who had hatched the conspiracy and who had the motive to kill the deceased had been discharged and the order had attained finality, the Single Judge was justified in holding that no useful purpose would be served by proceeding against the Respondent.

16.3 In the case of **Kanhu Behera v. State of Orissa, 2005 (II) OLR, 386**, this Court held as follows:-

"7. In the present case perusal of the case diary reveals that the petitioner is the uncle-in-law of the deceased and the only allegation against him in the FIR is that he along with other family members demanded additional dowry of Rs.5,000/-. Except this allegation, there is no other evidence against him. None of the witnesses except the informant has even taken the name of the petitioner in their statements before the I.O. Since there is no prima facie case against the petitioner for the alleged offences and the principal accused persons have already been acquitted after a full- fledged trial, continuance of the criminal proceeding against the petitioner would be undoubtedly abuse of the process of the Court as in the present facts and circumstances of the case, the chance of conviction of the petitioner is totally bleak."

16.4 In the case of **Premananda Sahu** (supra), this Court after referring to a number of decisions of the Supreme Court and this Court, quashed the proceedings after holding as follows :

"*16. In such situation, it will be always appropriate for the Court, for the ends of justice as well as to prevent abuse of the process of law to quash the proceeding against such absconding accused in its entirety by exercising the inherent power under section 482 Cr.P.C. It is needless to mention that the inherent powers of the High Court recognized under section 482 Cr.P.C. can always be used to prevent abuse of the process of any court or otherwise to secure the ends of justice and in appropriate cases, such power is required to be exercised to render justice even beyond law.*

17. In the above parameters, examining the facts of the present case, this Court is of the view that if the petitioner is required to face the trial, such trial would definitely be a futile exercise and will amount to an abuse of the process of law. This Court further finds that this is an appropriate case where the criminal proceeding against the petitioner is required to be quashed."

16.5 In the case of ***Satyaban Pradhan*** (supra) this Court has held as follows :

"9. In applying the principle laid down in the aforesaid cases, this Court finds that the main accused Madhab Chandra Sahoo, who had allegedly assaulted the informant on his face by means of a stone with an intention to commit his murder, has already been acquitted. The allegation against the present petitioner is that he caught hold of the informant and threw him on the ground and caught hold of him. When the prosecution could not prove the main allegation of commission of offence under section 307 of the I.P.C. against the co-accused and he has been acquitted of the charges under Section 232 Cr.P.C., there is hardly any possibility of proving the case under section 307/34 of the I.P.C. against the present petitioner. So, in this view of the material on record, this Court is of the opinion that it will be appropriate for this Court, for ends of justice and to prevent abuse the process of law to quash the proceeding against the absconding accused i.e. the petitioner in its entirety by exercising the inherent power under Section 482 of the Cr.P.C."

16.6 In the case of ***Hidayat Khan @ Hidayatullah Khan vs. State of Orissa*** reported in ***(2017) 68 Orissa Criminal Reports 945***, this Court has held as follows :

"7 …… There is no settled principle of law that whenever some accused persons are acquitted after facing trial or discharged by the trial Court, the co-accused should also be discharged or the proceeding in respect of such co-accused should also be quashed. Absconding accused cannot be given premium to frustrate the justice or to misuse the process of law by treating him at par with those accused who have shown respect for legal processes and have appeared and have not evaded their arrest ….."

16.7 In the case of ***Ajaya Kumar Sethi vs. 2018 SCC OnLine Ori 275*****,** this Court rejected the prayer of the co accused for quashing of the proceedings holding as follows**:**

" 14. It cannot be lost sight of the fact that it is a case of abduction and gang rape of a married lady. Even if the victim has not supported the prosecution case during trial of the co-accused persons, the possibility of the victim supporting the prosecution case during the course of trial of the petitioner cannot be ruled out. In that event, what would be the evidentiary value of the victim's statement after confrontation of her previous statement given while deposing as P.W.5 in case of the co-accused persons, is to be assessed by the learned trial Court. The victim may give explanation as to why she did not support the prosecution case while she was examined during trial of the co-accused persons in spite of the fact that she gave her statement before police as well as before the Magistrate implicating the accused

persons. The learned trial Court may accept such explanation. If the accused against whom accusation of abduction and gang rape is there remains as an absconder, watches the criminal proceeding in respect of the co-accused persons and after such proceeding ended in acquittal before the learned trial Court, he comes out of his hiding place either because he felt that it had become insecure or because he believed that his presence would sooner nor later be discovered by his pursuers or that in view of the acquittal of the co-accused persons, the prosecution case against him has become weak and the Court accepts his plea on the basis of the evidence adduced in the trial of the co-accused persons and quashes the proceeding against him then it would be a travesty of justice.

15. What will happen in future in the trial of the petitioner cannot certainly be predicted at this stage. This Court cannot assume a thing and quash the criminal proceeding against the petitioner on the ground that the co-accused persons have been acquitted as the victim has not supported the prosecution case. It cannot be said that the continuance of the criminal proceeding against the petitioner in spite of acquittal of the co-accused persons would be an abuse of process. When prima facie materials are there on record against the petitioner for commission of offences under which the charge sheet has been submitted, I am not inclined to invoke the inherent power under section 482 of Cr.P.C. to quash the impugned order and the criminal proceeding against the petitioner in G.R. Case No. 844 of 2003.".

DISCUSSION

17. On a conspectus of various decisions of the Supreme Court and different High Courts, it is apparent that there is no universal rule that in each and every case of acquittal of a co accused, the case against an absconding co accused has to be quashed. When the conclusion in the subsequent trial can be predicted with certainty that there is no chance of conviction of such co accused, valuable time and resources of the trial court should not be wasted for holding such a trial. There can also be no quarrel over the proposition that no useful purpose would be served by compelling an accused who face a trial subsequently, where the main accused who has been tried earlier, has been acquitted or discharged due to paucity or non availability of evidence and there is no chance of better evidence being adduced in the subsequent trial or where the evidence against all the accused persons is inseparable and indivisible. But for arriving at such a conclusion and quashing the proceedings, the High Court has to carefully examine the nature of evidence already adduced in the concluded trial and the nature of materials available against the absconding accused and the type of evidence which may or can be adduced against the accused who has not faced the trial. If the fate of the trial cannot be predicted with certainty, the proceeding should not be quashed.

18. In the trial of the co accused, the prosecution does not have the opportunity or obligation to adduce all evidence against the absconding co-accused. The fact that the testimony of a witness was not accepted or acted upon in that trial against the co-accused is no reason to assume that such witness shall not tender incriminating evidence or that his evidence will not be accepted in such later trial. It may be possible that a witness may not have come to the witness box or having come, may not have deposed against the accused persons in the trial for a variety of reasons including false implication, threats from absconding accused or failure to recollect

the incident. But this does not mean that such a witness will never implicate the accused in the subsequent trial. Similarly a witness who has not come to the witness box in the first trial, may appear and depose against an accused who has not faced the previous trial.

19. The High Court under Section 482 of the Code of Criminal Procedure, 1973, has the inherent power to pass such orders as may be considered necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Such power can also be exercised suo motu. But is has to be exercised sparingly and with circumspection. It is to be exercised *ex debito justitiae* to prevent abuse of process of court, but should not be exercised to stifle legitimate prosecution. (See ***State of Haryana vs. Bhajan Lal, reported in 1992 Supp (1) SCC 335 : (AIR 1992 SC 604 ;State of Karnataka vs. M. Devendrappa : (2002) 3 SCC 89; A.P. vs. Golconda Linga Swamy* : *2004 SCC (Crl.) 1805***. As the law in this regard has been settled in a catena of decisions of the Supreme Court including the aforesaid decisions and reiterated by this Court in a number of decisions, it is not necessary to make an elaborate discussion of the same. But it is necessary to state that it is also been decided in a number of decisions that the absconding accused who have scant regard for the legal process , should not be shown any indulgence while exercising the extraordinary power under Section – 482 Cr.P.C.

20. While considering the prayer of an accused for quashing of proceedings in exercise of power under Section – 482 Cr.P.C., where the chances of conviction of the accused is bleak, delay in approaching the Court may not be a ground for rejecting the application if the High Court is satisfied that allowing the proceedings to continue will be an exercise in futility and result in wastage of time and resources of the Court. But at the same time, it is open to the High Court to take into account, the bona fides and conduct of the accused who invokes exercise of the extraordinary power under Section 482 of the Cr.P.C. Whether such accused absconded or jumped bail, the reasons for doing so and whether he has waited "*for manipulation of hostility of witnesses*"? Conduct of an accused can be a justifiable reason for the court to refuse to exercise its power under Section 482 of the Code of Criminal Procedure.

21. By order dated 29.09.2005, after perusal of the chargesheet and connected papers, the learned SDJM, Sambalpur found a prima facie case against nine accused persons including the petitioner. But neither the copy of the chargesheet, nor the statements of the witnesses have been filed or produced for perusal of the Court for the purpose of comparison of the nature of allegations against them. The FIR as discussed earlier does not depict the prosecution case against the accused persons which was unearthed subsequently.

22. The petitioner had been arrested and released on bail during investigation of the case. As he did not appear in the case on a subsequent date i.e. 05.04.2006 NBW

of arrest was issued against him. He remained at large for almost ten years. Five co accused persons who faced trial were acquitted by judgment dated 30.04.2012.This CRLMC was filed on 27.10.2016. But while the CRLMC remained pending in this Court, the case was in respect of the petitioner and one Ganga Sahu in the Court below was committed to the Court of Sessions, application filed by them for discharge was dismissed and charge has been framed against them on 20.03.2021 and summons issued to the prosecution witnesses.

23. In view of the facts of the case and developments which have taken place during pendency of the CRLMC and the settled position of law as discussed above, I do not consider this to be a fit case to exercise power under Section – 482 of the Crl.P.C. and quash the proceedings in C.T. Case No.2058(A) of 2004.

24. The CRLMC is accordingly dismissed.

25. The observations made in this CRLMC application are for the purpose of adjudication of this application only. They should not be taken as an opinion on the merits of the case. The learned trial Court is required to decide the matter in accordance with law in the light of evidence which would be adduced by both sides.

26. The learned trial Court is requested to take steps to complete the trial within a period of six months of receipt of this judgment.

27. Registry is requested to communicate a copy of this judgment to the learned trial court forthwith.

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2023 (II) ILR - CUT- 554

M.S. SAHOO, J.

WPC(OAC) NO. 309 OF 2015

Dr. RUDRA NARAYAN PRADHAN …..…...Petitioner

.V.

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

ODISHA CIVIL SERVICES (PENSION) RULES, 1992 – Rule 46 – Petitioner was removed from service pursuant to a departmental proceeding under the provisions of the Odisha Civil Services (Classification,Control and Appeal) Rules,1962 for imputed misconduct of unauthorized absence from service – Whether, the petitioner is eligible for "compassionate allowances" as per Rule 46 of 1992 Rules ? – Held, Yes – The act of petitioner which resulted in infliction of punishment of removal from service was not an act of moral turpitude, not an act of dishonesty towards his employer, the act may be that of

insincerity but something sort of being unscrupulous or untrustworthy or that the petitioner cheated the employer – The act of delinquency was not aimed at deliberately harming a third party interest.

(Paras 15 -17)

Case Law Relied on and Referred to :-

1. (2014) 11 SCC 684 : Mahinder Dutt Sharma Vs. Union of India & Ors.

For Petitioner : M/s. Deba Narayan Patnaik
For Opp.Parties : Mr. Subhasis Patnaik, Addl. Govt. Adv.

JUDGMENT Date of Hearing & Judgment: 15.05.2023

M.S.SAHOO, J.

Introduction

The writ petition has been registered before this Court on 17.12.2021 after the Original Application (O.A.) was transferred from the learned Odisha Administrative Tribunal, Cuttack Bench,Cuttack upon abolition. The O.A. was filed by the petitioner seeking direction to quash the order dated 18.7.2013 (Annexure-4) passed by the opposite party no.1-Principal Secretary to Government of Odisha, Department of Health & Family Welfare rejecting the application of the petitioner for grant of *"compassionate allowance"* under the provisions of Rule 46 of the Odisha Civil Services (Pension) Rules, 1992 by taking into account the period of effective Government Service rendered by the petitioner.

2. The order dated 18.7.2013, impugned in the present petition as at Annexure-4 has been passed by O.P. No.1 pursuant to the order dated 15.4.2013 by this Court disposing of W.P.(C) No. 5902 of 2013. The said order dated 15.04.2013 was passed by a Division Bench of this Court, in a challenge laid by the petitioner herein, to the order dated 27.11.2012 rendered by the learned Odisha Administrative Tribunal, Cuttack in O.A. No.207(C) of 2003.

Brief facts

3. The petitioner, who started his service as a Medical Officer in the year 1977 filed O.A. No. 207(C) of 2003, before the learned O.A.T., challenging order of punishment of removal from service (dated 05.10.2003), imposed on him pursuant to a departmental proceeding under the provisions of the Odisha Civil Services (Classification, Control & Appeal) Rules, 1962 for imputed misconduct of unauthorized absence from service from 01.01.1988 till the date of removal from service 05.10.2003.

By order dated 27.11.2012, disposing of the O.A., the learned OAT, Cuttack had directed :

> *"Admittedly, the applicant joined Govt. service in the year 1977 and the impugned order of removal was passed in the year 2003. Thus, he was in Govt. service for twenty six years. His*

absence for the period from 1.10.1988 till the date of his removal (5.10.2003) has been treated as leave due and admissible. Therefore, while refusing to interfere with the impugned order of removal at Annexure-14, we observe that the respondent no.1 may consider sanction of compassionate allowance in favour of the applicant under Rule 46 of the O.C.S. (Pension) Rules, 1992 taking into account the period of effective Govt. service rendered by him."

4. In the challenge to the aforesaid order laid by the petitioner, a Division Bench of this Court disposing of the W.P.(C) No. 5902 of 2013 by order dated 15.01.2023, directed as follows :

"Though learned counsel for the petitioner submits that due to illness, the petitioner could not discharge his duties and repeatedly filed leave applications, but such leave applications were not available on record and only two applications were found by the Enquiry Officer. The disciplinary authority after giving second show cause to the petitioner, passed the order of removal from service treating the period of absence with effect from 1.10.1998 till the date of issue of the order as leave due and admissible. Considering the said order of punishment learned Tribunal has passed the aforesaid order. We do not find any reason to differ with the said finding nor do we find any error apparent on the face of the order of the learned Tribunal for being interfered with by issuance of a writ of certiorari.We are sure that as directed by the learned Tribunal, which order is confirmed by us, the opposite party no.1 will consider sanction of compassionate allowance in favour of the petitioner under Rule 46 of the O.C.S. (Pension) Rules 1992 by taking into account the period of effective Government service rendered by him."

Submissions

5. It is averred by the petitioner in the petition as well as submitted by learned counsel that the order as at Annexure-4 passed by the opposite party no.1 is not sustainable in law in view of the fact that the said order has been passed without consideration of the relevant materials on record, the same is illegal and arbitrary.

6. When the matter was taken up on 08.05.2023 learned counsel for the petitioner referred to the judgment of the Hon'ble Supreme Court rendered in ***Mahinder Dutt Sharma v.Union of India and others; (2014) 11 SCC 684*** to submit that the impugned order dated 18.07.2013 passed by the opposite party no.1 does not satisfy the criteria laid down by the Hon'ble Supreme Court in paragraph-14 of the judgment. The learned counsel for State on 08.05.2023 was asked to obtain up-to-date instructions.

7. Referring to the counter filed, on behalf of the opposite party no.1, the learned Additional Government Advocate relying on paragraphs-6, 7, 8,11 and 12 of the counter affidavit supports the order as at Annexure-4, by which, the claim of the petitioner seeking *compassionate allowance* under Rule-46 of the OCS (Pension) Rules 1992 was rejected.

The said paragraphs 6, 7, 8, 11 & 12 of the counter are quoted herein :

"6. That in pursuance of the above directions of the Hon'ble High Court as well as learned Tribunal, the issues relating to sanction of compassionate allowance in favour of the applicant has been thoroughly examined basing on the averments made in the O.A. and Writ

Petition keeping in view the observation made by the Hon'ble Courts in their orders following the norms made under Rule-46 of Odisha Civil Services (Pension) Rule, 1992 and accordingly, a Government decision was communicated to the applicant vide this Department Order No.20835/H dated 18.07.2013 (Annexure-4 of the writ petition)

7. That it is humbly submitted that the applicant was proceeded departmentally under Rule-15 of OCS (CCA) Rules, 1962 vide Government Order No.4791/H dated 22.12.1999 basing on the charges like unauthorized and willful absence, disobedience of higher authority, gross misconduct and unwilling officer and not interested to serve any more.

8. That it is humbly submitted that as the above charges were grave in nature, the Enquiry Officer enquired the matter and suggested to remove the applicant from Government service as per Codal provision since he remained absent for more than five years. Basing on the suggestion of the Enquiry Officer, gravity of the charges and records of proceedings, the applicant was removed from Government service vide Government Order dated 05.06.2003 after following legal formalities of service rules.

xxx xxx xxx

11. That, it is humbly submitted that, the applicant is not deserving of special consideration like compassionate allowance as he has been removed from government service on conclusion of a departmental proceeding initiated against him under Rule-15 of OCS (CCA) Rules basing on serious charges like unauthorized and willful absence, disobedience of higher authority, gross misconduct and unwilling officer and not interest to serve any more.

12. That, it is humbly submitted that, the grievance of the applicant has been rightly examined by the Government Order dated 18.07.2013 keeping in view the observation of the Hon'ble High Court and earlier order of the learned Tribunal under Rule 46 of OCS (Pension) Rules, 1992 taking into account the effective period of service rendered by him. The learned Tribunal in their earlier O.A. passed order clarifying therein that the delinquency of un-authorized absence from duty continued from the year 1988 till 1999 and thus it was one of the continuing process. In view of the above, the applicant does not deserve to avail the benefit of compassionate allowance provided under Rule-46 of OCS (Pension) Rules, 1992."

Analysis and Conclusion :

8. The learned counsel for the parties are heard at length. The submissions as well as the pleadings of the respective parties, are taken note of.

9. The statutory provision involved, is Rule 46 of the OCS (Pension) Rule 1992, which provides as follows :

"*46. Compassionate Allowance-*

(1) A Government servant who is dismissed or removed from service shall forfeit his pension and gratuity:

Provided that the authority competent to dismiss or remove him from service may, if the case is deserving of special consideration, sanction a compassionate allowance not exceeding two-third of pension or gratuity or both which would have been admissible to him if he had retired on compensation pension.

(2) A compassionate allowance sanctioned under the proviso to sub-rule (I) shall not be less than the amount of minimum pension admissible.

(3) Onreceipt of the order of the competent authority removing an officer from service for misconduct, in solvency, or in efficiency the Head of Office, if he proposes to grant compassionate allowance shall fill in the application form for pension and send the same to the Accountant-General for necessary action after due concurrence of Finance Department. The Head of Office shall not wait for receiving the application from the Officer."

10. It is not disputed that the procedure adopted by the petitioner-employee applying for compassionate allowance has been valid. However, upon consideration of the merits of the claim of the petitioner to get compassionate allowance, the claim has been rejected for the reasons as indicated in the impugned order dated 18.07.2013 under Annexure-4.

In the counter affidavit filed by opposite party no.1 the reasons have been stated for rejecting the claim and the learned Additional Government Advocate has referred to the said reasons.

In the order dated 18.7.2013 (Annexure-4), the following reasons have been stated for rejecting the claim of the petitioner:

"5.In the instant case the provision of Rule-46 of OCS (Pension) Rule 1992 is not applicable to the applicant as he has not been retired from Govt. service on compensation pension.

6. Moreover, the applicant is not deserving of special consideration like compassionate allowance as he has been removed from Govt. service on conclusion of a departmental proceeding initiated against him under Rule, 15 of OCS (CC&A) Rule basing on serious charges like unauthorized and willful absence, disobedience of higher authority, gross misconduct and unwilling officer and not interested to serve any more.

7. As regards observation of the Hon'ble High Court to consider the case of petitioner under Rule 46 of OCS (Pension) Rule 1992 taking into account the period of effective Govt. service rendered by him, it may be clarified here that the Hon'ble Tribunal categorically observed that the delinquency of unauthorized absence from duty continued from the year 1988 till the year 1999 and thus it was one of the continuing nature.

The Hon'ble Tribunal, therefore, opined that the plea of limitation, taken by the applicant, is not tenable and each day of unauthorized absence gave rise to a fresh cause of action for initiation of the departmental proceeding against him.

Therefore, the applicant is not deserving to avail benefit of compassionate allowance provided under Rule 46 of Odisha Civil Services (Pension) Rules, 1992.

In view of the above, allowing the benefit of compassionate allowance in favour of the applicant is considered and the same is not tenable and accordingly rejected being devoid of merit."

11. In view of the specific submission of the learned counsel for the petitioner regarding the impugned order being contrary to the judgment rendered in ***Mahinder Dutt Sharma*** *(supra)*, the learned Additional Government Advocate, in response, referring to the counter filed by OPs., fairly states the legal proposition that the reasons for rejection of the petitioner's claim for compassionate allowance, cannot be further fortified by fresh reasons at this stage, apart from what has been stated in the Annexure-4 itself.

12. In the case of ***Mahinder Dutt Sharma*** *(supra),*the appellant before the Hon'ble Supreme Court, Mr. Sharma was holding the post of constable in Delhi Armed Police and after rendering service for about 24 years was departmentally proceeded for willful and unauthorized absence from duty for a period of about 321 days. The departmental proceeding culminated in order of punishment of dismissal from service and the period of absence was to be treated as leave without pay. After challenging the order of punishment in rounds of litigation Mr. Sharma withdrew with liberty to seek grant of compassionate allowance from the appropriate authority for the period of effective service rendered by him. His claim for grant of compassionate allowance under Rule-41 of the Central Civil Services (Pension) Rules, 1972 was rejected by the authority which was challenged before the learned Central Administrative Tribunal by filing an Original Application. The learned Tribunal declined to interfere on grounds of delay in approaching the authority/ Tribunal as well as observing that there being no extenuating circumstances for grant of *compassionate allowance* under Rule-41 of the C.C.S. Pension Rules. The order of the Tribunal was challenged by Mr. Sharma by filing writ petition before the Hon'ble High Court of Delhi which was dismissed by the Hon'ble High Court observing that the petitioner could not make out a case for grant of *compassionate allowance* though one may sympathise with the petitioner and the discretion exercised by the authorities cannot be said to have been vitiated by any extraneous or irrelevant factors. Challenging the order passed by Hon'ble Delhi High Court, the petitioner Mr. Sharma filed SLP which was allowed.

13. It would be apt to quote the Rule 41 of the CCS (Pension) Rules, 1972 :

> *"**41.Compassionate allowance**.—(1) A government servant who is dismissed or removed from service shall forfeit his pension and gratuity:*
>
> *Provided that the authority competent to dismiss or remove him from service may, if the case is deserving of special consideration, sanction a compassionate allowance not exceeding two-thirds of pension or gratuity or both which would have been admissible to him if he had retired on compensation pension.*
>
> *(2) A compassionate allowance sanctioned under the proviso to sub-rule (1) shall not be less than the amount of rupees three hundred and seventy-five per mensem."*

On perusal of the Rule-46 of Rules 1992 and Rule-41 of Rules 1972 it would be apparent that the Rules are almost similarly worded and are applicable to similar fact situation.

14. In the case ***Mahinder Dutt Sharma*** *(supra)* the Hon'ble Supreme Court at paragraph-14 of SCC while considering the *parimateria* provision under Rule 41 of the Central Civil Services (Pension) Rules, 1972 have summed up the principles that would be followed while considering the application for *compassionate allowance*. The relevant paragraphs, i.e. paragraphs 14, 15 & 17 (of SCC) of the Hon'ble Supreme Court's judgment those are also relied on by this Court are quoted herein :

14. *In our considered view, the determination of a claim based under Rule 41 of the Pension Rules, 1972 will necessarily have to be sieved through an evaluation based on a series of distinct considerations, some of which are illustratively being expressed hereunder:*

14.1. *(i) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, an act of moral turpitude? An act of moral turpitude is an act which has an inherent quality of baseness, vileness or depravity with respect to a concerned person's duty towards another, or to the society in general. In criminal law, the phrase is used generally to describe a conduct which is contrary to community standards of justice, honesty and good morals. Any debauched, degenerate or evil behaviour would fall in this classification.*

14.2. *(ii) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, an act of dishonesty towards his employer? Such an action of dishonesty would emerge from a behaviour which is untrustworthy, deceitful and insincere, resulting in prejudice to the interest of the employer. This could emerge from an unscrupulous, untrustworthy and crooked behaviour, which aims at cheating the employer. Such an act may or may not be aimed at personal gains. It may be aimed at benefiting a third party to the prejudice of the employer.*

14.3. *(iii) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, an act designed for personal gains from the employer? This would involve acts of corruption, fraud or personal profiteering, through impermissible means by misusing the responsibility bestowed in an employee by an employer. And would include acts of double-dealing or racketeering, or the like. Such an act may or may not be aimed at causing loss to the employer. The benefit of the delinquent could be at the peril and prejudice of a third party.*

14.4. *(iv) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, aimed at deliberately harming a third-party interest? Situations hereunder would emerge out of acts of disservice causing damage, loss, prejudice or even anguish to third parties, on account of misuse of the employee's authority to control, regulate or administer activities of third parties. Actions of dealing with similar issues differently, or in an iniquitous manner, by adopting double standards or by foul play, would fall in this category.*

14.5. *(v) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, otherwise unacceptable, for the conferment of the benefits flowing out of Rule 41 of the Pension Rules, 1972? Illustratively, any action which is considered as depraved, perverted, wicked, treacherous or the like, as would disentitle an employee for such compassionate consideration.*

15. *While evaluating the claim of a dismissed (or removed from service) employee, for the grant of compassionate allowance, the rule postulates a window for hope, "… if the case is deserving of special consideration…". Where the delinquency leading to punishment falls in one of the five classifications delineated in the foregoing paragraph, it would ordinarily disentitle an employee from such compassionate consideration. An employee who falls in any of the above five categories, would therefore ordinarily not be a deserving employee, for the grant of compassionate allowance. In a situation like this, the deserving special consideration, will have to be momentous. It is not possible to effectively define the term "deserving special consideration" used in Rule 41 of the*

Pension Rules, 1972. We shall therefore not endeavour any attempt in the said direction. Circumstances deserving special consideration, would ordinarily be unlimited, keeping in mind unlimited variability of human environment. But surely where the delinquency levelled and proved against the punished employee, does not fall in the realm of misdemeanour illustratively categorised in the foregoing paragraph, it would be easier than otherwise, to extend such benefit to the punished employee,of course, subject to availability of factors of compassionate consideration.

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17. *We shall only endeavour to delineate a few of the considerations which ought to have been considered, in the present case for determining whether or not, the appellant was entitled to compassionate allowance under Rule 41 of the Pension Rules, 1972. In this behalf it may be noticed that the appellant had rendered about 24 years of service prior to his dismissal from service, vide order dated 17-5-1996. During the above tenure, he was granted 34 good entries, including 2 commendation rolls awarded by the Commissioner of Police, 4 commendation certificates awarded by the Additional Commissioner of Police and 28 commendation cards awarded by the Deputy Commissioner of Police. Even though the charge proved against the appellant pertains to his unauthorised and wilful absence from service, there is nothing on the record to reveal, that his absence from service was aimed at seeking better pastures elsewhere. No such inference is even otherwise possible, keeping in view the length of service rendered by the appellant. There is no denial that the appellant was involved, during the period under consideration, in a criminal case, from which he was subsequently acquitted. One of his brothers died, and thereafter, his father and brother's wife also passed away. His own wife was suffering from cancer. All these tribulations led to his own ill-health, decipherable from the fact that he was suffering from hypertension and diabetes. It is these considerations, which ought to have been evaluated by the competent authority, to determine whether the claim of the appellant deserved special consideration, as would entitle him to compassionate allowance under Rule 41 of the Pension Rules, 1972."*

15. In considered opinion of this Court, the order dated 17.07.2013 issued on 18.7.2013 (Annexure-4) rejecting the claim of the petitioner is not in terms of the paragraphs 14, 15 & 17 of the judgment of the Hon'ble Supreme Court in ***Mahinder Dutt Sharma*** *(supra)*.

The act of delinquency attributed to the petitioner, after 11 years of service as a Medical Officer, is unauthorized absence from service and the period of absence has been treated to be leave due.

Based on the pleadings and materials brought before this Court, it has to be observed that the determination of the claim made by the petitioner under Rule 46 of the OCS (Pension) Rules, 1992 has not been sieved through an evaluation based on series of distinct considerations as illustratively expressed by the Hon'ble Supreme Court in ***Mahinder Dutt Sharma*** *(supra)*. The act of the petitioner herein, which resulted in infliction of punishment of removal from service was not an act of moral turpitude, not an act of dishonesty towards his employer, the act may be that of insincerity but something sort of being unscrupulous or untrustworthy or that the petitioner cheated the employer.The act of delinquency was not aimed at deliberately harming a third party interest.

16. This Court is of the view that by applying the criterion illustratively expressed by the Hon'ble Supreme Court in paragraph-14 of ***Mahinder Dutt Sharma*** *(supra),* there can be no doubt that the order of dismissal from service of the petitioner from the post was justified, but for determining the question of grant of *compassionate allowance*, the act of delinquency has to be within the parameters laid down in rule 46 of the OCS (Pension) Rules, 1992. The reasoning given in the order dated 17.07.2013 rejecting the petitioner's request for *compassionate allowance* fails judicial scrutiny, on applying the tests as enumerated in paragraph-14 of the judgment rendered by the Hon'ble Supreme Court.

17. Accordingly, the order dated 17.07.2013 issued on 18.07.2013 (Annexure-4) is set aside. The matter is remitted back to the authority directing to take a decision afresh; considering all the relevant materialson record by applying/following the tests/criteria/ guidelines as laid by the Hon'ble Supreme Court in paragraphs 14 (14.1 to 14.5), 15 and 17 of ***Mahinder Dutt Sharma*** *(supra).* It is further directed the decision shall be taken by the authority within two months from the date of communication of this judgment by the petitioner or by any other method.

Considering the fact that the petitioner would be about 75 years of age now, if the authority by applying the principles laid down in ***Mahinder Dutt Sharma*** *(supra)* decides to grant *compassionate allowance* in terms of Rule 46 of OCS (Pension) Rules, 1992, the procedure as contemplated under Rule 46 for grant of *compassionate allowance* shall be completed and the amount shall be calculated/determined within one month of such decision of the authority and the arrears shall be released along with the current dues within one month from the date determination of the amount.

The writ petition is allowed with the aforesaid directions. However, there shall be no order as to costs.

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2023 (II) ILR - CUT- 562

R.K. PATTANAIK, J.

CRLMC NO. 2089 OF 2017

BABU CHARAN PATRA .....Petitioner

.V.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – The informant lodge FIR against petitioner after two months of the death of his daughter who committed suicide – Charge sheet was submitted U/s. 498-A & 306 of I.P.C – When the evidence collected during enquiry in

P.S. UD case after the suicidal death, the informant deposed during the enquiry that she does not suspect the petitioner – Whether the proceeding should be interfered with exercising the inherent jurisdiction? – Held, Yes. – When the evidence collected during enquiry in UD case is diabolically opposite and run contrary to the clam of informant it has to be interfered with exercising the inherent jurisdiction. (Para 7)

Case Law Relied on and Referred to :-
1. AIR 1992 SC 604 : State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors.

For Petitioner : Mr. Debasis Sarangi

For Opp. Parties :Mr. Pradip Ku. Rout, AGA for O.P. No.1
Ms. Puspamitra Mohapatra, for O.P. No.2

JUDGMENT Date of Judgment:28.03.2023

R.K. PATTANAIK, J.

1. The petitioner has challenged the criminal proceeding in connection with G.R. Case No.205 of 2016 pending in the file of learned S.D.J.M. Gunupur on the ground that the same is a result of a vexatious prosecution initiated with an intention and oblique motive to harass him and therefore, it is liable to be interfered with and quashed in exercise of the Court's inherent jurisdiction under Section 482 Cr.P.C.

2. An FIR was lodged by the informant on 12th October, 2016 after the death of her daughter on 2nd August, 2016 with the allegation that the petitioner husband and in-laws to be responsible for her death. In connection therewith, Gunupur P.S. Case No.104 was registered under Section 304-B IPC and other allied offences and finally chargesheet was submitted under Sections 498-A and 306 IPC against the petitioner alone, whereupon, the learned S.D.J.M. Gunupur took cognizance of the said offences by order dated 5th June, 2017 under Annexure-4.

3. Heard Mr. Sarangi, learned counsel for the petitioner, Mr. Rout, learned AGA for the State opposite party No.1 and Ms. Mohapatra, learned counsel for the informant opposite party No.2.

4. Mr. Sarangi, learned counsel for the petitioner submits that the informant's daughter died in the month of August, 2016 and almost after two months, the FIR was lodged i.e. 12th October, 2016 with the false allegations therein and it was only on account of a dispute over the custody of the petitioner's son. It is further submitted that immediately after the suicidal death of the victim, Gunupur P.S. UD Case No.12 dated 3rd August, 2016 was registered and in course of inquiry, the involvement of the petitioner was neither alleged by the informant and others nor suspected and after two months, the report was lodged with false allegations claiming that the petitioner and her in-laws to be responsible for the incident. While contending so, Mr. Sarangi refers to the statements of the witnesses and of the

informant recorded under Section 161 Cr.P.C. in UD proceeding to satisfy the Court that nothing adverse was alleged against the petitioner.

5. Mr. Rout, learned AGA and Ms. Mohaptra, learned counsel for opposite party No.2 would submit that since ill-treatment and cruelty has been alleged and proved with the petitioner being chargesheeted for having abetted the death of the deceased, the learned court below rightly considering the materials received along with the chargesheet took cognizance of the offences and therefore, the criminal proceeding vis-à-vis the petitioner is absolutely justified and in accordance with law.

6. Gone through the statements of the witnesses recorded under Section 161 Cr.P.C. during enquiry and in course of Gunupur P.S. UD Case No.12 and it is made to reveal that the daughter of the informant committed suicide by hanging and none of her family members including the informant suspected the involvement of the petitioner and even disclosed that both the spouses had never quarrelled nor anyone else was involved. In fact, the informant deposed during the enquiry that she does not suspect the petitioner or any outsider for the alleged death of her daughter. The statements of other witnesses do not point any finger against the petitioner as it is similar to the version of the informant. In that case, what led to the lodging of the report which is after about two months is not transpired from the record. On a reading of the FIR though the petitioner and his family was held to be responsible but the State failed to bring any such material submitted along with the chargesheet to show that the petitioner to be responsible for the alleged death of the deceased. No reasonable explanation is coming forth to satisfy the Court as to why the informant turned hostile to the petitioner and contrary to her statement before the local police in the UD case lodged the FIR. If immediately after the death of the victim, during the UD proceeding, nothing adverse was alleged against the petitioner, in the considered view of the Court, suspicion looms large on the claim of the informant, who almost after two months, lodged the FIR and held the petitioner and his family to be responsible. The explanation that the informant was sick and hence the delay in reporting the matter to the police is quite unusual and absurd as any other member of her family could have lodged the FIR.

7. Mr. Sarangi, learned counsel for the petitioner submits that the crux of the dispute is over the custody of the child born to the petitioner and the deceased which is also revealed from the FIR. It is contended that the petitioner's son is presently in the custody of the informant which is opposed to the petitioner and in that connection, both the sides are in a dispute which is the only reason behind lodging of the FIR. The informant alleged in the FIR that the petitioner is pressurizing and threatening her family while demanding custody of the child and also to kill her which, in the considered view of the Court, does appear to be improbable especially in the peculiar facts and circumstances of the case. The contention of Mr. Sarangi, learned counsel for the petitioner, who refers to the materials collected during enquiry in UD case, rather appears probable which is to the effect that the FIR has

been lodged to retaliate the petitioner over the custody of the child so demanded by him. Furthermore, the explanation in reporting the matter to the police with a delay of two months is strongly suspectful as against the evidence in UD case which never alleged anything adverse against the petitioner. So, therefore, the inevitable conclusion is that the criminal prosecution has been thrust upon the petitioner with a chargesheet filed when the evidence collected during enquiry in UD case immediately preceding the investigation is diabolically opposite and runs contrary to the claim of the informant and hence, it has to be interfered with exercising inherent jurisdiction keeping in view the settled principles of law as enunciated by the Apex Court in **State of Haryana and others Vrs. Ch. Bhajan Lal and others AIR 1992 SC 604** for having fulfilled one of the conditions about the prosecution to have been levied with vindictiveness or an ulterior motive in order to wreak vengeance against him.

8. Accordingly, it is ordered.

9. In the result, the CRLMC stands allowed. Consequently, criminal proceeding in connection with G.R. Case No.205 of 2016 pending in the file of learned S.D.J.M. Gunupur is hereby quashed for the reasons discussed herein above.

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2023 (II) ILR - CUT- 565

R.K. PATTANAIK, J.

CRLMC NO. 2215 OF 2015

UTTAM KUMAR RAY .....Petitioner

.V.

M/s. KNOWLEDGE INFRASTRUCTURE SYSTEM PVT. LTD. .....Opp. Party

NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 & 141 – Whether the proprietor concern is required to be arrayed as a separate party/accused in a proceeding U/s. 138 of the N.I. Act? – Held, Not required – The settled position of law is that Section 141 of the N.I. Act is applicable in case of a company or a firm and not proprietary concern. (Para 6)

Case Laws Relied on and Referred to :-

1. AIR 2007SC1634 : Raghu Lakshminarayan Vs. Fine Tubes.
2. MANU/DE/4881/2012 : M.M. Lal Vs. State NCT Delhi and Ors.
3. (2020) ILR 11 All 215 : Dhirendra Singh Vs. State of U.P. & Ors.
4. (2002) 1 SCC 1 : Anil Hada Vs. Indian Acrylic Ltd.
5. 2012(3) Supreme 416 : Aneeta Hada Vs. Godfather Travels and Tours Pvt.Ltd.
6. (1998) 5 SCC 567 : Ashok Transport Agency Vs. Awadhesh Kumar.

For Petitioner : Mr. Anirudha Das

For Opp. Party : Mr. Laxmidhar Pangari, Sr. Adv.

JUDGMENT Date of Judgment:02.05.2023

R.K. PATTANAIK, J.

1. By invoking inherent jurisdiction of the Court, the petitioner has challenged the impugned order dated 21st August, 2010 passed in ICC Case No.372 of 2010 by the learned S.D.J.M., Panposh at Rourkela, whereby, cognizance of offence under Section 138 of the NI Act has been taken against him and also the criminal proceeding on the grounds inter alia that it is not tenable in law principally on the ground that the company which is a party to the alleged transaction has not been arrayed as an accused which is a requirement of law in terms of Section 141 thereof.

2. The opposite party filed the complaint against the petitioner under Section 138 of the NI Act alleging therein that it is a private limited company dealing in trade of imported non-coking (steam) coal and has sold 3765.98 MT to the petitioner and accordingly, the material was delivered as per the purchase order and invoice was raised against the above supply and in that connection, the latter issued cheques on different dates but the same stood dishonoured with an endorsement of the bank as 'insufficient fund'. Thereafter, opposite party said to have demanded the payment and when it was not honoured, he lodged the complaint against the petitioner for having committed an offence under Section 138 of the NI Act. After the complaint was filed by the opposite party, the learned court below took cognizance of the offence under Section 138 of the NI Act on 21stAugust, 2010 and thereafter issued process to the petitioner vide Annexure-2.

3. Heard Mr. Das, learned counsel for the petitioner and Mr.Pangari, learned Senior Advocate for opposite party assisted by Mr. A. Sahoo, Advocate.

4. Mr. Das, learned counsel for the petitioner submits that the company with whom the opposite party had the transaction is not an accused in the complaint and hence, the learned court below could not have taken cognizance of the offence under Section 138 of the NI Act and therefore, the impugned order dated 21st August, 2010 cannot be sustained in law. While contending so, Mr. Das cited a decision of the Apex Court in **Anil Gupta Vs. Star India Pvt. Ltd. & Another 2014(3) Crimes 447(SC)** to contend that if the company is not a party in a proceeding under Sections 138 read with 141 of the NI Act, its officers cannot be proceeded with.

5. Mr.Pangari, learned Senior Advocate, on the other hand, submits that though the petitioner is the proprietor of M/s. Ray Trading and Company and being a proprietorship, compliance of Section 141 of the NI Act does not arise as it is neither a company incorporated under the Companies Act nor a firm within the meaning of the provisions of Section 4 of the Partnership Act. In other words, it is submitted that such compliance of Section 141 of the NI Act is only to be insisted

upon when a company or a partnership firm is involved not a proprietary concern. In support of such contention, Mr.Pangari, learned Senior Advocate placed reliance on the following decisions, such as, **Raghu LakshminarayanVrs. Fine Tubes AIR 2007SC1634; M.M. LalVrs. State NCT Delhi and Others MANU/DE/4881/2012; Dhirendra Singh Vrs. State of U.P. and Others (2020) ILR 11 All 215 besides H.N. NagarajVrs. Suresh LalHiraLal** of the Karnataka High Court decided in Criminal Petition No.8257 of 2019 and batch cases.

6. In **Anil Gupta** (supra), the Apex Court held that the decision in **Anil HadaVrs. Indian Acrylic Ltd (2002) 1 SCC 1** was partly overruled by **AneetaHadaVrs. Godfather Travels and Tours Pvt.Ltd. 2012(3) Supreme 416** and held and observed that in absence of a company, its officers cannot be criminally prosecuted for an offence under Section 138 of the NI Act. In fact, in **Anil Hada** case, the Supreme Court held that even if prosecution against the company could not be continued, it is no bar for proceeding against other persons falling within the purview of sub-sections (1) and (2) of Section 141 of the NI Act which was overruled later in **AneetaHada** (supra). However to apply the aforesaid judgment in **Anil Gupta** (supra) to the case at hand, it has to be concluded that the complaint is against the company or a firm so as to bring it within the purview of Section 141 of the NI Act. In so far as, the decision in **Raghu Lakshminarayan** (supra) is concerned, it has been categorically held therein that there is a distinction between the partnership firm and a proprietary concern and held that a company or a firm can only be prosecuted as a legal entity as it falls within the purview of Section 141 of the NI Act and not a proprietary concern. The decision in **Ashok Transport Agency Vrs**. **Awadhesh Kumar (1998) 5 SCC 567** was quoted with approval by the Apex Court in **Raghu Lakshminarayan,** wherein, it has been held that a proprietary concern is only the business name on which the proprietor of the business carried on the business; a suit by or against a proprietary concern is by or against the proprietor of the business; and in the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor, who alone can sue or be sued in respect of the dealings of the proprietary business. In **M.M. Lal** (supra), this Court also held that sole proprietorship firm has no separate legal entity and in fact, is a business name of the sole proprietary and thus, any reference to the sole proprietorship firm means and includes sole proprietary thereof and vice versa and in such view of the matter, a proprietorship firm would not fall within the ambit and scope of Section 141 of the Act which envisages that if the person committing an offence under Section 138 of the NI Act is a company, every person who at the time of offence was committed, was in-charge of and was responsible to the company for the conduct of its business as well as the company shall be deemed to be guilty of the offence and a company includes a partnership firm and any other association or individuals. It obviously means Section 141 of the NI Act is with reference to a company or a firm but not to a sole proprietorship concern. It may be said that the proprietor and proprietary concern are not required to be separately

arrayed as a party/accused. In other words, in a proceeding under Section 138 of the NI Act, if the proprietor is an accused or a proprietary concern represented by the proprietor is arrayed an accused would be sufficient compliance of the requirement of Section 138 of the NI Act. Similarly, in **Dhirendra Singh** (supra), the High Court of Allahabad concluded that in case of a proprietary concern, no vicarious liability may ever arise and therefore, the principle contemplated in Section 141 of the NI Act is not attracted and hence, a complaint cannot be held as not maintainable or defective on the ground that the proprietary firm has not been arrayed as an accused. In the said case, the accused was found to be the proprietor of a firm. Having found the accused to be sole proprietor, in **Dhirendra Singh** (supra), it was held that the legal fiction was created in the statute about the vicarious liability is to bring within its fold any company or firm or association of individuals and not a proprietorship concern. The Karnataka High Court in **H.N. Nagaraj**(supra) also considered the question as to whether the proprietary concern is required to be arrayed as a separate party/accused in a proceeding under Section 138 of the NI Acts and answered it in the negative. So the settled position of law is that Section 141 of the NI Act is applicable in case of a company or a firm and not proprietary concern. In the case at hand, the complaint is filed by the opposite party alleging that the petitioner being the proprietor of the proprietary concern M/s. Ray Trading and Company issued the alleged cheques which bounced back and dishonoured and hence, the complaint was filed and being a proprietary concern, the proprietor is liable to pay back the amount due and to discharge the labiality which was in connection with supply of 3765.98 MT of non-coking (steam) coal. Nowhere, the petitioner ever claimed that the opposite party had any such transaction with a company or firm. It is made to appear from the complaint (Annexure-1) that the opposite party had the business dealings with the proprietary concern owned by petitioner. When such is the case and the petitioner being the proprietor of M/s. Ray Trading and Company, the Court is of the considered view that there was no need of any compliance of Section 141 of the NI Act. As earlier discussed, the decisions in **Anil Gupta** and **AneetaHada** (supra) can only be made applicable to a company or firm and its officers and not to a proprietary concern.

7. Accordingly, it is ordered.

8. In the result, CRLMC stands dismissed.

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2023 (II) ILR – CUT-569

SASHIKANTA MISHRA, J.

W.P.(C) NO. 3150 OF 2020 (WITH BATCH)

(W.P.(C) NOS. 4075 OF 2014, 22665 OF 2015, 11862 OF 2018, 12970 OF 2018, 21522 OF 2019, 6557 OF 2021, 6969 OF 2021, 10414 OF 2021 & 16687 OF 2021)

PRADEEP KUMAR DHAL ..... .Petitioner

.V.

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

WITH

W.P.(C) NO. 4075 OF 2014
CHRIST COLLEGE & ANR. -V- THE DIRECTOR, HIGHER EDUCATION & ANR.

W.P.(C) NO. 22665 OF 2015
RABINDRANATH LENKA -V- STATE OF ODISHA & ORS.

W.P.(C) NO. 11862 OF 2018
GOVERNING BODY, CHRIST COLLEGE -V- STATE OF ODISHA & ORS.

W.P.(C) NO. 12970 OF 2018
DR. SMITA NAYAK -V- STATE OF ODISHA & ORS.

W.P.(C) NO. 21522 OF 2019
DR. PRADEEP KUMAR DHAL -V- STATE OF ODISHA & ORS.

W.P.(C) NO. 6557 OF 2021
ITISHREE SWAIN -V- STATE OF ODISHA & ORS.

W.P.(C) NO. 6557 OF 2021
PRANGYA PARAMITA JETHY -V- STATE OF ODISHA & ORS.

W.P.(C) NO. 10414 OF 2021
ITISHREE SWAIN -V- STATE OF ODISHA & ORS.

W.P.(C) NO. 16687 OF 2021
KARISMA MOHAPATRA -V- STATE OF ODISHA & ORS.

(A) ODISHA EDUCATION ACT, 1969 – Sections 2, 3(b) & 7(c) – Whether by seeking approval of the Constitution of the governing body from prescribed authority U/s. 7(c) as also by seeking permission /recognition to open new streams/subjects, the management of the Institution has waived the protection of minority institution as afforded to it U/s. 2 of the 1969 Act? – Held, No.

(B) CONSTITUTION OF INDIA, 1950 – Article 226 – Writ Jurisdiction – Whether the writ applications would be maintainable against a minority institution ? – Held, Yes – A writ of mandamus can be issued

against a private body, which is not a 'State' within the meaning of Article 12 of the Constitution of India, but there must be a public law element involved and it cannot be exercised to enforce purely private contracts entered into by the parties. (Paras 23-24)

(C) CONSTITUTION OF INDIA, 1950 – Fundamental rights – Article 30(1) – Whether the management is stopped to claim as minority institution once it approached the State Govt. seeking approval and permission as per the Education Act, 1969 ? – Held, No – There can be no estoppels against the Fundamental rights guaranteed under Part-III of the Constitution. (Paras 16 - 17)

Case Laws Relied on and Referred to :-

1. 2008 SCC OnLine Ori 2 : AIR 2008 Ori 143: Governing Body of Stewart Science College, Cuttack Vs. State of Orissa.
2. 2002 (Supp.) OLR 452 : St. Catherine Girls' High School Vs. State of Orissa & Ors.
3. AIR 2003 SC 355 : T.M.A.Pai Foundation Vs. State of Karnataka.
4. 2022 SCC OnLine SC 1091 : St. Mary's Education Society and Anr. Vs. Rajendra Prasad Bharagava & Ors.

For Petitioner : M/s. K.K. Swain, S.C.D. Dash,P.K. Mohanty, P.K. Mohapatra, K. Swain & J.R. Khuntia. [W.P.(C) No. **3150 of 2020**]

Ms. S.P. Mishra, Sr. Advocate with M/s. Soumya Mishra, B. Mohanty, S.K. Sahoo & D. Priyanka. [W.P.(C) No. **4075/2014**]

M/s. S.K. Das, S.K. Mishra & P.K. Behera, Mr. S. Pattnaik & N. Jena. [W.P.(C) Nos. **22665/2015, 12970/2018, 6557/2021, 10414/2021 & 16687/2021**]

M/s. S.K. Dash, S. Das, A.K. Hotta, A Sahoo & S. Mohanty. [W.P.(C) No. **11862/2018**]

Mr. Bimbisar Dash. [W.P.(C) No. **21522/ 2019**]

M/s. K.P. Mishra, L.P. Dwibedi, S. Rath, A. Mishra & K. Hussain. [W.P.(C) No. **6969/2021**]

For Opp.Parties : Mr. B.P. Tripathy, Addl.Govt. Adv.

M/s. S.K. Dash, A.K. Otta, S. Das, A Sahoo, S. Mohanty, P. Das. [For O.Ps.- **Governing Body and Principal of Christ College, Cuttack**]

M/s. U.C. Pattnaik, S. Patnaik & M.R. Sahu.[**O.P.No. 5** in W.P.(C) No.**3150 of 2020**]

M/s. S.K. Das, S.K. Mishra & P.K. Behera.[**O.P. No.2** in W.P.(C) No. **4075 of 2014**]

Mr. Bimbisar Dash, Advocates [**O.P. No.4** in W.P.(C) No. **11862 of 2018**]

Ms. S.P. Mishra, Sr. Advocate with M/s. Soumya Mishra, B. Mohanty, E. Agrawal, S.K. Samantaray. [**O.P.No.3** in W.P.(C) No.**22665 of 2015**]

M/s. Pami Rath, J. Mohanty, S. Gumansingh & P. Mohanty, [**O.P. No.4** in W.P.(C) No. **10414 of 2021**]

JUDGMENT Date of Judgment: 26.04.2023

SASHIKANTA MISHRA, J.

1. Whether Christ College, Cuttack is a minority educational institution within the meaning of Section 2 of the Odisha Education Act, 1969 (in short the "Act, 1969") is the preliminary question to be determined in all these writ applications. The other question to be determined is as to if these writ applications would be maintainable regardless of the answer to the preliminary question.

2. The petitioners in these writ applications (except W.P.(C) No. 4075 of 2014 and W.P.(C) No.11862 of 201) are Staff of Christ College and are aggrieved by action taken against them by governing body of the College. Since the preliminary question as above was raised, with consent of the parties, the said question was taken up for determination at the outset. Since this issue is common to all these writ applications, they were heard together and are being decided by this common judgment. To such extent therefore, the facts of each of the cases are not required to be gone into at this stage.

3. W.P.(C) No. 4075 of 2014 has been filed by the Christ College challenging letters dated 13.11.2013 and 22.02.2014 issued by the Director, Higher Education, Odisha in requesting the Management to revoke the order of suspension of Sri Rabindranath Lenka (opposite party No.2 and a teaching staff) and to dispose of his prayer made in the representation dated 21.10.2013 and in reminding the Management to ensure compliance of the earlier request on threat of withdrawal of delegation of financial power bestowed on the Principal. Be it noted that as per resolution of the Governing Body dated 11.09.2013, the Management had placed Sri Lenka on suspension with immediate effect.

4. W.P.(C) No.11862 of 2018 has been filed by the Christ College with prayer to quash the letters dated 07.06.2018 and 06.07.2018 in relegating the order of suspension passed against Dr. Pradeep Kumar Dhal (opposite party No.4, a teaching taff) from the date of expiry of one month in terms of second proviso to Rule 21(2) of the Odisha Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules,1974 and in reminding the Management to comply with such order.

The stand taken by the Christ College in both these writ applications basically is, it being a minority managed institution, the provisions of the Orissa Education Act, 1969 and Rules framed thereunder are not applicable to it and therefore, the impugned communications made by the Director Higher Education are contrary to the provision under Article 30 of the Constitution of India.

5. On the other hand, it has been argued on behalf of all other petitioners (Staff of the College) that Christ College, Cuttack is not a minority educational

institution but an aided educational institution within the meaning of Section 3(b) of the Act, 1969 and therefore, all the relevant rules framed under the Act,1969 relating to conditions of service of its employees are applicable to it.

6. Heard Mr. K.K.Swain and Mr. S.K.Das, learned counsel for the petitioners; Mr. B.P.Tripathy, learned Addl. Government Advocate for the State; Mr. S.K. Dash and Mr. S.P.Mishra, learned Senior Counsel along with Mr. S.Mishra, learned counsel for the Christ College; and Ms. Pami Rath and Mr. U.C.Pattnaik, learned counsel for the private opposite parties and Mr. B.Dash, learned counsel for the petitioner in W.P.(C) No. 21522 of 2019 and opposite party No.4 in W.P.(C) No. 11862 of 2018.

7. It has been urged on behalf of the petitioners (staff of the college) that Christ College, Cuttack though held to be a minority institution by a coordinate Bench of this Court in the case of ***Governing Body of Stewart Science College, Cuttack v. State of Orissa and Governing Body of Christ College, Cuttack vs. State of Orissa***, reported in 2008 SCC OnLine Ori 2 :: AIR 2008 Ori 143, yet the said finding was diluted by the subsequent judgment rendered by a Division Bench of this Court in the case of ***Dr. Shyamal Ku.Saha and others vs. State of Orissa and others*** [W.P.(C) No. 2207/2012, 29737/2011, 7579/2008 and 9406/2008 disposed of on 26th June, 2012]. Therefore, according to the petitioners, the question of status of the institution is open for determination by this Court. On the other hand, it has been argued on behalf of the Christ College that the judgment of the Division Bench was rendered specifically in respect of Stewart College, Cuttack and the finding of the Single Judge relating to Christ College was reaffirmed by the Division Bench as also by order dated 11.09.2007 of the National Commission for Minority Educational Institutions.

8. It is therefore, apposite to refer to the judgments relied upon by the parties as mentioned in the previous paragraphs.

9. In the case of ***Governing Body of Stewart Science College*** (supra), the legality of the notifications No. IV.HE/GB-02/2004.21066/HE and No. IV.HE/GB-02/2004.21016/HE dated 10th June, 2004 issued by the State Government dissolving the Governing Body of the Stewart Science College, Cuttack as well as Governing Body of Christ College, Cuttack respectively were under challenge. Both the writ applications were heard together and disposed of by a common judgment passed by the Single Judge. After analyzing the facts and the relevant provisions of law as also some decisions of the Apex Court relating to Article-30(1) of the Constitution, the Single Judge held as follows:

> *"10. The main ground on which the State resists the rights of the petitioners to manage the Stewart Science College, Cuttack is that the said College was established in the year 1944 by the Baptist Church Trust Association and its management was handed over to the Diocese of Cuttack, a creature of the Church of North India. Thus according to the opposite*

parties, the Diocese having not established this College has no right to manage the same. But then according to learned counsel for the petitioners, the Baptist Church Trust Association is the Apex Body of which Diocese of Cuttack is a branch. Be that as it may, the dispute as to whether the Stewart Science College and Christ College are Minority Institutions or not is no longer in dispute, as would be evident from the letter bearing number 4010/83-16179 dated 18-3-1983 (Annexure-11) issued by the Director of Public Instruction (Higher Education), Orissa, as it then was, addressed to the Secretary to Government of Orissa, Education Department wherein it was clearly mentioned that the Stewart Science College, Cuttack and Christ College, Cuttack being Minority Institutions are not governed under the Orissa Education Act,1969 and the Rules framed thereunder as those two Institutions had been established and were being administered by Christian Minority. In spite of the said decision, it appears, the dispute as to whether the aforesaid two Colleges were Minority Institutions or not cropped up now and then, and the same was referred to the National Commission for Minority Educational Institutions, Government of India. After receiving the said reference notices were issued by the National Commission and after due consideration of the matter, the National Commission, headed by Justice M.S.A. Siddiqui as its Chairman with B.S.Ramoowalia as member on 11-9-2007 ordered as follows:—

"It is stated in Col. 9(d) of the petition that the petitioner-Institution has been recognised by the State Government as a Minority Educational Institution. Reliance has been placed on order dated 18-3-1983 issued by the Directorate of Public Instruction (H.E.), Orissa. Since the State Government has already recognised the petitioner-Institution as a Minority Educational Institution, there is no need to issue another certificate by this Commission in this regard.The petition is disposed of accordingly. Copy of the order be sent to the parties."

On such finding, the impugned notifications in so far as they relate to the petitioner-Colleges were quashed and the State Government was directed not to interfere with the management/administration of the Colleges.

10. In so far as the judgment of the Division Bench in the case of ***Dr. Shyamal Ku.Saha*** (supra) is concerned, it is to be noted that the same was a common judgment passed in respect of four writ applications filed by the petitioners therein to challenge the Resolutions of Minutes of Eighteenth Ordinary Meeting of Diocesan Council dated 9th-11th July, 2007 and the Minutes of the Governing Body of the College dated 06.10.2007 providing the modalities for appointment of Principal of the Stewart Science College. Further, the appointment/proposed appointment of the private opposite parties as Principal of the College was also under challenge. Since the question of maintainability was raised on the ground that Stewart Science College, Cuttack was a minority educational institution, the same was taken up as a preliminary issue and the common judgment was rendered. In so far as the decision of the Hon'ble Single Judge in ***Governing Body of Stewart Science College*** (supra) is concerned, the Division Bench held as follows :

"*33. It is apparent from the above that the very same question of the Diocese to have not established the College was raised before the learned Single Judge. However, learned Single Judge arrived at the decision basing solely on the letter of the Director, of Public Instruction (Higher Education), Orissa bearing No.4010/83-16179 dated 18.3.1983 and the order of the Commission dated 11.9.2007. So far as order of the Commission is concerned, Annexure-9 to W.P.(C) No.2207 of 2012 fortifies the*

contention of the petitioners that order of the Commission related to Christ College, Cuttack only. Opposite parties have not placed any material to indicate that the order of the Commission dated 11.9.2007 related to Stewart Science College, Cuttack. So far as the letter dated 18.3.1983 of Director of Public Instruction (Higher Education), Orissa is concerned, the first para of the letter addressed to the Secretary to Government of Orissa in the Education Department reads:

"I am directed to say that the Stewart Science College, Cuttack and Christ College, Cuttack being Minority Institutions are not governed and or Orissa Education Act, 1969 and rules framed there under as those the Institutions have been established and being dministered by the Christian Minority. They are making the appointments of Lecturers by their own selection without taking candidates from the Adhoc merit panel prepared by this Directorate as well as from the Selection Board on the grounds that they are Minority Institutions. Although these two Institutions are being managed and administered by the Minority Community, the Staff of the Institutions are receiving direct payment since the date of its introduction in the aided Colleges. In this connection it may be mentioned here that previously Government in their letter No. 22369/EYS,dated 27.08.79 had decided that the payment of salaries to the Staff of these two Institutions through direct payment system should be stopped, a copy of the order based on this decision was communicated to both the Institutions in this Directorate Memo No. 32484 dtd.25.07.79. But subsequently Government in their No.27085/EYS, dated 03.08.79 have kept the said orders in abeyance and decided that pending finalization of the matter, the existing arrangement for making payment of salaries to the staff directly may continue Govt. order in the matter is awaited."

In the last paragraph request has been made that Government order in the matter may be communicated at an early date.It is also worthwhile to observe that State Government have taken conflicting and contradictory stands with regard to the status of the Stewart Science College in different Writ Petitions. In W.P.(C) No. 2207 of 2012 stand of the Government is that Stewart Science College is a Minority Educational Institution entitled to protection under Article 30. However, in W.P.(C) No.7762 of 2004 stand of the Government was that the present Management or Governing Body having not established the College cannot claim the protection of administration of the College as envisaged under Article 30 of the Constitution.Infact, learned Single Judge has categorically observed in the decision extracted above that the main ground on which the State resisted the rights of the Management was that the said College was established by BCTA and its management was handed over to the Diocese and as such the Diocese having not established the College has no rights to manage the institution. Also, in the counter affidavit filed on behalf of Director, Higher Education in W.P.(C) No.7579 of 2008 it has been pleaded that the impugned resolution passed by the Management in contravention of Government Resolution dated 9.3.1999 issued under the Act prescribing that Principals of Non-Government Aided Colleges may be appointed from among Readers/Lecturers (Selection Grade) is to be ignored as the same is illegal and the Management is estopped from deviation from the prescribed Rule framed by the Government since the College is receiving grant-in-aid on direct payment scheme. Vacillating stands of the State Government make the situation worse. Thus, learned Single Judge has not only placed reliance on the order of the Commission which did not relate to Stewart Science College,but also has not taken note of conflicting and contradictory stands of the State Government. Therefore, judgment passed by the learned Single Judge in Governing Body of Stewart Science College, Cuttack and

> *another (W.P.(C) No.776 of 2004) (supra) cannot be held to have finally determined the status of Stewart Science Collegeas a Minority Educational Institution. Instead of entertaining the writ application,the learned Single Judge ought to have directed to get the dispute adjudicated by competent fact finding authorities in accordance with the mandate of Hon'ble Supreme Court in Manager, St. Thomas U.P. School Kerala and another vs. Commissioner & Secy. to General Education Deptt. and others (supra)."*

Nothing further has been stated in so far as the Christ College is concerned. Nevertheless, reference having been made to the order of the National Commission as being relatable to Christ College only, it would be reasonable to hold that the Division Bench did not deem it proper to render any specific finding as regards the status of the Christ College. Moreover, there is nothing in the said judgment which would lead to the conclusion that the order of the Single Judge in so far as it relates to Christ College was diluted in any manner whatsoever. On the other hand, the writ petitions were disposed of by directing the Management of Stewart Science College, Cuttack to obtain necessary declaration from the National Commission regarding minority status within a period of two months. In view of the above discussion, it would rather be reasonable to hold that the finding of the Single Judge in so far it relates to Christ College stood impliedly affirmed by the Division Bench.

11. As was noticed by the Division Bench in ***Dr. Shyamal Ku. Saha*** (supra), the judgment of the Single Judge in deciding the minority status of both Stewart Science College,Cuttack and Christ College was based on the letter dated 18.03.1983 issued by the Director of Public Instructions (Higher Education), Odisha mentioning that the said Colleges being minority institutions are not governed under the Act, 1969 and Rules framed thereunder as they had been established and were being administered by Christian minority. There is a subtle but clear difference between Stewart Science College, Cuttack and Christ College, Cuttack. This is being said because till the time of rendering of the judgment by the Single Judge, Stewart Science College, Cuttack had not obtained any declaration from the National Commission. On the other hand, the Single Judge took note of the fact that there was an order by the National Commission (11.09.2007) in respect of Christ College. The Division Bench in ***Dr. Shyamal Ku. Saha*** (supra), therefore, directed the Management of Stewart Science College, Cuttack to obtain necessary declaration. Be it noted that Christ College was not a party to the cases before the Division Bench and therefore, it must be held that the order passed by the Single Judge, in so far as it relates to Christ College holds the field even till date. Such being the case, ordinarily no further determination would be required but as has been stated hereinbefore, the order of the Single Judge was based on letter dated 18.03.1983 and order dated 11.09.2007 of the National Commission. In the present batch of writ applications, several other points have been raised which were not agitated before the Single Judge. This Court therefore, deems it proper to consider all the other contentions raised before it relating to the status of Christ College, Cuttack.

12. Without referring to the contentions raised by learned counsel individually it would be proper to summarise the arguments as follows:

It has been argued that after coming into force of the National Commission for Minority Educational Institution Act, 2004 it was necessary for Christ College to obtain a declaration from the Commission under Section 11(f) of the Act as regards its status. As regards the order dated 11.09.2007 already passed by the National Commission, it is contended that the same was passed under misconception being based only on the order dated 18.03.1983 of the Director of Public Instructions and cannot be treated as a declaration as such. Per contra, it has been argued on behalf of the Christ College that the Commission has itself held that in view of the recognition by the Government of the minority status of Christ College no declaration is necessary under Section 11(f) and therefore, the matter must be treated as closed. This is more so as the order of the Commission was never challenged and therefore, has attained finality.

13. This Court finds that the status of Christ College as a minority educational institution was determined long back and recognized by the National Commission in the year 2007. The matter must therefore, be treated as being finally set at rest. Since the competent forum has already given its finding with regard to the status, which has been duly noted by a coordinate Bench of this Court, no further determination is necessary in this regard. Moreover, neither the order of the Commission or of the Director of Public Instruction (Higher Education) (order dtd. 18.03.1983) has been challenged nor is presently under challenge in these writ applications.

14. It has been further argued on behalf of the petitioners (staff of the college) that notwithstanding the judgment of the Single Judge of this Court as well as the order passed by the National Commission, the Management of the Christ College by its own conduct has proved that it is not a minority institution. In this regard it has been argued that the Management has always subjected itself to the control of the State Government as would be evident from the orders of approval issued by the prescribed authority under Section 7 of the Odisha Education Act and Odisha (Establishment, Recognition and Management of Private College) Rules, 1991 in respect of its governing body. Moreover, it has applied to the prescribed authority for grant of permission and recognition for opening new streams and subjects under Section 5 and 6 of the Act,1969. The staffs of the College have received grant-in-aid under section 7-C of the Act, 1969 and also UGC scale of pay for the teachers. All these go to show that the Management of the College does not consider itself as a minority educational institution.

15. What has been essentially argued on behalf of the petitioners (Staff of the College) in the present case is, by seeking approval of the constitution of the governing body from the prescribed authority under section 7-C of the Act, 1969 as

also by seeking permission/recognition to open new streams/subjects, the Management of the institution has waived the protection afforded to it under Section-2 of the Act, 1969.

On the other hand, it has been argued on behalf of the College that such acts on the part of the Management cannot nullify its status as a minority institution which is guaranteed under the Constitution of India.

16. Similar question arose for consideration before a Division Bench of this Court in the case of ***St. Catherine Girls' High School vs. State of Orissa and Ors***., reported in 2002 (Supp.) OLR 452, wherein it was held as follows:

> *"14. Regarding the approval sought for from the Inspector of Schools to the appointments made by the Secretary of the Schools and to grant of higher pay scales to the staff, it has been submitted that it was necessary for the purpose of release of grant as the School was a fully aided School. Although the grant of approval of appointment of staff in a minority institution is outside the purview of the State control but before release of aid the concerned authorities are to be satisfied that the appointments are within the sanctioned strength and that the appointees possess the required minimum qualification. Such approvals do not signify that the School is not a minority institution.*
>
> *15. Allegation of direct payment of salaries to the staff are release of salary in favour of the Headmistress appears to be post-dispute development. Even in 1991 (Annexure-9) grant for payment of salaries to the staff was released in favour of the Secretary of the School.*
>
> *16. Moreover, those acts like direct payment of salaries, deduction of G.P.F. amount, inclusion of the School in the list of general Schools are all unilateral acts of the State Government and those never prejudicially affected the right of management of the minority School.These unilateral acts which did not in reality interfere with the constitutional freedom of management are not all relevant for the purpose of determining the real character of the School.*
>
> *17. Article 30 of the Constitution finds place in Part-III as one of the fundamental rights of the minorities based on religion or language. It is well- known and well settled that there is no estoppel against a constitutional provision and more particularly against a fundamental right enshrined in the Constitution. A private statutory right can be waived under certain circumstances, but a constitutional guarantee of a fundamental right given to a particular Section of the community cannot be waived. So even assuming and/or accepting that the management of the School initially was following the provisions of the Orissa Education Code or the Rules relating to management of private educational institutions, the same cannot take away the minority character and/or status of an institution, if itis proved that the same has been established and is being administered by the minorities based on religion or language. In Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors., AIR 1986 SC 180, a Constitution Bench of the Supreme Court has pronounced:*
>
> *"...There can be no estoppel against the constitution, the Constitution is not only the aramount law of the land but, it is the source and sustenance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action*

imparts certainty and honesty to human affairs. If a person makes a representation to another, on the faith of which the latter acts to his prejudice, the former cannot resile from the representation made by him. He must make itgood.This principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. For example, the concession made by a person that he does not possess and would not exercise his right to free speech and expression or the right to move freely throughout the territory of India cannot deprive him of those constitutional rights, any more than a concession that a person has no right of personal liberty can justify his detention contrary to the terms of Article 22 of the Constitution. Fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and enforced by them, if those rights are violated. But the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit individuals but to secure the larger interests of the community. The preamble of the Constitution says that India is a Democratic Republic. It is in order to fulfil the promise of the Preamble that fundamental rights are conferred by the Constitution, some on citizens like those uaranteed by Articles 15, 16, 19, 21 and 29 and, some on citizens and non-citizens alike, like those guaranteed by Articles 14, 21, 22 and 25 of the Constitution; No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppel valid, an all powerful State could easily tempt an individual to forge his precious personal freedoms on promise of transitory, immediate benefits.

**** **** ****

The plea of estoppel is closely connected with the plea of waiver, the object of both being to ensure bona fides in day-to-day transactions. In Basheshwar Nath v. Commnr. of Income-Tax, Delhi (1959) Supp. (1) SCR 528; AIR 1959 SC 149; a Constitution Bench of this Court considered the question whether the fundamental rights conferred by the Constitution can be waived. Two members of the Bench (Das C.J. and Kapoor, J.) held that there can be no waiver of the fundamental right founded on Article 14 of the Constitution. Two others (N.H. Bhagwati and Subba Rao, JJ.) held that not only could there by no waiver of the right conferred by Article 14, but there could be no waiver of any other fundamental right guaranteed by Part III of the Constitution. The Constitution makes no distinction, according to the learned Judges, between fundamental rights enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy."

In re The Kerala Education Bill, AIR 1958 SC 956, a seven-Judge Bench of the Supreme Court has said that "there can be no loss of fundamental rights merely on the ground of non -exercise of it. " The similar view has been expressed by the Supreme Court in the Ahmedabad St. Xaviers College Society and Anr. etc. v. State of Gujarat and Anr., AIR 1974 SC 1389 and in Gandhi Faiz-e- am College, Shahjahanpur v. University of Agra and Ors., AIR 1975 SC 1821.

18. Thus it is wholly irrelevant whether at the initial stages the management of the School was voluntarily complying with some provisions of the Education Code or the Rules framed by the State Government and sending the constitution and reconstitution of the Managing Committee for approval of the appropriate authorities.

Besides, a minority institution may on its own follow the principle or policy contained in any Statute, or Rules so long as the same does not clash with its right of freedom of management, Voluntary submission to certain general rules, regulations or restrictions is totally different from the state's insistence on compliance with the provisions of the Statute, Rules and Regulations interfering with the freedom of management guaranteed under Article 30 of the Constitution. So constitution or reconstitution of the Managing Committee on the pattern laid down in the Education Code or any Rule and sending those for approval cannot affect the minority status of the School if it is otherwise found to be an institution established by the minorities within the meaning of Article 30 of the Constitution. Direct payment of salaries, to the teachers deduction of P.F amount etc. are all unilateral acts of the State Government and those are not at all relevant for the purpose of determination of the real character of the School.

17. The principle that emerges from the cited judgment is, there can be no estoppel against the fundamental rights guaranteed under Part-III of the Constitution. So merely because the Management has in the past approached the State Government seeking approval, permission etc.,such action would not operate to nullify its status as a minority educational institution protected under Article 30(1) of Constitution of India. As has been emphasized in the judgment (supra), the constitutional protection of a fundamental right exists forever and cannot be diluted/nullified/ taken away by any act or conduct of any party.

18. It would be proper at this stage to refer to Article 30 of the Constitution of India, which runs as follows:

"30. ***Right of minorities to establish and administer educational institutions***

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice (1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause

(2) The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language"

19. In ***T.M.A.Pai Foundation vs. State of Karnataka***, reported in AIR 2003 SC 355, an 11 Judge Bench of the Supreme Court recognized the inviolable rights of the minorities to establish and administer educational institutions in detail. It was observed as under:

"149. Although the right to administer includes within it a right to grant admission to students of their choice under Article 30(1), when such a minority institution is granted the facilityof receiving grant-in-aid, Article 29(2) would apply, and necessarily, therefore, one of the rights of administration of the minorities would be eroded to some extent. Article 30(2) is an injunction against the State not to discriminate against the minority educational institution and prevent it from receiving aid on the ground that

the institution is under the management of a minority. While, therefore, a minority educational institution receiving grant-in- aid would not be completely outside the discipline of Article 29(2) of the Constitution, by no stretch of imagination can the rights guaranteed under Article 30(1) be annihilated. It is in this context that some interplay between Article 29(2) and Article 30(1) is required. As observed quite aptly in St. Stephen's case [(1992) 1 SCC 558] (at SCC p. 608, para 85) "the fact that Article 29(2) applies to minorities as well as non-minorities does not mean that it was intended to nullify the special right guaranteed to minorities in Article 30(1)". The word "only" used in Article 29(2) is of considerable significance and has been used for some avowed purpose.Denying admission to non-minorities forthe purpose of accommodating minority students to a reasonable extent will not be only on grounds of religion etc., but is primarily meant to preserve the minority character of the institution and to effectuate the guarantee under Article 30(1). The best possible way is tohold that as long as the minority educational institution permits admission of citizens belonging to the non-minority class to a reasonable extent based upon merit, it will not be an infraction of Article 29(2), even though the institution admits students of the minority group of its own choice for whom the institution was meant. What would be a reasonable extent would depend upon variable factors, and it may not be advisable to fix any specific percentage. The situation would vary according to the type of institution and the nature of education that is being imparted in the institution. Usually, at the school level, although it may be possible to fill up all the seats with students of the minority group, at the higher level, either in colleges or in technical institutions, it may not be possible to fill up all the seats with the students of the minority group. However, even if it is possible to fill up all the seats with students of the minority group, the moment the institution is granted aid,the institution will have to admit students of the non-minority group to a reasonable extent, whereby the character of the institution is not annihilated, and at the same time,the rights of the citizen engrafted under Article 29(2) are not subverted. It is forthis reason that a variable percentage of admission of minority students depending on the type of institution and education is desirable, and indeed, necessary, to promote the constitutional guarantees enshrined in both Article 29(2) and Article 30."

Thus, the contentions advanced by the petitioner (staff of the College) are untenable.

20. It would now be apt to refer to the arguments made by learned State Counsel. According to him, the Christ College is a self contained institution. It appoints its own employees. There are no transfers of employees to and from the said Colleges. The governing body enjoys absolute control over the management and the government has merely recognized the existing status of the Institution as a minority institution. In its letter dated 21.09.2022 issued by the Government in Higher Education Department addressed to the Principal of Christ College, Cuttack the above fact has been clarified. A copy of such letter was furnished by learned State Counsel along with his written note of submissions. For immediate reference, letter dated 21.09.2022 is extracted hereinbelow:

"GOVERNMENT OF ODISHA
HIGHER EDUCATION DEPARTMENT

No. HE-NCNE-MISC-0007-2021 40173 //H.E., Dt.21.09.2023

From
Sri Srinabash Mishra
Senior Administrative Officer

To
The Principal,
Christ College, Cuttack, Dist.- Cuttack

Sir,

I am directed to invite a reference to your letter No. 691 dt.10.05.2022 on the subject noted above and to say that the Odisha Education (Establishment, Recognition and Management of Private Colleges) Amendment Rules, 2020 is not applicable to the minority Educational Institutions.Hence this Department letter No.18288/HE dt.05.05.2022 issued to all Non Govt. Aided Degree Colleges for submission of proposals for re- constitution of Governing Body has no relevance in respect of your college being a minority Institution.

This is for your Information

Yours faithfully,
Sd/-21/9/22
Sr. Administrative Officer."

21. Thus, from a conspectus of the analysis of facts, law and the discussion thereon made in the preceding paragraphs, the irresistible conclusion available to be drawn is, Christ College, Cuttack is a minority educational institution within the meaning of Section-2 of the Odisha Education Act, 1969.

22. This takes the Court to the next question - whether the writ applications would be maintainable despite the aforementioned finding.

23. It has been argued on behalf of the petitioners that even if it is held that the Christ College is a minority educational institution, it is still amenable to the writ jurisdiction of this Court under Articles 226 and 227 of the Constitution since by providing education it is performing a public duty. On the other hand, it has been argued on behalf of the Christ College that even if it is held that the institution is performing a public duty, the lis before this Court involves individual and private grievances of the petitioners against the Management, which cannot be gone into in the writ applications.

24. This Court finds that the very same question as posed above came up for consideration before the Apex Court recently in the case of ***St. Mary's Education Society and Another vs. Rajendra Prasad Bharagava and others***, reported in 2022 SCC OnLine SC 1091. In the said case the following issues were framed for determination.

(a) Whether a writ petition under Article 226 of the Constitution of India is maintainable against a private unaided minority institution?

(b) Whether a service dispute in the private realm involving a private educational Institution and its employee can be adjudicated in a writ petition filed under Article 226

of the Constitution? In other words, even if a body performing public duty is amenable to writ jurisdiction, are all its decisions subject to judicial review or only those decisions which have public element therein can be judicially reviewed under the writ jurisdiction?

Analyzing the law on the subject, the Apex Court held that the School discharges a public duty by imparting education, which is a fundamental right of the citizen. However, judicial review of the action challenged by a party can be had by resort to the writ jurisdiction only if there is a public law element and not to enforce a contract of personal service. It was further clarified that a contract of personnel service includes all matters relating to the service of employee – confirmation, suspension, transfer and termination etc. It was therefore held that a writ of mandamus can be issued against a private body, which is not a 'State' within the meaning of Article 12 of the Constitution of India, but there must be a public law element involved and it cannot be exercised to enforce purely private contracts entered into by the parties. It was also held that in case of retirement and in case of termination, no public law element is involved. It also referred to the decision of the Apex Court in the case of ***Trigun Chand Thakur.***

"45. In the case of Trigun Chand Thakur v. State of Bihar, reported in (2019) 7 SCC 513, this Court upheld the view of a Division Bench of the Patna High Court which held that a teacher of privately managed school, even though financially aided by the State Government or the Board, cannot maintain a writ petition against an order of termination from service passed by the Management."

25. Such being the legal position, it would be proper to refer to the grievances of the petitioners in this batch of writ applications. This Court finds that the prayer of the petitioner in W.P.(C) No. 22665 of 2015 is to set aside the order of suspension framing charges against him on 09.12.2013, second show cause notice and the final order of dismissal passed by the governing body against him.

26. The petitioner in W.P.(C) No. 12970 of 2018 has prayed for direction to regularize his service with release of arrear salary.

27. The prayer of the petitioner in W.P.(C) No. 6557 of 2021 is to direct the governing body not to separate the Department of IT and Computer Science and to place her against 1st post of Lecturer in Computer Science of the Degree Wing of Christ College, Cuttack with all consequential service and financial benefits.

28. The prayer of the petitioner in W.P.(C) No.10414 of 2021 and W.P.(C) No. 16687 of 2021 is identical to the prayer of the petitioner in W.P.(C) No.6557 of 2021.

29. The prayer of the petitioner in W.P.(C) No.6969 of 2021 is to post her in Department of Computer Science taking into consideration her seniority, qualification and experience and to quash the resolution of the Governing Body dated 06.02.2021.

30. The petitioner in W.P.(C) No. 21522 of 2019 is to quash the decision of the governing body treating the period of suspension as such.

31. The prayer of the petitioner in W.P.(C) No. 3150 of 2020 is to quash the order of suspension, disciplinary proceeding against him and for his reinstatement.

32. This Court thus, finds that the grievances of the petitioners (Staff of the College) are relatable to contract of personal service and no public law element is involved therein so that the same could be adjudicated upon by this Court exercising writ jurisdiction under Articles 226 and 227 of the Constitution of India.

33. For the foregoing reasons therefore, this Court holds that Christ College, Cuttack is a minority educational institution within the meaning of Section-2 of the Odisha Education Act, 1969 and further that the grievances of the petitioners (staff of the college) are not amenable to the writ jurisdiction of this Court under Articles 226 and 227 of the Constitution of India.

34. In view of the findings of this Court as above,it is clear that the impugned communications under Annexures-5 and 12 in W.P.(C) No. 4075 of 2014 and Annexures-7 and 9 in W.P.(C) No. 11862 of 2018 cannot be sustained in the eye of law as the Director has no jurisdiction or authority to issue the same in respect of the Christ College, Cuttack, which is a Minority Educational Institution. As such, the writ petitions being W.P.(C) No.4075 of 2014 and W.P.(C) No. 11862 of 2018filed by Christ College, Cuttack are allowed. The impugned communications under Annexures-5 and 12 in W.P.(C) No. 4075 of 2014 and Annexures-7 and 9 in W.P.(C) No. 11862 of 2018 are hereby quashed.

35. All the other writ petitions filed by the Staff of the College are hereby, dismissed. There shall be no order as to costs.

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2023 (II) ILR - CUT- 583

SASHIKANTA MISHRA, J.

W.P.(C) NO.14995 OF 2016

PARBATI GHADEI .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Article 226 – Whether the availability of the alternative statutory remedy is an absolute bar for entertaining a writ application by the Court? – Held, No. – If the grievance is related to purely legal question without involving disputed questions of fact but

only questions of law, the High Court should decide the same instead of dismissing the writ petition on the ground of alternative remedy being available. (Para 12)

Case Laws Relied on and Referred to :-

1. Civil Appeal No.5393 of 2010 : M/s. Godrej Sara Lee Ltd. Vs. The Excise and Taxation Officer-cum-Assessing Authority & Ors.
2. (2022) 4 SCR 840 : The State of Maharashtra & Ors. Vs. Greatship (India) Ltd.
3. 2007 (II) OLR 788 : Shri Dillip Kumar Samal Vs. State of Orissa & Anr.
4. 2008 (Supp.I) OLR-316 : Jitendra Kishore Baghasingh and batch Vs. State of Orissa & Ors.
5. (2014) 118 CLT 533 :Gopal Krishna Behera Vs. Union of India.

For Petitioners : Mr. S.K. Das, S.K. Mishra & P.K. Behera

For Opp. Parties : Mr. N. Pratap, ASC.

M/s. K.K. Swain, P.N. Mohanty, B. Jena, S.C.D. Dash, P.K. Mohanty, K. Swain & J.R. Khuntia.

JUDGMENT Date of Judgment: 26.04.2023

SASHIKANTA MISHRA,J.

1. The petitioner has approached this Court with the following prayer:

> *"Under the above circumstances, it is therefore humbly prayed that this Hon'ble Court may be graciously pleased to direct the opp.parties to release the 100% block grant to the petitioner without any further discrimination.*
>
> *And/or pass any other appropriate writ/writs, order/orders and direction/directions in the fitness of the case.*
>
> *And for this act of kindles as in duty bound the petitioner shall ever pray."*

2. The case of the petitioner is that she was appointed as Asst. Teacher against a Trained Graduate Post in Anchalika Girls' High School, Saradpur in the district of Bhadrak as per appointment order dated 06.08.1993. She was untrained at that time but acquired B.Ed. qualification in 1994. The Managing Committee appointed her as Headmaster on 20.07.2001. She was prevented from discharging her duties on 27.07.2007. She filed an appeal before the Regional Director of Education, Bhubaneswar, which was dismissed. She challenged such dismissal of the appeal before this Court in W.P.(C) No. 921 of 2009 and by order dated 01.10.2009, this Court directed de-novo disposal of the appeal. By order dated 10.10.2011, the Regional Director set aside the order of termination and directed reinstatement of the petitioner. Against such order, one Nirupama Mishra approached this Court in W.P.(C) No. 28449 of 2011. This Court modified the order of the Regional Director only to the extent of allowing the said Nirupama Mishra to continue as Headmistress of the charge of the School. The petitioner joined in

her post from 14.10.2011. Her service was approved by order dated 14.08.2012 and block grant was released from 01.04.2008. As per the ORSP Rules, 2008, the Institution became eligible for 100% block grant w.e.f. 01.04.2013 and as such, the petitioner was also eligible for 100 % block grant, but it is alleged that all other employees of the Institution were extended 100% block grant except the petitioner, who was granted 60% on the ground that she had not completed 8 years of services as required under Clause-5 of the Government Resolution dated 10.06.2013. According to the petitioner, the Institution being a Girls' High School comes within Clause-5(e) of the Resolution dated 10.06.2013 and therefore, the individual employees are also similarly eligible. She submitted a representation to the Director, Secondary Education, but to no avail. Hence the writ petition.

3. The case of the Institution in question is,the writ petition is not maintainable since alternative statutory remedy provided under Section 24-B of the Odisha Education Act, 1969 (in short the'Act,1969') has not been exhausted by the petitioner. Moreover, the petitioner is guilty of suppressing the fact that she had filed GIA Case No. 690 of 2012 before the State Education Tribunal claiming self same relief. It is further stated that the very appointment of the petitioner as an Assistant Teacher against a trained graduate post on 06.08.1993 is invalid for want of necessary qualification. Since she was engaged as Sikshya Sahayak from 2008 to 2011, the said period cannot be counted towards regular service for the purpose of grant-in-aid. The petitioner was therefore, rightly allowed block grant @ 60% from the date of re-absorption in the institution.

4. Similar stand has been taken by the District Education Officer, (opposite party No.3).

5. During pendency of the writ application, it was brought on record that by order dated 04.12.2019, (copy enclosed as Annexure-D/4 to the Additional Counter affidavit filed by opposite party No.4) 75 % block grant was allowed to the petitioner w.e.f. 15.10.2017 and 100% w.e.f. 15.10.2019 by the District Education Officer. The petitioner has also brought on record copy of the judgment dated 23.10.2019 passed by the State Education Tribunal in GIA Case No. 690 of 2012.

6. Heard Mr. Samir Kumar Das, learned counsel for the petitioner, Mr. Nikhil Pratap, learned Addl. Standing Counsel for the State and Mr. K.K. Swain, learned counsel for the institution (opposite party No.4).

7. Mr. Das would argue that despite availability of alternative remedy, the writ petition is maintainable because only a question of law is involved without any disputed questions of fact. In this context Mr. Das submits that the only question required to be determined by this Court is interpretation of the provisions of the Government Resolution dated 10.06.2013. He further submits that the petitioner has accepted the judgment passed by the Tribunal holding that the period of engagement as a Sikshya Sahayak shall not be counted towards financial benefits.

However, the petitioner's only claim is that she should be extended 100% block grant with effect from the date indicated by the Tribunal and not 60% as has been extended to her. On the question of maintainability, Mr. Das has cited a decision of the Apex Court in the case of **M/s. Godrej Sara Lee Ltd. vs. The Excise and Taxation Officer-cum-Assessing Authority & Ors**.,(Civil Appeal No. 5393 of 2010, decided on 01.02.2023).

8. Mr. N. Pratap, learned Addl. Standing Counsel argues that the petitioner's claim, being relatable to payment of grant-in-aid can be adjudicated by the Tribunal under Section 24-B of the Act, 1969. She cannot bypass such statutory remedy. Mr. Pratap further argues that the petitioner was rightly granted 60% block grant w.e.f. 15.10.2011 as she was not eligible for 100% as per the Rules.

9. Mr. K.K. Swain submits that the statutory remedy under Section 24-B of the Act, 1969 cannot be bypassed under any circumstances as the statute also provides the remedy of appeal against the order passed by the Tribunal on an application under Section 24-B of the Act, 1969. On merits, it is submitted that the petitioner having been engaged as Sikshya Sahayak is not entitled to 100% block grant in view of the provision under paragraph- 6(b) of the Resolution dated 10.06.2013. On the point of maintainability, Mr. Swain had relied upon the decision of the Apex Court in the case of State of T**he State of Maharashtra and others vs. Greatship (India) Limited**, reported in (2022) 4 SCR 840 and the decisions of this Court in the case of **Shri Dillip Kumar Samal vs. State of Orissa and another**, reported in 2007 (II) OLR 788; **Jitendra Kishore Baghasingh and batch vs. State of Orissa and others**, reported in 2008 (Supp.I) OLR-316 and the case of **Gopal Krishna Behera vs. Union of India**, reported in (2014) 118 CLT 533.

10. Since the question of maintainability of the writ petition has been raised, it would be proper to address the said issue at the outset. Admittedly, the petitioner claims block grant @ 100% from 15.10.2011 as against 60% extended to her by the authorities. Section 24-B (1) of the Odisha Education Act, 1969 runs as follows:

> ***"24-B. Adjudication by Tribunal****- (1) The Tribunal shall have jurisdiction, power and authority to adjudicate all disputes and differences, between the Managing Committee or, as the case may be, the Governing body of any private educational institution and any teacher or employee of such institution or the State Government or any officer or authority of the said Government, relating to or connected with the eligibility, entitlement, payment or non-payment of grant-in-aid.*
>
> *Xx xx xx"*

11. Thus, ordinarily the petitioner's grievance as laid in the writ application is a matter that can be adjudicated by the Tribunal. The question is, whether the availability of the alternative statutory remedy is an absolute bar for entertaining a writ application by the High Court. In all the cases cited by Mr. Swain, it has been

held that when there is an alternative/statutory remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the constitutional provision. In particular, in **Jitendra Kishore Baghasingh** (supra) it was held that any dispute covered under Section 24-B of the Act should not be entertained by the High Court in exercising jurisdiction under Article 226 of the Constitution of India in view of the appellate authority vested in it for consideration of the decision of the Education Tribunal. It was further held that a dispute relating to claim of grant-in-aid shall not be decided in a proceeding under Article 226 of the Constitution. As against the line of decisions referred hereinbefore, in the recent decision in **M/s. Godrej Sara Lee Ltd**. (supra), the Apex Court held as follows:

> *8. That apart, we may also usefully refer to the decisions of this Court reported in (1977) 2 SCC 724 (State of Uttar Pradesh & ors. vs. Indian Hume Pipe Co. Ltd.) and (2000) 10 SCC 482 (Union of India vs. State of Haryana). What appears on a plain reading of the former decision is that whether a certain item falls within an entry in a sales tax statute, raises a pure question of law and if investigation into facts is unnecessary, the high court could entertain a writ petition in its discretion even though the alternative remedy was not availed of; and, unless exercise of discretion is shown to be unreasonable or perverse, this Court would not interfere. In the latter decision, this Court found the issue raised by the appellant to be pristinely legal requiring determination by the high court without putting the appellant through the mill of statutory appeals in the hierarchy. What follows from the said decisions is that where the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should be decided by the high court instead of dismissing the writ petition on the ground of an alternative remedy being available. (Emphasis supplied)*

12. What emerges from reference to the decisions cited above is, ordinarily the High Court exercising jurisdiction under Article 226 of the Constitution should not entertain grievances, the redressal of which can be had before a statutory forum. In other words, the High Court would refrain from entertaining a matter where alternate and efficacious statutory remedy is available. But then, if the grievance is related to purely legal question without involving disputed questions of fact but only questions of law, the High Court should decide the same instead of dismissing the writ petition on the ground of alternative remedy being available.

13. Such being the law relating to maintainability of a writ application in the presence of alternative statutory remedy, the next question to be seen in the present case is, whether the controversy here is a factual or legal one.

14. The facts of the case are not disputed. The petitioner joined on 06.08.1993. Since she was engaged as Sikshya Sahayak from 01.04.2008 to 14.10.2011, learned Tribunal in its judgment dated 23.10.2019 passed in GIA Case No. 690 of 2012 held that the date of initial appointment of the petitioner shall be treated as 06.08.1993 but she will not be eligible to receive financial benefit from 01.04.2008 to 14.10.2011. No one has challenged the said judgment for which the same has

attainedfinality. The petitioner has also been extended 60% block grant w.e.f. 15.10.2011. She does not claim block grant from any prior date, but her only claim is, instead of 60% the same ought to have been 100%. In making such claim she relies upon the Government resolution dated 10.06.2013. No other fact, much less disputed fact is involved.The case is thus, relatable entirely to interpretation of the provisions of the aforementioned Government Resolution. It has also been argued that the petitioner had filed the present writ application way back in the year 2016. Nearly seven years have passed. It would therefore, be iniquitous to relegate her to the Tribunal for redressal of her grievance. After considering the submissions as above, this Court finds force therein. The petitioner could have been relegated to seek redress before the Education Tribunal at the very threshold but the writ application has been pending for the last seven years. Taking the above fact into consideration, as also the fact that no disputed questions of fact are involved, this Court holds the writ petition to be maintainable.

15. As regards the merits of the claim of the petitioner, it would be proper to refer to the provisions of the resolution dated 10.06.2013 of the Government in Department of School and Mass Education, copy enclosed as Annexure-4 to the writ application. Paragraph-5(a) and 5(e) are relevant in the present context and hence, quoted hereinbelow:

> *"**5. Quantum of Grant-in-Aid:***
>
> *The private educational institutions who are in receipt of block grant as per grant-in-aid order,2004 and as per grant-in-aid order, 2-11 and who are eligible to receive Block grant up to 31.03.2013 shall be eligible to receive grant-in-aid in the following manner:-*
>
> *(a) Amount representing 100% of the emolument in respect of educational institutions who have received grant-in-aid by way of block grant as per GIA order, 2004 or as per GIA Order, 2011 and as per this order taken together for 8 years and above.*
>
> *xx xx xx*
>
> *(e) 110 Girl's High School which are receiving Block Grant as per Grant-in-Aid (Amendment) order 2007 shall be eligible to receive Grant-in-Aid in the manner as mentioned under sub para-(a) irrespective of the year of receiving Grant-in-Aid by way of Block Grant."*

16. Admittedly, the Institution in question is one among the 110 Girls' High Schools receiving block grant w.e.f.01.04.2008 as per Notification dated 10.02.2009. Paragraph-6 lays down the stipulation for sanction of grant-in-aid for different categories of institution. Opposite party No.3 has referred to paragraph-6(b), which reads as follows:

> *"6. Sanction of Grant-in-Aid for all categories of Institutions shall be subject to following stipulations, namely-*
>
> *xx xx xx*
>
> *(b) In computing the period of eligibility for release of Grant-in-Aid at different rates, the period for which the relevant post remained vacant or was held by an under qualified/ineligible person shall be excluded."*

This, according to the opposite parties disentitles the petitioner from receiving 100% block grant as she was not in the service of the School from 2008-2011.

17. After going through the provisions referred hereinbefore carefully,this Court is unable to persuade itself to agree with the reasoning adopted by the opposite party authorities. From the scheme of the resolution, it is evident that the institution in question has to first become eligible to receive block grant. Once the institution comes within the grant-in-aid fold, the individual employees also become automatically eligible. There is no provision by which an employee can be deprived of the benefit taking the period of his/her service in the institution. It is reiterated that the eligibility of an employee to receive block grant is entirely dependent on the institution's eligibility. The Resolution does not conceive of a situation where the institution is eligible for 100% block grant but its individual employees are not. In the instant case it has been pleaded and argued by the petitioner that all other employees are in receipt of 100% block grant except her. Such assertion has not been specifically denied by the opposite party authorities. Thus, the interpretation of the Government resolution being as narrated above, there is no way by which the petitioner could be deprived of 100% block grant from 15.10.2011.

18. For the foregoing reasons therefore, the writ petition is allowed. The opposite party authorities are directed to extend 100% block grant to the petitioner w.e.f. 15.10.2011. The differential amount in this regard shall be paid to her within a period of three months.

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2023 (II) ILR - CUT- 589

A.K. MOHAPATRA, J.

W.P.(C) NO. 933 OF 2021

RAMESH CHANDRA DEO .....Petitioner

.V.

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

W.P.(C) NO.9797 OF 2021
Sangita Das -V- State of Odisha & Ors.

W.P.(C) NO.1673 OF 2023
Jaladhar Jena -V- State of Odisha & Ors.

W.P.(C) NO.1674 OF 2023
Bibekananda Mishra -V- State of Odisha & Ors.

INTERPRETATION OF STATUTE – Revised Assured Career Progression Scheme, 2013 r/w clarification of the Government vide Memo No. 1738 dt. 20.01.2015 issued by the Finance Department – The clarification is contrary to the scheme – Effect of – If a clarification is contrary to the scheme then the scheme is to be followed as the clarification does not have any legislative value – In absence of any rule, the scheme is to be followed without any discrimination.

(Para 19)

Case Laws Relied on and Referred to :-

1. O.A. No.2887 of 2018 (Order dated 11.12.2018) : Sankarsana Acharya Vs. State of Odisha.
2. W.P.(C) No.2831of 2016 (Decided on 27.06.2916) : Bihari Lal Barik Vs. State of Odisha.

For Petitioner : Mr. P.C. Acharya

For Opp. Parties : Mr. N.K. Praharaj, A.G.A.

JUDGMENT Date of Hearing : 28.03.2023 : Date of Judgment : 27.04.2023

A.K. MOHAPATRA, J.

01. The above noted writ applications involved a common set of facts as well as a common question of law. Therefore, the aforesaid batch of writ applications are being taken up together for hearing. Further, since the aforesaid batch of cases involved a common set of facts, to avoid repetition and for the sake of brevity, the facts involved in W.P.(C) No.933 of 2021 is being taken up for analysis and to answer the common question of law involved in the above noted batch of writ applications. Moreover, the above noted writ applications are being disposed of by the following common order.

02. Heard Mr. P.C. Acharya, learned counsel appearing for the Petitioner and Mr. N.K. Praharaj, learned Additional Government Advocate for the State-Opposite Parties. Perused the pleadings of the parties as well as materials placed before this Court.

03. The present writ application has been filed by the Petitioner with a prayer to quash the order under Annexure-6 dated 22.12.2020 passed by the Additional Chief Secretary to Government Forest and Environment Department under Annexure-6 to the writ application. The Petitioner has also prayed for a direction to the Opposite Parties to fix the petitioner's Grade Pay at the rate of Rs.4,600/- with effect from 01.01.2013 in accordance with Clause-10 of Government Resolution dtd.06.02.2013 under Annexure-1 keeping in view the ratio decided in ***Bihari Lal Barik vs. State of Odisha*** by modifying the Grade Pay fixed vide Order under Annexure-5 and with a further direction to the Opposite Parties to pay all arrears arising out of the aforesaid modification of the grade pay within a stipulated period of time.

04. The factual background of the present writ application in short is that the petitioner was initially appointment as a Forest Guard on 17.06.1977. The Petitioner completed 10 years of service on 17.06.1987, 20 years of service 17.06.1997 and 30 years of service 17.06.2007. In the year 2013 the Government of Odisha through the Finance Department introduced the Revised Assured Career Progression Scheme (RACPS) for the State Government employees vide resolution No.3560 dated 06.02.2013. On perusal of the said resolution it is observed that the Government after considering the recommendation of the Appointment Committee, granted Assured Career Progression (ACP) to the State Government employees on completion of 15th, 25th and 30th years of service which are akin to the Time Bound Advancement (TBA) provisions under the ORSP Rules, 1998.

05. Accordingly, all State Government employees availed ACP in three stages on completion of 15th, 25th and 30th years of service. Further, taking into account the uncertain promotional avenues and Career stagnation of State Government employees, the Government of Odisha keeping in view the aforesaid facts and further taking into consideration the Modified Assured Career Progression Scheme (MACPS) of the Government of India decided to implement a Career Advancement Scheme to be known as Revised Assured Career Progression Scheme (RACPS). It was further decided that the State scheme shall come into force w.e.f. 01.01.2013.

06. While the matter stood thus, the petitioner was allowed the 1st Financial Upgradation and the 2nd Financial Upgradation under the RACPS 2013 Scheme with correct grade pay. So far, the 3rd Financial Upgradation under the 2013 scheme, which is payable after completion of 30 years of service w.e.f. 01.01.2013, the petitioner has been given a grade pay of Rs.2,800/-. According, to the petitioner, the said Grade Pay of Rs.2,800/- sanctioned w.e.f. 01.01.2013 is not the correct Grade Pay under the Resolution dated 06.02.2013. Further, it has been stated that the promotional post of the petitioner is up to the Forest Ranger as per the promotional hierarchy. While considering the petitioner's claim of 3rd Financial Upgradation the authorities have not taken into consideration the promotional avenue of the petitioner up to the post of Forest Ranger and accordingly the Grade Pay has not been fixed on such basis. Mr. Acharya, learned counsel appearing for the Petitioner submitted that initially the petitioner was appointed as a Forest Guard. Thereafter, promotional avenue of the petitioner are as follows:-

Forest Guard --> Forester --> Deputy Ranger --> Ranger

07. Mr. Acharya, in course of his argument also submitted before this Court that a person who has been appointed as a Forester in course of his employment can go up to the post of ACF (Assistant Conservator Forest). Therefore, it was argued before this Court that the fixation of Grade Pay under the 3rd Financial Upgradation by the Opposite Parties is erroneous and illegal and therefore the order of fixation of petitioner's Grade Pay vide 24.09.2015 under Annexure-5 in respect of Forest Guard

at the rate of Rs.2000/- on completion of 10 years, Rs.2400/- on completion 20 years, Rs.2800/- on completion 30 years which is not in conformity with the Resolution dated 06.02.2013 as well as the law laid down by this Court and has also been affirmed by the Hon'ble Supreme Court in ***Bihari Lal Barik vs. State of Odisha***.

08. Mr. Acharya, further referring to clause-10 of the Resolution dated 06.02.2013 under Annexure-1 submitted before this Court that the promotional hierarchy of the Petitioner is to be taken into consideration while fixing the Grade Pay of the Petitioner for 3rd Financial Upgradation under the RACP Scheme pursuant to Resolution under Annexure-1. Clause-10 of Resolution dated 06.02.2013 which is relevant for the purpose has been quoted hereinbelow:-

> "Benefit of pay fixation available at the time of regular promotion shall also be allowed at the time of financial upgradation under the Scheme, which means the pay shall be raised by 3% of the total of pay in the Pay Band and the Grade Pay drawn before such upgradation. The employees of the cadre having promotional hierarchy will get the Grade Pay of the promotional post. The employees in isolated/ ex-cadre posts not having any promotional hierarchy will get the next higher Grade Pay as per the first schedule of ORSP Rules, 2008 with the interpolations, if any introduced subsequently. In case the new Grade Pay corresponds to a different Pay Band, the employee will get the Pay Band corresponding to the revised Grade Pay. There shall, however, be not further fixation of pay at the time of regular promotion."

09. On perusal of the clause-10 of Resolution dated 06.02.2013, it is observed by this Court that the employees of the cadre having promotional hierarchy will get the Grade Pay of the promotional post. The employees in isolated/ ex-cadre post not having any promotional hierarchy will get next higher Grade Pay as per the 1st schedule of ORSP Rules, 2008 with the interpolations, if any, introduced subsequently. In case, the new Grade Pay corresponds to different pay band, the employees will get the Pay Band corresponding to the Revised Grade Pay. Therefore, the language employed in Clause-10 of the Resolution indicates that the Grade Pay attached to the promotional hierarchical post shall be taken into consideration while fixing the Grade Pay under the Resolution dated 06.02.2013 for fixation of a grade pay under financial upgradation scheme.

10. Learned counsel for the petitioner in course of his argument also referred to the orders passed in favor of the similarly placed employees. First he referred to the order passed in Duryodhan Sahoo vs. State of Odisha and others by the Odisha Administrative Tribunal in O.A. No.1186 of 2019 on 08.07.2019. In that case, the Petitioner was a Forest Guard and pursuant to the order of the Tribunal he has been granted a Grade Pay of Rs.4,600/- towards 3rd RACP with effect from date when he completed 30 years of service. It is further contended that the said order has already been implemented by the State-Opposite Parties.

11. The learned counsel for the petitioner also referred to the order of the Tribunal in the case of ***Sankarsana Acharya vs. State of Odisha*** decided by the Odisha Administrative Tribunal Bhubaneswar Bench in O.A. No.2887 of 2018 vide order dated 11.12.2018. On the request of learned counsel for the petitioner the record of that case was called for by this Court. On perusal of the record it appears that the while disposing of the said O.A. vide order dated 11.12.2018, the learned Tribunal has taken into consideration the above referred clause-10 of the Resolution dated 16.02.2013 as well as the ratio laid down in ***Bihari Lal Barik***'s case in O.A. No.520 of 2014 and batch of other petitions filed before the Tribunal which were eventually confirmed by this Court as well as the Hon'ble Apex Court and accordingly a Grade Pay of Rs.4,600/- with the corresponding Pay Band was allowed to the petitioner in that case w.e.f.01.01.2013. It was also submitted that the order of the Tribunal in that case has also already been implemented and that the petitioner in that case was also a Forest Guard.

12. Learned Addl. Government Advocate, on the other hand, submitted that the petitioner is not entitled to the Grade Pay of Rs.4,600/- as claimed by him. Referring to the counter affidavit filed by the State-Opposite Parties, learned Addl. Government Advocate submitted that neither clause-10 nor the ratio laid down in ***Bihari Lal Barik vs. State of Odisha*** in W.P.(C) No.2831 of 2016 decided on 27.06.2016 is applicable to the facts of the present case. Learned Addl. Government Advocate contended that the post of Forest Guard, Forester and Deputy Ranger, Ranger does not come within a common cadre. Therefore, he submitted that by no stretch of imagination it can be construed that the same constitutes a single cadre. In the said context, learned Addl. Government Advocate, drawing attention of this Court to clause-1 of the Resolution dated 06.02.2013, submitted that one of the essential requirements of the scheme under resolution dated 06.02.2013 as per Annexure-1 is that the petitioner must have served in a single cadre in absence of promotion. For better appreciation, clause-1 of the resolution dated 06.02.2013 has been extracted hereinbelow:-

> "There shall be three financial up-gradation under the RACPS, counted from the direct entry grade on completion of 10, 20 and 30 years of service in a single cadre in absence of promotion. An employee if completed 10 years of service in the entry grade will be considered for 1st up-gradation under the RACPS. An employee completing 20 years of service and has got only one upgradation either by promotion or by RACPS will be considered for the 2nd upgradation. Similarly, an employee completing 30 years of service and has got two upgradation either by RACPS or promotion or both will be considered for 3rd upgradation under the RACPS."

13. Learned Addl. Government Advocate further also contended that different recruitment rules have been prescribed for appointment to the post of Forest Guard, Forester, Deputy Ranger and Ranger. Therefore, it was argued before this Court that since different recruitment rules have been provided to different posts, therefore, the same does not constitute a single cadre. In such view of the matter, it was submitted

that the petitioner is not entitled to the benefit claimed by him in view of the provision in Clause-1 of the resolution dated 06.02.2013.

14. By referring to para-6 of the counter affidavit, learned Addl. Government Advocate submitted that the Government of Odisha has issued a clarification vide Memo No.1738 dated 20.01.2014 through the Financial Department giving a clarification to the effect that Grade Pay of hierarchical promotional post which belongs to other cadre shall not be allowed under RACP scheme even if the former post being the only feeder post for promotional post and that it has also been clarified in the said Memo that the RACP is confined to a single cadre only.

15. Finally, referring to the rejection order dated 22.12.2020 under Annexure-6, learned Addl. Government Advocate submitted that the opposite parties have not committed any illegality by rejecting the representation of the petitioner which was filed pursuant to the order passed in W.P.(C) No.18174 of 2019. It was also contended, by referring to order 22.12.2020, that while rejecting the representation of the petitioner under Annexure-6, the Opposite parties have taken note of the fact that the petitioner is not entitled to Grade Pay of Rs.4600/- payable to the promotional post of Forest Ranger on completion of 30 years of service which is beyond the cadre of the post being held by the Petitioner and that the post of Forest Guard and Forester Ranger do not constitute a single cadre even though the promotional channel passes through Forest Ranger. In view of the aforesaid submission learned Addl. Government Advocate submitted that the petitioner is not entitled to Grade Pay of Rs.4600/- upon completion of 30 years of service as claimed by him pursuant to the resolution dated 06.02.2013 under Annexure-1. Accordingly, the learned Addl. Government Advocate submitted that the writ petition is devoid of merit and same should be dismissed.

16. Having heard the learned counsels for the parties and upon a careful consideration of the contentions raised by them and on a careful analysis of the factual background of the writ petitions as well as the position of law that governs the field, this Court is required to consider as to whether eligibility condition of single cadre as has been mentioned in clause-1 of the notification under Annexure-1, the Petitioner is entitled to get the Grade Pay of Rs.4600/- on completion of 30 years of service and further the claim of the petitioner is also required to be examined in the light of the fact that similarly placed persons have been extended such benefit by virtue of order passed by the Odisha Administrative Tribunal which have attained finality and the same have been implemented by the Opposite Parties in the meantime.

17. So far the common cadre is concerned, this Court posed a specific question to the learned Addl. Government Advocate as to whether there exists any common cadre rule in respect of the Forest Guard, Forester, Deputy Ranger and Ranger working under the Forest Department. The specific reply of learned Addl.

Government Advocate was that there is no such common cadre rule. However, the learned Addl. Government Advocate contended that there are two separate rules for recruitment to the posts in the Forest Department. One rule which regulates the recruitment to the post of Forest Guard and Forester and there is another rule which governs the recruitment procedure to the post of Ranger. Therefore, so far Deputy Ranger is concerned, the appointment to such post is governed by Government Resolution vide order dated 07.01.2009.

18. Moreover, it is clear that once a person enters into Government service on being appointment as a Forest Guard he will be promoted to the post of Forester. Thereafter, by virtue of the Resolution dtd.07.01.2009 the post of Deputy Ranger shall be filled up by way of promotion from amongst the eligible foresters working in the Forest Department. So far, the post of Forest Rangers are concerned, the same is governed by Rule-16 of Orissa Forest Service (Recruitment and Conditions of Service) Rules, 2013. Therefore, even though there is no common cadre rule, however, if a person is appointed as a Forester through the promotional hierarchy he can go up to the Forest Ranger. Moreover, the restriction that is imposed by clause-1 of the resolution dated 06.02.2013 is not applicable to the facts of the present case as there is no common cadre rule. As such this Court is of the considered view that the case of the petitioner is to be considered under clause-10 of resolution dated 06.02.2013.

19. So far, the clarification of the Government vide Memo No.1738 dated 20.01.2015 issued by the Finance Department is concerned, this Court on perusal of the judgment of this Court in ***Bihari Lal Barik vs. State of Odisha*** observed that para-16 of the said judgment has specifically considered the aforesaid clarification of the Government and after discussing the said clarification dated 20.01.2014, it has been observed that the said clarification is contrary to para-10 of RACP scheme dated 06.02.2013. Therefore, it was held by this Court in the said judgment in ***Bihari Lal Barik***'s case (supra) that if a clarification is contrary to the scheme then the scheme is to be followed as the clarification does not have any legislative value and as such it can over-ride the scheme and in the absence of any rule, the scheme is to be followed without any discrimination.

20. In view of the aforesaid legal position and considering the contention raised by learned Addl. Government Advocate, this Court is of the considered view that aforesaid clarification of the Government dated 20.01.2014 has no force in it and as such the argument advanced in that regard has to be rejected at this juncture.

21. In view of the aforesaid analysis of factual position as well as the legal aspects and further keeping in mind the principles of law laid down by this Court in ***Bihari Lal Barik***'s case (supra) which has been confirmed by the Hon'ble Apex Court and further taking into consideration the fact that orders have been passed in respect of similarly situated employees of the same department and that orders

passed by the Tribunal were allowed to attain finality and the same having not been challenged any further, and moreover the same has already been implemented as referred to hereinabove, this Court is of the considered view that the order rejecting the petitioner's claim under Annexure-6 to the writ application is unsustainable in law and accordingly the same is hereby quashed. Further, the order dated 24.09.2014 under Annexure-5, fixing Grade Pay of Forest Guard at the rate of Rs.2800/- so far 3rd RACP benefits is concerned, is also hereby quashed.

22. The Opposite Parties are further directed to grant the Grade Pay of Rs.4600/-towards 3rd RACP benefit under the resolution dated 06.02.2013. Accordingly, the arrears payable to the petitioners be calculated by taking into consideration the Grade Pay under 3rd RACP at the rate of Rs.4600/-. Similarly, the last pay drawn by the petitioner be also fixed by taking into consideration the revised grade pay Rs.4600/- and accordingly the pensionary benefits payable to the petitioner be also re-calculated. Let the aforesaid exercise be concluded and the benefits be released in favor of the petitioner within a period of three months from the date of production of the certified copy of this judgment. Since this judgment is being delivered keeping in view the factual background of W.P.(C) No.933 of 2021, the ratio decided in this case shall also apply to W.P.(C) No.9797 of 2021, W.P.(C) No.1673 of 2023 & W.P.(C) No.1674 of 2023 and accordingly the relief be worked out keeping in view the factual scenario involved in each such cases within the aforesaid time frame.

23. With the aforesaid observations/directions these writ petitions are allowed. However, there shall be no order as to cost.

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2023 (II) ILR - CUT- 596

A.K. MOHAPATRA,J.

W.P.(C) NO. 37371 OF 2021

NAROTTAM BEHERA .....Petitioner

.V.

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

(A) ODISHA CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1962 – Rule 15 r/w Recruitment and Conditions of Services of the Employees of SPC Board, Odisha Regulation, 2011 – Regulation 44(A)(1)(x) and 47(3) – The disciplinary authority by invoking the power as per regulation,compulsorily retired the petitioner from service – No reasonable opportunity of hearing by giving prior notice to the petitioner before passing an order of compulsory

retirement has been given – Effect of – Held, the punishment has been imposed in violation of natural justice and without following the due procedure as laid down in Rule 15 of the 1962 Rules, the same is unsustainable in law. (Paras 20-21)

(B) ALTERNATIVE REMEDY – When alternative remedy is not a Bar – Held, when impugned order has been passed in gross violation of the principles of natural justice the statutory appeal as alternative remedy is not a bar. (Para 23)

Case Laws Relied on and Referred to :-

1. (1998) 8 SCC 1 : Whirlpool Corporation Vs. Registrar of Trade Mark, Mumbai.
2. (2016) 12 SCC 204 : Chamoli Cooperative Bank Limited & Anr. Vs. Raghunath Singh Rana & Ors.
3. (2017) 1 SCC 768 : Himachal Pradesh State Electricity Board vrs. Mahesh Dahiya.

For Petitioner : M/s. S.P. Mishra, Sr. Adv, P. Sahoo, A. Dash & A. Mohanty
For Opp. Parties : Mr. S. Das, Addl. Govt. Adv.
Mr. B. Dash, for O.P. No.4

JUDGMENT Date of Hearing : 12.04.2023 :Date of Judgment : 27.04.2023

A.K. MOHAPATRA, J.

1. By filing the present writ application, the petitioner urges to question the decision of the Opposite Parties in retiring the petitioner prematurely. Furthermore, it has also been prayed in the writ application to set aside the order of premature retirement dated 09.11.2021 under Annexure-5 and to direct the Opposite Parties to reinstate the petitioner with all service and consequential benefits.

2. The factual matrix involved in the present writ application, shorn of unnecessary details, is that on 22.10.1999, the petitioner was appointed on temporary basis as a Junior Engineer with a scale of pay by the Opposite Party No.4. While he was working as such, regular vacancies arose on 13.09.2006. On the recommendation of the internal committee constituted and subsequently after obtaining due approval of the Chairman (Opposite Party No.2), the petitioner was appointed in the post of Assistant Environment Engineer.

3. On perusal of the pleading of the petitioner, it appears that the petitioner was discharging his duties to the satisfaction of the higher authorities and he had an unblemish service career. Further, it is revealed that there is no adverse remark in his PAR, at least no such remark was ever communicated to the petitioner on the basis of the performance and service record of the petitioner, the petitioner was promoted and posted ad Deputy Engineer and Executive Engineer on 07.01.2013 and 08.11.2018 respectively.

4. On 26.06.2020, while the petitioner was working as Environmental Engineer, Regional Office, SPC Board, Bhubaneswar, he was transferred and posted as Regional Officer in the Regional Office at Balasore.

5. While the matter stood thus, to the utter surprise of the petitioner on 09.10.2021, while the petitioner was en-route from his place of work to his rented house at Bhubaneswar for making necessary arrangement for his niece's marriage, which was to be held scheduled on 21.11.2021, the petitioner was intercepted and searched upon his person and the vehicle by the vigilance Department. On such search, a sum of Rs.89,290/- was seized from the vehicle of the petitioner and accordingly, a vigilance case was registered bearing Vigilance P.S. Case No.17 of 2021.

6. In the background of the aforesaid search and seizure by the Vigilance Department, the petitioner was given compulsory retirement by the SPC Board order dated 09.11.2021. The order of compulsory retirement was issued under the signature Chairman, Disciplinary Authority, State Pollution Control Board, Odisha-Opposite Party No.2. Challenging the aforesaid order dated 09.11.2021 under Annexure-1, the petitioner has approached this Court by filing the present writ application.

7. Heard Mr. S.P. Mishra, learned senior counsel appearing on behalf of the petitioner, Mr.B.Dash, learned counsel appearing on behalf of the Opposite Party No.4 and Mr.S.Das,learned Additional Government Advocate for the State. Perused the pleadings of the parties as well as materials placed before this Court for consideration.

8. Mr. S.P. Mishra, learned senior counsel appearing on behalf of the petitioner, at the outset, drawing attention of this Court to the impugned order dated 09.11.2021 under Annexure-5, submitted that in the 3rd paragraph of the impugned order it has been stated by the disciplinary authority that the conduct of the present petitioner has led to his ***conviction*** and that the same has rendered his further retention in the service of the SPC Board, Odisha undesirable. Accordingly, the disciplinary authority by invoking the powers conferred by Regulation-44(A)(1)(x) read with Regulation-47(3) of the "Recruitment and Conditions of Service of the Employees of SPC Board, Odisha Regulation-2011"directed that the petitioner,who was under suspension is hereby compulsorily retired from service w.e.f. 08.11.2021 (A.N.).

9. Learned senior counsel appearing on behalf of the petitioner emphatically submitted that the basic premise on which the order has been passed thereby giving compulsory retirement to the petitioner is erroneous and arbitrary. To substantiate the aforesaid submissions made by him, Mr. Mishra,

learned senior counsel submitted before this court that the Vigilance P.S. Case No.17 of 2021 which was registered against the petitioner for commission of offence under Sections 7(A)/13(2) read with Section 13(1)(b) of the P.C.(Amendment) Act, 2018 is at a nascent stage when the impugned order dated 09.11.2021 was passed. He further contended that by the time, the impugned order was passed, the Vigilance Department had not even filed charge-sheet in the above noted Vigilance P.S. Case. Therefore, the foundation of the order which is based on the fact that the petitioner has been convicted in the Vigilance P.S. Case is a glaring example of distortion and concoction of the factual aspects involved in the matter and as such, the impugned order is based on erroneous facts. In course of his argument, Mr. Mishra, learned senior counsel for the petitioner further submitted that when the foundation of the impugned order is erroneous, therefore, the entire edifice of the impugned order under Annexure-5 is more likely to be demolished once the foundation of the order based on such erroneous facts is removed.

10. Next, Mr. Mishra, learned senior counsel appearing on behalf of the petitioner referred to the regulation, 2011. By referring to Regulation 44(A)(1), it was contended before this Court that the provisions of Odisha Civil Services (Classification Control and Appeal) Rules, 1962 (hereinafter referred to as "OCS(CCA) Rules) shall be applicable to the employees of the Board in so far as procedure for holding an enquiry, imposition of penalty and the communication of orders are concerned. Further, drawing attention of this Court to Clause-(s) of the Regulation-44(A)(1), it was submitted by Mr. Mishra that the punishment of compulsory retirement has been prescribed as a penalty along with other penalties that could be imposed in course of the disciplinary proceeding. In such view of the matter, learned senior counsel appearing for the petitioner submitted that the order under Annexure-5 giving compulsory retirement to the petitioner is in the nature of a penalty as provided under Regulation 44(A)(1) of the Regulations 2011.

11. Learned senior counsel appearing on behalf of the petitioner further drawing attention of this Court to the counter affidavit filed by the Opposite Party No.4 and referring to Annexure-E/4 submitted that the Member Secretary of the SPC, Odisha passed an order dated 05.11.2021 directing Mr. Niranjan Mallick, SES(CL) to proceed to the Regional Office, SPC Board, Balasore and conducted enquiry confidentially towards dereliction in discharging the duties of the Regional Officer and further Mr. Mallick was directed to submit a report along with supporting documents in respect of the delinquent officer towards dereliction in official duty and misconduct on or before 08.11.2021.

12. He further contended that pursuant to the aforesaid order passed by Member, Secretary, a confidential enquiry was conducted in the Regional Office, SPC Board, Balasore and accordingly, a report dated 08.11.2021 was submitted before the Member Secretary. Further drawing attention of this Court to the report under Annexure-E/4 to the counter affidavit, learned senior counsel appearing for the petitioner submitted that the said enquiry report reveals that the petitioner was discharging his duties properly and sincerely except the noting to the effect that the disposal of files by the petitioner on offline mode is a clear deviation from the usual recommended procedure and hence reported that question arises on petitioner's integrity. So far other aspects in the enquiry report are concerned, the same were found to be satisfactory and has been duly complied with by the petitioner.

13. Furthermore, in reply to the only adverse common in the enquiry report in connections with the disposal of files on offline mode, learned senior counsel for the petitioner submitted before this Court that there are internet connectivity issues in the office of the Regional Officer, SPC Balasore and such fact has been duly intimated to the Head Office of SPC, Odisha. As such, it was contended by Mr. Mishra, learned senior counsel that the confidential enquiry by no stretch of imagination can form the basis for awarding the punishment of compulsory retirement.

14. Most importantly, Mr. Mishra, learned senior counsel submitted that in view of the Regulation 44(A)(1) of the Regulation, 2011, the OCS(CCA) Rules is applicable to the employees of SPC Board, Odisha. He further contended that while imposing penalty, the disciplinary authority is bound to follow the procedure prescribed under Rule 15 of the OCS (CCA) Rules, 1962. Since the imposition of penalty of compulsory retirement is a major penalty, the authorities are bound to follow the procedure prescribed OCS (CCA) Rules. Any deviation or violation of the procedure prescribed under Rule 15 would render the entire proceeding a nullity and the imposition of the consequential penalty would be non-est in the eyes of law. For better appreciation of the procedural formalities which are required to be followed in view of Rule 15, the said Rule 15 of the Rule, 1962 has been quoted herein below:-

> "**15. Procedure for imposing penalties.-**(l) Without prejudice to the provisions of the Public Servant (Inquiry) Act 1960, no order imposing on a Government Servant any of the penalties specified in Clauses (vi) to (x) of Rule 13 shall be passed except after an enquiry held as far as be in the manner hereinafter provided.
>
> (2) The disciplinary authority shall frame definite charges on the basis of the allegations on which the inquiry is to be held. Such charges together with a statement of the allegations on which they are based, shall e communicated in writing to the Government servant and he shall be required to submit, within such time as may be specified by the

disciplinary authority, not ordinarily exceeding one month a written statement of his defence and also to state whether he desires to be heard in person.

Explanation – In this Sub-rule and in Sub-rule(3) the expression Disciplinary authority shall include the authority competent under these rules to impose upon the Government servant of the penalties specified in Clauses (i) to (v) of Rule 13.

(3) The Government servant shall, for the purpose of preparing his defence, be supplied with all records on which the allegations are based. He shall also be permitted to inspect and take extracts from such other official records as he may specify, provided that such permission may be refused if, for reasons to be recorded in writing in the opinion of the disciplinary authority such records are not relevant for the purpose or it is against interest of the public to allow him access thereto.

(4) On receipt of the written statement of defence or if no such statement is received within the time specified, the disciplinary authority may itself enquire into such of the charges as are not admitted or, if it considers it necessary so to do, appoint a board of inquiry or an enquiring officer for the purpose.

[Provided that if, after considering the written statement of defence, the disciplinary authority is of the view that the facts of the case do not justify the award of a major penalty,it shall determine after recording reasons thereof, what other penalty or penalties, if any, as specified in Clauses (i) to (v) of Rule 13 should be imposed and shall after consulting the Commission, where such consultation is necessary, pass appropriate order.]

(5) The disciplinary authority may nominate any person to present the case in support of the charges before the authority inquiring into the charges (hereinafter referred to as the 'inquiring authority'). The Government servant shall have the right to engage a legal practitioner to present his case if the person nominated by the disciplinary authority, as aforesaid, is a legal practitioner. The inquiring authority may also having regard to the circumstances of the case, permit the Government servant to be represented by a legal practitioner.

(6) The inquiring authority shall,in the course of the inquiry, consider such documentary evidence and take such oral evidence as may be relevant or material in regard to the charges. The Government servant shall be entitled to cross-examine witnesses examined in support of the charges and to give evidence in person. The person presenting the case in support of the charges shall be entitled to cross-examine the Government servant and the witnesses examined in his defence. If the inquiring authority declines to examine any witness on the ground that his evidence is not relevant or material, it shall record its reason in writing.

(7) At the conclusion of the inquiry authority shall prepare a report of the inquiry, recording its findings on each of the charges together with reasons thereof. If, in the opinion of such authority, the proceedings of the inquiry establish charges different from those originally framed, it may record its findings on such charges, provided that the findings on such charges shall not be recorded, unless the Government servant has admitted the facts constituting them or has had an opportunity of defending himself against them. The inquiring authority may recommend the punishment to be inflicted when the charges are establishment on the findings.

(8) The record of inquiry shall include-

(ii) his written statement of defence, if any;

(iii) the oral evidence taken in the course of the inquiry;

(iv) the documentary evidence considered in the course of the inquiry;

(v) the orders, if any, made by the disciplinary authority and the inquiring authority in regard to the inquiry;

(vi) a report setting out the findings on each charge and the reasons therefore; and

(vii) the recommendations of the inquiring authority, if any, regarding the punishment to be inflicted.

(9) The disciplinary authority shall, if it is not the inquiring authority, consider the record of the inquiry and record its findings on each charge.

[(10) (i)(a) If the inquiring officer is not the disciplinary authority, the disciplinary authority shall furnish to the delinquent Government servant a copy of the report of the inquiring officer and give him notice by registered post or otherwise calling upon him to submit within a period of fifteen days such representation as he may wish to make against findings of the Inquiring Authority.

(b) On receipt of the representation referred to in Sub-clause (a) the disciplinary authority having regard to the findings on the charges, is of the opinion that any of the penalties specified in Clauses (vi) to (ix) of Rule 13 should be imposed, he shall furnish to the delinquent Government servant a statement of its findings along with brief reasons for disagreement, if any, with the findings of the inquiring officer and give him a notice by Registered post or otherwise stating the penalty proposed to be imposed on him and calling upon him to submit within a specified time such representation as he may wish to make against the proposed penalty :

Provided that in every case in which it is necessary to consult the Commission under the provision of the Constitution of India and the Orissa Public Service Commission (Limitation of Functions) Regulation, 1989 the record of Inquiry together with a copy of the notice given under Sub-clause (a) and the representation if any, received within the specified time in response to such notice shall be forwarded by the disciplinary authority to the Commission for its advice.

(c) On receipt of the advice from the Commission the disciplinary authority shall consider the representation, if any, made by the Government Servant and the advice given by the Commission and shall pass appropriate orders in the case.

(d) In any case in which it is not necessary to consult the Orissa Public Service Commission, the disciplinary authority shall consider the representation, if any, made by the Government servant in response to the notice under Sub-Clause (b) and pass appropriate order in the case.]

[Provided that in every case in which it is necessary to consult the Commission under the provision of the Constitution of India and the Orissa Public Service Commission (Limitation of Functions) Regulation, 1989, the record of inquiry together with copies of the notices given under Sub-clauses (a) and (b) and the representations, if any, received in response thereto within the specified time shall be forwarded by the disciplinary authority to the Commission for its advice.]

> (ii) The orders passed by the disciplinary authority shall be communicated to the Government servant, who shall also be supplied with a copy of the report of inquiring authority and where the disciplinary authority is not the inquiring authority, a statement of its findings together with brief reasons for disagreement, if any, with the findings of the inquiring authority, as well as a copy of the advice of the Commission, where the Commission had been consulted, and brief statement of reasons for non-acceptance of the advice of the Commission, if the disciplinary authority has not accepted such advice."

15. Per contra, the Opposite Party No.4, who is the contesting Opposite Party has filed a detailed counter affidavit. In the said counter affidavit, the Opposite Party No.4 has elaborately narrated the factual background of the case, which include the incident of lodging and registration of Vigilance P.S. Case and thereafter a confidential enquiry by Mr. Niranjan Mallick, Senior Environmental Scientist and finally passing of the impugned order by the authorities. The Opposite Party No.4 in his counter affidavit has further specifically denied the applicability of Rule 71 of Odisha Service Code to the case of the petitioner which deals with premature retirement of a Government servant. On the contrary, it has been stated that the Board Employees are governed by the Rules and Regulations of the board.

16. Further, in Para-9 of the counter affidavit it has been stated that nowhere Regulation-44(A)(1)(x) read with Clause 47(3)of the Regulation-2011 prescribes anything to give reasonable opportunity of hearing by giving prior notice to the petitioner before passing an order for compulsory retirement. With regard to the confidential enquiry report, it has been stated in the counter affidavit that the Enquiring Officer, namely, Mr. Niranjan Mallick found that in most of the cases consent to establish and consent to operate applications were disposed of through offline mode which should have been carried out by the petitioner by following online process. Therefore, it has been concluded that the disposal of files on offline mode is a clear deviation of the recommended procedure. Therefore, the same raises question on the integrity of the petitioner. In such views of the matter, the Opposite Party No.4 through the counter affidavit have tried to its best to justify the passing of the impugned order under Annexure-5 and that such impugned order of compulsory retirement has been approved by the Board in its 124th meeting held on 24.11.2021.

17. On a close scrutiny of the counter affidavit, this Court observed that the factual background of the case has been repeated at several places and further it has been repeatedly pleaded that the Chairman being the disciplinary authority has been pleased to direct compulsory retirement from service in respect of the petitioner while exercising his power under Regulations 44(A)(1)(x) of the Regulation, 2011. There exists clear denial with regard to applicability of the Rule 71 of Odisha Service Code to the facts of the present case. Even in reply to

the averments in different paragraphs of the writ application, it has been stated that three months prior notice has not been given to the petitioner and in reply to para-1, it has been categorically stated in the counter affidavit that the Board has passed the order by following regulations 2011 which is in force and applicable to all the employees and officers of the Board including the petitioner. Finally, in para-18 of the counter affidavit, it has been mentioned in clear terms that the Chairman SPC Board being the disciplinary authority after careful consideration of the reports of G.A. (Vigilance) Department and confidential report of Mr. Niranjan Mallick came to a conclusion that the conduct of the delinquent officer (Petitioner) led to his conviction and such conduct has rendered further retention of the petitioner in the services of SPC Board undesirable.

18. Mr. B. Dash, learned counsel appearing for the Opposite Party No.4 contended before this court that the present writ application is not maintainable in law. In support of such contention, Mr. Dash, learned counsel for the Opposite Party No.4 referred to the schedule one of the regulations of 2011. Upon a cursory look of such schedule, it is observed that so far employees of the Board are concerned, the Chairman, who is the disciplinary authority, an appeal lies to the Board and against the decision of the Board appeal shall lie to the Government. In such view of the matter, Mr. Dash, further contended that since penalty has been imposed by the Chairman by invoking regulation 44(A)(1), the petitioner should have approached the appellate authority i.e. Board instead of approaching this Court by filing the present writ application and therefore, it was contended that the writ application is not maintainable and the same is liable to be dismissed.

19. Mr. Mishra, learned senior counsel appearing on behalf of the petitioner, on the other hand, led emphasis on the procedural irregularities committed by the disciplinary authority while imposing the punishment in question. He further contended that the Opposite Parties in their counter affidavit have categorically admitted that the punishment has been imposed by invoking the provisions of Regulation 44(A)(1) of the regulation 2011. Therefore, there is no dispute with regard to the fact that the petitioner has been made to retire compulsorily which is a major punishment. Indisputably while imposing such a punishment, the disciplinary authority is required to follow the procedure as provided under Rule 15 of the OCS(CCA) Rules, which has been quoted in the preceding paragraph and the same is a self-content code and provides for observance of the principles of nature justice. In other words, while imposing a major punishment like compulsory retirement from service, the disciplinary authority is duty bound to issue a show cause notice and after considering the reply of the Petitioner, punishment should have been imposed by following the Procedure under Rule-15 of the OCS(CCA) Rules, 1962.

20. On a careful consideration of the facts presented before this Court by the parties, as well as upon a careful scrutiny of the materials on record, this Court has no other option than to come to a conclusion that the provisions of Rule 15 of OCS(CCA) Rules, 1962 has been given a complete go by and the disciplinary proceeding has not been initiated & carried out, so far as the present petitioner is concerned as per law. Only confidential enquiry was conducted and concluded within a period of three days and on the basis of such confidential enquiry report, which was conducted without even giving any opportunity to the petitioner, the authorities have gone ahead and imposed punishment on the petitioner. Such conduct of the disciplinary authority definitely infringes the provisions contained in Rule-15 of the OCS (CCA) Rules, 1962. With regard to applicability of the OCS(CCA) Rules, this Court need not elaborate the same here as the same has been discussed elsewhere in this judgment keeping in view the Regulation 44(A)(1) of the Regulation, 2011 adopted by SPC Odisha for its employees. In such view of the matter, this Court has no hesitation in coming to a conclusion that the punishment has been imposed in violation of natural justices and without following the due procedure as laid down in Rule-15 of the OCS (CCA) Rules, 1962.

21. In view of the aforesaid analysis of law as well as keeping in view the contentions raised by learned senior counsel for the petitioner and further taking into consideration the provisions of Rule 15 of the OCS(CCA) Rules read with regulation 441(A)(1) of the Regulations, 2011, this Court has not hesitation that the issuance of notice to the petitioner and initiation of disciplinary proceeding before imposing such punishment is a mandatory requirement of law and the same having not been followed in the present case and merely coming to a conclusion that the petitioner is guilty of the allegations made by the Vigilance authorities that too in the absence of charge-sheet against the petitioner, the entire procedure followed in the present case while imposing punishment in question is vitiated and the same is unsustainable in law. The aforesaid finding of this Court also gets support from the fact that the entire procedure was conducted and the punishment in question was imposed without knowledge of the petitioner and behind his back.

22. The next question that falls for consideration is based on the submissions made by learned counsel appearing for the Opposite Party No.4 that the order passed by the disciplinary authority imposing punishment on the petitioner is appealable order and therefore, this Court while exercising jurisdiction under Article 226 of the Constitution of India should not interfere with the impugned order. In reply to the said question, this Court is conscious of the settled position of law by a catena of judgments of this Court as well as the Hon'ble Supreme Court that availability of alternative remedy is not an absolute bar while

exercising jurisdiction under Article 226 of the Constitution and thereby exercising the power of judicial review. This Court has to exercise such power with caution. Furthermore, the Hon'ble Supreme Court of India in the case of ***Whirlpool Corporation vrs. Registrar of Trade Mark, Mumbai : reported in (1998) 8 SCC 1*** have carved out certain exceptions for exercising jurisdiction under Article 226 of the Constitution of India even though remedy in the shape of a statutory appeal is available to the petitioner.

23. In the instant case, the authorities have given a clear go by to the principles of nature justice as well as the procedure prescribed in of Rule 15 OCS (CCA) Rules, 1962. Thus, accepting that the impugned order is an appealable one, the same will not stand in the way of this Court while exercising of power of judicial review by invoking extraordinary jurisdiction under Article 226 of the Constitution of India. Hence, the grounds taken by learned counsel for the Opposite Party No.4 with regard to maintainability of the present writ application by submitting before this Court that remedy of statutory appeal is available to the petitioner is unsustainable in law in view of the fact that the impugned order has been passed in gross violation of the principles of natural justice, which is so glaring that this Court cannot ignore such fact while adjudicating the present writ application.

24. At this juncture, this Court would also like to observe that it is well settle position of law, in view of, various judicial pronouncements that while imposing penalty on an employee, the disciplinary authority cannot impose such a penalty without following the statutory provisions governing the conduct of such disciplinary proceedings.Moreover, since the impugned order imposing punishment on the petitioner has civil consequence and is bound to affect the petitioner adversely, it was incumbent upon the disciplinary authority to comply with the principles of natural justice which is not a mere empty formality. Moreover, regulations 48(A)(1) which provides for the punishments that can be imposed on an employee also provides that such punishment can only be imposed by following provision contained in OCS(CCA) Rules, 1962.

25. At this stage, this Court would also like to go a step further by observing that in a case of departmental review it is well settled that while reviewing service career of an employee and making him retired compulsorily/prematurely would not attract the observance of principle of nature justice, however, when compulsory retirement is given as a measure of punishment, then the disciplinary authority is bound to follow the procedure as prescribed in the OCS(CCA) Rules, 1962 and therefore, compliance of principle of nature justice becomes mandatory under the law. In the aforesaid context, this Court would also like to refer to the judgment of the Hon'ble Supreme Court in the case of ***Chamoli***

Cooperative Bank Limited and another vrs. Raghunath Singh Rana and others : reported in ***(2016) 12 SCC 204***.

26. Law is fairly well settled that before inflicting any punishment on the employee, which is based on enquiry report and it is mandatory on the part of the disciplinary authority to provide an opportunity to the delinquent officer to submit his reply/representation on the findings of the enquiry report which contains some adverse remarks against such delinquent officer. In the present case, on perusal of the enquiry report, this Court observes that there is no substantial adverse remark against the petitioner which would call for imposition of punishment like the compulsory retirement. However, this Court at this stage refrains from making any comment on the allegation made against the petitioner in the F.I.R. lodged by the Vigilance department. So far the said Vigilance case is concerned, this Court was informed that the investigation is not yet over and accordingly no final charge-sheet has been filed.

27. Even in the criminal trial arising out of the aforesaid vigilance case, the petitioner would get an opportunity to defend himself by leading evidence before any punishment is imposed by the final judgment of the court. Be that as it may, since the disciplinary authority before inflicting penalty of compulsory retirement did not provide any opportunity to the petitioner, the petitioner did not get a scope to rebut the findings in the confidential enquiry report. Even it was open to the petitioner to raise a question with regard to the procedural illegalities before the disciplinary authority, had such an opportunity been given to the petitioner to do so. The law in this regard has been succinctly discussed and crystallized by the Hon'ble Apex Court in the case of ***Himachal Pradesh State Electricity Board vrs. Mahesh Dahiya :*** reported in ***(2017) 1 SCC 768.***

28. In view of the aforesaid analysis of the factual background involved in the present case as well as analysis of law applicable to the facts of this case, this Court has no hesitation to exercise its power of judicial review conferred under Article 226 of the Constitution of India to set aside the impugned order under Annexure-5. Accordingly, the impugned order under Annexure-5 is hereby quashed. However, while disposing of the present writ application, this Court further observes that it is open for the authorities to initiate disciplinary proceeding by following Regulation 48(A)(1) of the Regulation, 2011 read with the provisions contained in OCS(CCA) Rules, 1962, if they are so advised. Since the impugned order under Annexure-5 is quashed, the authorities are directed to grant necessary consequential relief to the petitioner forthwith.

29. With the aforesaid observation and direction, the writ petition stands allowed. However, in the facts and circumstances of the present case, there shall be no order as to cost.

2023 (II) ILR - CUT- 608

A.K. MOHAPATRA, J.

W.P.(C) NO.7711 OF 2012

SARAT KUMAR SWAIN .....Petitioner

.V.

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

ESSENTIAL COMMODITES ACT, 1955 – Section 6-A r/w OPDS Control Order, 2008, clause 23(a) – The seizer was made by the Sub-Inspector who is not competent to seize the essential commodities – Whether the proceeding U/s. 6(A) of the Act is sustainable? – Held, No – If the seizure is not valid and the same is not in conformity with the provision of law, such seizure is non-est in the eye of law and no proceeding can be initiated basing upon said illegal seizure by an authority who is not competent to do so.

Case Laws Relied on and Referred to :-

1. 2010 (I) OLR 221 : Tapan Kumar Samant Vs. Collector-cum-District Magistrate, Balasore & Ors.
2. OCR Volume 45 (2010)-414 : Tapan Kumar Samanta vrs. Collector-cum-District Magistrate, Balasore & Ors.
3. 2007 (II) OLR (SC) 471 : Kailash Prasad Yadav and another Vs. State of Jharkhand.
4. Crimes Vol-(VIII) 1990(2)-744 : Nanda Kishore Singh Vs. State of Bihar
5. 2011 (II) OLR-240 : Anand Samal Vs. State of Orissa & Ors.

For Petitioner : M/s. Gopal Krishna Nayak & S. Patra

For Opp. Parties: Mr. A. Behera, Addl. Standing Counsel

JUDGMENT Date of Hearing : 22.03.2023: Date of Judgment : 27.04.2023

A.K. MOHAPATRA, J.

1. The present writ application has been filed by the petitioner calling in question the conduct and the procedure adopted by the Opposite Parties while conducting the seizure of the PDS commodities by the S.I. Gangapur Police Station and the petitioner has further challenged the legality and propriety of the impugned order as well as the jurisdiction of the Collector, Ganjam in initiating the proceeding against the petitioner under Section 6-A of the Essential Commodities Act on the basis of illegal seizure. The petitioner has further prayed for quashing of notice under Annexure-4 to the writ application.

2. The back ground facts leading to filing of the present writ application is that the petitioner is an honest businessman having very good reputation in the locality and he is in the business of distribution of PDS commodities for last twenty years. The writ application further reveals that the petitioner has an unblemished career as a PDS retailer as he has not been implicated in any case relating to commission of any irregularity in the distribution of PDS commodities in the locality.

3. On 18.09.2011 at about 6.00 P.M., while the petitioner was coming with Kerosene Oil in a truck, the OIC of Gangapur P.S. stopped the said vehicle and seized the truck as well as Kerosene Oil on the ground that the petitioner could not produce proper documents. It has also been mentioned that the petitioner produced the documents in respect of 2000 liters of Kerosene, however, he could not produce documents in respect of another 1000 liters of Kerosene that was being transported. In the writ application, it has been further pleaded that one Bipra Charan Swain has purchased 1000 liters of Kerosene and due to heavy rain and bad weather and road condition,he was unable to shift such Kerosene Oil and accordingly decided to return the same.

4. Referring to clause-3 of the Control Order, 2008, it has also been stated in the writ application that the petitioner has not violated any guidelines and executive instructions issued by the Government. Furthermore, the petitioner, although, produced proper documents and stated before the OIC Gangapur P.S. that he has procured such Kerosene Oil from M/s. Gurumurty Oil Company and produced valid papers before the OIC, the OIC of Gangapur P.S. did not take any note of the same. It is also contended that on verification by police, M/s. Gurumurty Oil Company produced all the relevant documents for perusal. However, without considering the said documents, OIC, Gangapur P.S. was bent upon to seize and accordingly he had seized the Kerosene Oil that was being transported in the truck.

5. Learned counsel for the petitioner further contended before this Court that the petitioner has not violated any of the provisions of the PDS Control Order, 2008. He further submitted that although the petitioner produced valid paper/documents along with money receipt, but the appellate authority without following the guidelines and without giving an opportunity of show cause to the petitioner, seized 3000 liters of Kerosene Oil belonging to the petitioner. It is also contended that the Collector, Ganjam issued a notice dated 19.10.2011 under Annexure-4 without application of mind. The said notice under Annexure-4 purported to be one under the provisions of the E.C. Act, is stated to be illegal, arbitrary and in furtherance of the mala fide intention of the Opposite Parties. He further contended that on the basis of such illegal report of the OIC, Gangapur P.S., the Collector, Ganjam without verifying the facts and without application of mind initiated an E.C. Case. Learned counsel for the petitioner further contended that although by the direction of the learned Additional Sessions Judge, Bhanjanagar in CRLREV No.34 of 2011, seized vehicle has been released by the police, however, the Collector, went ahead for issuance of notice and continued with the E.C. case against the petitioner.

6. Learned counsel for the petitioner assailed the notice issued by the Collector, Ganjam under Annexure-4 and further continuance of the E.C. case on the principal ground that the OIC Gangapur P.S. has no power and authority under the rules to seize the Kerosene Oil and as such, on the basis of such illegal seizure no confiscation proceeding under Section 6-A of the E.C. Act should have been

initiated against the petitioner. Further referring to the notification dated 13.03.2008 issued by the Government of Odisha known as OPDS Control Order, 2008 and specifically referring to clause-23 thereof, it is argued that the licensing authority or any other officer authorized by the Government have the power of entry and to conduct search and seizure in respect of the essential commodities. Pursuant to the aforesaid provisions, the Food Supplies and Consumer Welfare Department, Government of Odisha came out with a notification dated 29.03.2008 specifying therein the officers, who can exercise such power. Referring to the notification dated 29.03.2008, learned counsel for the petitioner submitted that no police officer has been conferred with such power under clause-23 of the OPDS Control order, 2008 to carry out search and seizure as prescribed therein. Therefore, the notice issued by Collector under Annexure-4 based on the seizure made by OIC Gangapur P.S. is bad in law and without jurisdiction and authority. Accordingly, learned counsel for the petitioner has approached this Court by filing the present writ application with a prayer to quash the notice dated 19.10.2011 under Annexure-4 issued by the Collector, Ganjam.

7. Per contra, the State Opposite Parties have filed the counter affidavit. The counter affidavit filed on behalf of the Opposite Party No.2 i.e. Assistant Civil Supplies Officer, Bhanjanagar has supported the notice issued by the Collector, Ganjam in E.C. Case No.42 of 2011. It has also been pleaded in the counter affidavit that for illegal transportation and transaction in PDS Kerosene Oil by the petitioner, Gangapur P.S. has seized the Kerosene Oil and accordingly, lodged F.I.R. with an intimation to the licensing authority. Basing on such report, the licensing authority has initiated a proceeding under Section 6-A of the E.C. Act bearing E.C. No.42 of 2011.

8. Learned Additional Standing Counsel appearing on behalf of the State referring to the counter affidavit, further contended that for contravention of PDS Control Order, 2008, the quota of Kerosene Oil Sub-Wholesaler has been suspended and tagged with another distributor for smooth distribution of the PDS Kerosene Oil. Learned Additional Standing Counsel further contended that the petitioner himself admitted the fact that he could not produce the documents in support of transportation of 1000 liters of Kerosene Oil and accordingly, the licensing authority has not committed any illegality in issuing a notice to the petitioner under the provisions of the E.C. Act. He also submitted that the conduct of the collector is neither illegal nor arbitrary and that the Licensing Authority-cum-Collector, Ganjam-Opposite Party No.2 is well within the authority and jurisdiction conferred upon him by the statute.

9. Learned Additional Standing Counsel appearing on behalf of the State in course of his argument, referring to clause-3-A of the Kerosene (Restriction on use and fixation of ceiling price) Order, 1966, submitted that the Sub-Inspector of Police is empowered for seizure of Kerosene Oil. He also referred to the notice dated

29.03.2008 and submitted that the police officers are empower for seizure of PDS commodities. Learned Additional Standing Counsel appearing on behalf of the State referred to the provisions under Section 102(1) of Cr.P.C. and submitted that any police officer can seize any property which may be alleged or suspected to have been stolen or which were found under the circumstances which creates suspicion of commission of any offence of which the concerned Police Officer is authorized to inspect under Section 156 of the Cr.P.C. Further the offences under the E.C. Act are cognizable in nature as provided under Section 10(A) of the E.C. Act.

10. Learned Additional Standing Counsel appearing on behalf of the State, in course of his argument, referred to the judgment of the Hon'ble Court in ***Tapan Kumar Samanta vrs. Collector-cum-District Magistrate***, ***Balasore and others*** : reported in ***OCR Volume 45 (2010)-414*** and contended before this Court that in the said judgment it has been observed that the police officer not below the rank of Sub-Inspector can make search and seizure and it was further held that for search and seizure by any officer in the rank of Assistant Sub-Inspector is illegal. In such view of the matter, learned Additional Standing Counsel submitted that the notice issued by the Collector on the basis of the report of Sub-Inspector of Police, is perfectly justified and lawful.

11. Having heard learned counsels appearing for the respective parties, and upon a careful examination of the contentions raised by such counsels and keeping in view the pleadings involved in the present case, this Court finds that the most pertinent question involved in the present writ petition is as to whether the search and seizure conducted by OIC, Gangapur P.S. is illegal valid and proper or not? And further on search and seizure whether the notice issued by the Licensing Authority-cum-Collector under Annexure-4 is legally sustainable? While answering the above noted two questions, this Court is required to look into the provisions of law as well as to determine as to, who is the competent authority, who can carry out the search and seizure as provided in PDS Control Order, 2008 as well as Kerosene Control Order, 1962.

12. Odisha Kerosene Control order, 1962, which has been framed in exercise of power conferred under Section 3 of the E.C. Act, 1955 provides in clause 3 that no person other than Wholesale Dealer and Sub-Wholesale Dealer under parallel marketing system is authorized to carry on the business as a Wholesale Dealer or Sub-Wholesale Dealer within the State of Odisha except in accordance with terms and conditions of a license granted in that behalf by the Licensing Authority. Clause-12 of the said Control Order provides that the Licensing Authority or any other officer appointed by the State Government in this behalf made with such assistance search, seizure and remove the stock of Kerosene and vehicles, vessels and use Kerosene in contravention of the provisions of the said order or of the condition of the license issued by the authorities.

13. Similarly, the provisions found in clause-3-A of the Kerosene (Restriction on use and fixation of ceiling price) Order, 1966 were modified by the Central Government in exercising of the power conferred Section 3 of the E.C. Act, 1955. Clause-3-A thereof provides for power of entry, search and seizure. Clause-3-A (1), further provides that any police officer not below the rank of Sub-Inspector or any other officer of the Government or above authorized in this behalf by the Central Government or State Government may carry out the search and seizure as provided in the said Control Order in the year 1966. The aforesaid order in the year 1966 was repealed and substituted by Kerosene (Restriction on use and fixation of ceiling price) Order, 1993 issued by the Central Government vide notification dated 02.09.1993. Under clause-9 of the order, 1993 power of entry, search and seizure has been conferred upon an officer of the department of Food Supplies of Government not below the rank of an Inspector authorized by such Government and notified by the Central Government or any officer authorized notified by the Central Government or any officer not below the rank of as well as officer of a Government company authorized by the Government and notified by the Central Government may with a view to ensure compliance of the provisions of this order exercise the power of entry, search and seizure.

14. The power exercisable under the Control Order, 1962, which has been referred to in the previous paragraph has been repealed by the Odisha Public Distribution System (Control) Order, 2008 notified by the Food Supplies and Consumer Welfare Department, Government of Odisha vide notification dated 13.03.2008. A careful scrutiny of the Control Order, 2008 reveals that clause-23 of the said order provides for power of entry, search and seizure etc. For better appreciation clause-23 of the OPDS Control Order 2008 has been quoted herein below:-

xx xx xx xx

"**23. Power of entry, search and seizure etc.** - (a) The Licensing Authority or any other officer authorized by Government in this behalf, may, with such assistance, if any, as he thinks fit :

(i) require the owner, occupier or any person in charge of the place, premises, vehicles or vessels in which he has reason to believe that any contravention of the provisions of this order or of the conditions of any license issued there under has been, is being or is about to be committed, to produce any books, accounts or other documents showing transactions relating to such contravention;

(ii) enter, inspect or break open any place, premises, vehicles or vessels in which he has reason to believe that any contravention of the provisions of this order or of the conditions of any licence issued there under has been, is being or is about to be committed;

(iii) take or cause to be taken extracts from or copies of any documents showing transactions relating to such contravention which are produced before him/her;

(iv) test or cause to be tested the weight of all or any of the essential commodities found in any such premises;

> Provided that in entering upon and inspecting any premises the persons so authorised shall have due regard to the social and religious customs of the persons occupying the premises.
>
> (v) search, seize and remove the stocks of the essential commodities and the packages, coverings, animals, vehicles, vessels or other conveyances used, in carrying the said essential commodities in contravention of the provisions of this order or of the conditions of any licence issued there under and thereafter take or authorize the taking of all measures necessary for securing the production of the essential commodities and the packages, coverings, animals, vehicles, vessels or any other conveyances so seized in a Court and for their safe custody pending such production.
>
> (b) The provisions of Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974) relating to search and seizure shall so far as may be, apply to searches and seizures under this clause."

xx xx xx xx

15. Upon a careful examination of clase-23(a), this Court observes that the Licensing Authority or any other officer authorized by the Government in this behalf may, with such assistance exercise such power as has been provided in clause-23 including the power of entry, search and seizure. Therefore, it is pertinent to ascertain as to who are the authorities competent to carry out the search and seizure?

16. A question arose as to whether a police officer is competent to seize PDS Wheat along with the truck and as to whether on the basis of such seizure, confiscation under Section 6-A can be initiated? A coordinate Bench of this Court in the case of ***Tapan Kumar Samant vrs. Collector-cum-District Magistrate***, ***Balasore and others*** : reported in 2010 (I) OLR 221 was required to adjudicate such issue. The coordinate Bench of this Court after detailed analysis of facts came to a conclusion that since the ASI of Police, who was not authorized to make seizure, seized the so-called PDS wheat, seizure itself being illegal proceeding under 6-A of the E.C. Act is unsustainable in law. It is further relevant to mention here that the aforesaid case also involved interpretation on clause-23 of OPDS Control Order, 2008. In paragraph-3 of the judgment the coordinate Bench of this Court also referred to the notification of the Food Supplies and Consumer Welfare Department bearing Notification No.7450-FS.IC.2/2008 dated 29.03.2008 and observed that such notification specify and confer power of search and seizure as provided under clause-23 of the PDS Control Order, 2008 in Police Personnel and in paragraph-8 of the judgment of the coordinate Bench of this Court, it has been categorically held that since an ASI of Police, who was not authorized to make seizure, seized so-called PDS Wheat, the seizure itself being illegal, the proceeding under Section 6-A of the E.C. Act cannot sustain.

17. On analysis of the provisions of law applicable to the facts of the present case, this Court is of the considered view that a valid seizure is *sine qua non* for issuance of notice and initiating a proceeding under Section 6-A of the E.C. Act, 1955 for confiscation of the seized property. A valid seizure of the PDS

commodities is the basis and foundation for initiating and continuing with such proceeding under Section 6-A of the E.C. Act to confiscate the seized properties. In other words, if the seizure is not valid and the same is not in conformity with the provisions of law, such seizure is non-est in the eye of law and no proceeding can be initiated basing upon said illegal seizure by an authority, who is not competent to do so. The view taken by this Court gets support from a judgment of the Hon'ble Supreme Court in the case of ***Kailash Prasad Yadav and another vrs. State of Jharkhand*** : reported in ***2007 (II) OLR (SC) 471***. At this juncture, it is also relevant to refer to another Supreme Court judgment in the case of ***Nanda Kishore Singh vrs. State of Bihar*** : reported in ***Crimes Vol-(VIII) 1990(2)-744***. In ***Nanda Kishore Singh case*** (supra), it was held by the Hon'ble Supreme Court that whether the seizure was made by a person not competent to seize the essential commodities, such seizure being illegal, the proceeding under Section 6(A) of the E.C. Act can stand. Therefore, the view taken by this Court gets support from the above noted two Supreme Court judgments in the case of ***Kailash Prasad Yadav and another vrs. State of Jharkhand*** (supra) as well as ***Nanda Kishore Singh's case*** (supra).

18. Learned counsel for the petitioner also referred to the judgment in the matter of ***Anand Samal vrs. State of Orissa and others*** : reported in ***2011 (II) OLR-240*** a coordinate Bench of this Court was deciding an issue as to whether a Police Officer is competent to seize PDS rice along with a truck on suspicion of the said rice was being sold in black market and whether on the basis of such seizure, a confiscation proceeding under Section 6(A) can be initiated? Learned coordinate Bench of this Court while answering the said issue referred to the notification of the State Government empowering officers to enter and to carry out search and seizure under clause-23 of the OPDS Control Order, 2008 vide notification dated 29.03.2008. On a careful analysis of the PDS Control Order, 2008, the coordinate Bench in the above noted judgment came to a conclusion that the S.I. of Police, who was not authorized to make seizure, seized the so-called PDS rice and as such, the seizure itself being illegal, the proceeding under Section 6(A) of the E.C. Act is unsustainable in law and accordingly, quashed the proceeding under Section 6(A) of the E.C. Act.

19. Keeping in view the aforesaid analysis of law as well as legal position as has been interpreted by various judgment of this Court as well as the Hon'ble Apex Court, this Court would now proceed to examine as to whether the OIC of Gangapur Police Station, who has admittedly carried out the search and seizure has been conferred with such power under the Statute and as such, competent to do so. With regard to the conferment of power an officer under clause-23(a) of the OPDS Control Order, 2008, learned Additional Standing Counsel for the State has filed copy of the notification dated 29.03.2008 to impress upon this Court that the officers are also authorized to carry out the said search and seizure. On perusal of the notification dated 29.03.2008 under Annexure-B/2 to the counter affidavit, it appears that the Police Officers not below the rank of Inspector, who were initially not

included in the said notification dated 29.03.2008 have been included under Sl. No.28, subsequently, vide Notification No.7599 dated 29.04.2010, OGE No.379 dated 13.05.2010. For better understanding the said Notification has been quoted herein below:-

> "No7599—LS-PD-2/2010-FS & CW—In exercise of the powers conferred by sub-clause(a) of Clause 23 of the Orissa Public Distribution System (Control) Order, 2008, the State Government do hereby direct that the following amendment shall be made to the notification of the Government of Orissa in the Food Supplies & Consumer Welfare Department No.7450, dated the 29th March, 2008, namely :—
>
> AMENDMENT
>
> In The said notification, after Serial No.27, the following Serial No. and the entries against it under appropriate column shall be added, namely :—
>
> "28—Police Officers not below the Rank of Inspector. Within the local limit of their jurisdiction"
>
> By order of the Governor
> ASHOK K. MEENA
> Commissioner-cum-Secretary to Government"

20. On perusal of the notification dated 29.03.2008, it appears that the said notification had been issued in exercise of the power conferred by clause-23(a) of the OPDS Control Order, 2008 by the State Government and on further scrutiny it appears that initially no Police Officer was included under the said notification accordingly, the judgment of the coordinate Bench of this court in ***Tapan Kumar Samanta vrs. Collector-cum-District Magistrate, Balasore and others*** (supra) has been correctly decided. However, since the notification dated 29.03.2008 reveals that ***Police Officer*** not below the rank of Inspector has been included w.e.f. 13.05.2010, therefore, keeping in view the said notification the conduct of the Police Officer in the present case is to be examined. Before examining the facts of the present case, this Court would also like to observe that the judgment relied upon by the learned counsel for the petitioner in ***Ananda Samal's case*** (supra) has also been correctly decided. On careful scrutiny of the facts narrated in the judgment, it appears that the seizure took place 01/02.09.2008 by the OIC, Anandapur Police Station. However, position of law as discussed hereinabove has changed w.e.f. 13.05.2010 and accordingly, Police Officer not below the rank of Inspector has been included in the notification dated 29.03.2008.

21. Reverting back to the facts of the present case and to decide the issue as to whether the Police Officer, who conducted the search and seizure was competent to do so under the OPDS Control Order, 2008, this Court would like to refer to the F.I.R. registered in the present case. The F.I.R. dated 19.09.2011 under Annexure-2 reveals that one Dinabandhu Behera S.I. of Police, Gangapur Police Station lodged the F.I.R. inter alia alleging that on 18.09.2011 at about 6.00 P.M., he along with Havildar, Subash Chandra Barada, Antaryami Padhy and Bhanja Kishore Behera

were performing evening patrolling duty. At that time, they came across the seized truck and the PDS commodities, when they stopped the vehicle and found Kerosene Oil was being transported and on being asked, the driver of the vehicle could not produce any valid paper in respect of 1000 liters of Kerosene out of a total quantity of 3000 liters, the said Dinabandhu Behera, S.I. of Police Gangapur P.S. has categorically stated in the F.I.R. which is quoted herein below:-

> "…… hence, I seized the above noted 3000 liters of Kerosene along with Truck and 2 nos of retail invoice dated 14.09.2011 and 18.09.2011 in presence of above noted witnesses on 18.09.2011 at 7.00 P.M. for further verification. Then returned to P.S. along with seized kerosene Truck invoice with driver and called for Sub-dealer Sarat Kumar Swain to P.S. with other documents for further verification and produce before IIC and again as per direction of my IIC I proceeded to Surada for further verification of registers at the place of procurement."

22. Now, again coming back to the notification dated 29.03.2008, it is clear that by virtue of an amendment Police Officer not below the rank of Inspector has been included w.e.f.13.05.2010.Thus, the truck as well as PDS commodities like Kerosene Oil involved in the present case having been admittedly seized by the Sub-Inspector of Police, who is definitely below the rank of Inspector, the seizure made in the present case is absolutely illegal and contrary to the OPDS Control Order, 2008. Therefore, this Court has no hesitation to come to a definite conclusion that the seizure made in this case is illegal and therefore, the proceeding under Section 6(A) of the E.C. Act, 1955 initiated pursuant to notice under Annexure-4 to the writ application is also void and non-est in the eyes of law. Above view of this Court also gets support from the judgment of the Hon'ble Supreme Court in ***Kailash Prasad Yadav*** (supra) wherein the Hon'ble Supreme Court has held that valid seizure is a sine qua non for passing an order of confiscation of property and also finding of the Hon'ble Supreme Court in ***Nanda Kishore Singh*** (supra) wherein seizure was made by a person not competent to seize the essential commodities and as such, said seizure being illegal, the proceeding under Section 6(A) of the E.C. Act is not sustainable in law.

23. In such views of the matter, this Court has no hesitation to hold that the seizure conducted in the present case by S.I. of Police is illegal and accordingly, the proceeding initiated under Section 6(A) of the E.C. Act and by the licensing authority and the notice under Annexure-4 are illegal and void and accordingly, the notice under Annexure-4 as well as the entire proceeding bearing E.C. No.42 of 2011 under Section 6(A) of the E.C. Act, initiated by the Collector, Ganjam-Opposite Party No.2, are hereby quashed.

24. Accordingly, the writ petition stands allowed. However, there shall be no order as to cost.

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2023 (II) ILR - CUT- 617

V. NARASINGH, J.

WP(C) NO. 25141 OF 2012

AJOY KUMAR PRAHARAJ …….Petitioner

.V.

CHAIRMAN, UTKAL GRAMYA BANK & ORS. ……..Opp. Parties

SERVICE LAW – Departmental Proceeding – Appellate authority rejected the appeal of delinquent officer without assigning reason – Whether the order is sustainable? – Held, No – It is trite law that reasons are heart and soul of an order which allows the Court to examine the same in the factual matrix of a case and in the absence of the same, the order becomes vulnerable. (Para 27)

Case Laws Relied on and Referred to :-

1. AIR 1996 SC 484 : B.C. Chaturvedi Vs Union Of India.
2. 2010 (9) SCC 496 : Kanti Associates Vs. Masood Ahmed Khan.
3. (1969) 2 SCC 262 : A.K. Kraipak Vs. Union of India.
4. (2011) 4 SCC 584 : State Bank of Bikaner and Jaipur Vs. Nemi Chand Nalwaya.

For Petitioner : Mr. N.Ch. Das

For Opp Parties : Mr. P. V. Balakrishna

JUDGMENT Date of Hearing & Judgment : 02.01.2023

V. NARASINGH, J.

1. Heard Mr. Das, learned counsel for the Petitioner and Mr. Balakrishna, learned counsel for the Bank.

2. The Petitioner herein assails the order passed by the Competent Authority & General Manager-I dated 13.07.2011 by which he was dismissed from Bank service with immediate effect and other punishments which were affirmed by the appellate authority by order dated 05.10.2011, vide Annexures-1 and 2 respectively.

3. The Petitioner was initially appointed as a Clerk-cum-Cashier in the year 1983 under the erstwhile Kalahandi Anchalika Gramya Bank, Bhawanipatna.

4. In the year 2005, as per the notification of the Government, three Gramya Banks sponsored by the State Bank of India, namely, Bolangir Anchalika Gramya Bank, Kalahandi Anchalika Gramya in which the Petitioner was working and Koraput Panchabati Gramya Bank were amalgamated and were renamed as Utkal Gramya Bank.

5. In the year 2008, on the allegation of misappropriation, the Petitioner was charge sheeted and was placed under suspension. The memorandum of charges were drawn against him on 09.09.2008, which is on record at Annexure-3.

6. The articles of charges leveled under major misconduct proceeding against the present Petitioner under heading Annexure-I is quoted hereunder for convenience of ready reference:

"xxx xxx xxx

I. By committing criminal breach of trust and misappropriating Bank's cash worth Rs.25,40,586/- out of Boudh branch closing cash balance of Rs.26,55,762/- as on 7.1.08, Shri Praharaj had not served the Bank honestly and faithfully and had acted in a manner detrimental to the interest of the Bank.

II. By temporarily misappropriating cash on different dates sent for deposit in Bank's Current Account maintained with State Bank of India, Boudh Branch, Shri Praharaj had not served the Bank honestly and faithfully and had acted in a manner detrimental to the interest of the Bank."

7. Statement of imputations in support of the articles of charges levelled under major penalty proceeding against the Petitioner is mentioned under heading Annexure-II and the list of documents and list of witnesses are mentioned under heading at Annexure III.

8. The Petitioner submitted his reply and after considering the same by order dated 13.07.2011 vide Annexure-1 the disciplinary authority imposed the following punishments;

"xxx xxx xxx

(i) You are dismissed from Bank's service with immediate effect.

(ii) The period of suspension will be treated as such i.e. not spent on duty. You will not earn any increment during the period of suspension.

(iii) Recovery of loss caused to the Bank and attributable to you, i.e. Rs.25,40,586/- from terminal dues, if any, payable to you and/or from civil suit filed against you.

(iv) The Bank reserves the right to initiate further action against you on the outcome of police action/court case."

9. The Petitioner preferred an appeal and the appellate authority dismissed the appeal by order dated 05.10.2011 which giving rise to filing of the present writ petition.

10. Mr. Das, learned counsel for the Petitioner, assails the order of the disciplinary authority as well as the appellate authority on two counts, i.e, non supply of relevant documents and non payment of subsistence allowance and urges that the entire proceeding is vitiated since the documents which weighed with the authority were not supplied and it is the positive case of the Petitioner that the same were not even available with the authority.

11. Hence, solely on the ground of violation of principle of natural justice, learned counsel for the Petitioner seeks intervention of this Court.

12. Learned counsel for the Petitioner has strenuously urged that documents at serial numbers 2,3,4 and 7 under the heading list of documents, which are stated to

have been furnished as per Annexure-III, which is part of the memorandum of charges were never supplied to him. The details of the said documents at serial numbers 2,3,4, and 7 are stated hereunder:

> "LIST OF DOCUMENTS
>
> "1. xxx xxx xxx
>
> 2. Branch Cash Balance Book dt.5.1.08, 7.1.08, 8.1.08 and 9.1.08.
>
> 3. Vault Register dt.5.1.08, dt.7.1.08 and 9.1.08.
>
> 4. Cashier's Receipts and Payments Register dt.7.1.08.
>
> 5 & 6. xxx xxx xxx
>
> 7. Cash Inventory Report dt.9.1.08.
>
> 8 to 15. xxx xxx xxx"

13. Per contra, learned counsel for the Bank submits that such assertion is not correct inasmuch as the Petitioner is stated to have received the documents and endorsed to the said effect in the original file which, were produced before this Court.

14. During the course of hearing, this Court requested the learned counsel for the Bank to apprise regarding specific stand of the Petitioner that the documents were not available to be supplied.

15. On instruction, learned counsel for the Bank submitted that vault register dated 07.01.2008 (sl. no.3) is marked as PEX-16 and register dated 09.01.2008 (sl. no.3) is marked as PEX-17. But vault register dated 05.01.2008 as stated in sl. no.3 is not readily traceable. So far as other documents at sl. nos.2,4 and 7 are concerned, it is the specific stand of the learned counsel for the Bank that even if the entire allegation of the Petitioner is for manipulation of documents is accepted, he having not raised any grievance at the appropriate stage cannot be allowed to agitate the same before this Court.

16. Mr. Balakrishna, learned counsel for the Bank relying on the judgment of the apex Court in the case of **B.C. Chaturvedi vs Union of India** reported in **AIR 1996 SC 484** submits that this Court has limited power to interfere in a departmental proceeding. And, in the factual matrix of the case at hand, the exercise of power of judicial review is unwarranted.

17. Learned counsel for the Petitioner has filed an additional affidavit after serving a copy thereof on the learned counsel for the Bank.

18. In the said additional affidavit, learned counsel for the Petitioner has placed on record by way of Annexure-13 a letter which was received by the Petitioner dated 4.11.2008 which is patently at variance with the self-same document which is relied on by the learned counsel for the Bank. In as much as, the date has been scored through and though the contents of the letter is same but the one on which the

learned counsel for the Bank relied upon is at variance so far as endorsement to the General Manager is concerned.

19. Learned counsel for the Bank submits that since there is no discrepancy regarding contents of the letter the endorsement on which much reliance has been placed by the learned counsel for the Petitioner ought not to weigh with the Court to interfere to hold that the entire proceeding is vitiated, as claimed.

20. Assailing the order passed by the disciplinary authority the Petitioner preferred the appeal.

21. Though the memorandum of appeal was not part of the pleadings but on being directed, the same is submitted and is taken on record.

22. Referring to paragraph-1 of the said memorandum of appeal, learned counsel for the Petitioner submits that the Petitioner has taken a specific stand regarding non-supply of documents on account of non-availability of the same and as such as stated that violation of the principle of natural justice is tell tale.

23. In the writ petition at paragraphs-8 and 14 the Petitioner has taken a specific stand regarding non-availability of the original documents and according to the learned counsel for the Petitioner the same has not been controverted by the Opposite Party-Bank while filing their counter affidavit in an effective manner and only vague reply has been given justifying the stand of the Bank.

24. At this stage, learned counsel for the Petitioner draws the attention of this Court to the order passed by the appellate authority dated 05.10.2011 which is annexed as Annexure-2 to the present writ petition.

25. On perusal of the memorandum of appeal, it comes to fore that the Petitioner has taken a specific stand in Ground No.C thereof, extracted hereunder for convenience of ready reference, that relevant documents, which are essential for him to put-forth his defence, were not supplied for reasons best known.

> "C) For that accordingly the enquiry was conducted by the Enquiring Officer and in the said inquiry the appellant has been co-operated with the said enquiry in each and every date. But while the appellant required some relevant documents to put forth his defence before the Competent Authority, the same was not supplied by the authority, the reason best known to them. As a result of which, the appellant was unable to defend his case before the Competent Authority. Therefore, without giving the reasonable opportunity and without supplying the documents as required by the appellant the enquiry report has been submitted by the Enquiring Officer before the Respondent No.1.
>
> It is pertinent to mention here that, the documents which has been supplied by the Competent Authority to the appellant were totally vague and fabricated documents, because said documents has been prepared and tampered with by the Respondent No.2. For sake of arguments, it is my humbly request that, the documents which are relied upon in the proceeding drawn up against the appellant, these said documents in original may be called for by your kind honour for kind perusal."

26. The appellate authority notwithstanding the seriousness of the charges and the specific stand taken in Ground No.C extracted hereinabove passed an order which exemplifies the abdication of responsibility and suffers from vice of lack of reasoning. The order of the appellate authority is culled out hereunder for reference.

> "xxx xxx xxx
>
> **BANK'S BOUDH BRANCH**
> **DISCIPLINARY PROCEEDINGS**
> **APPEAL AGAINST THE IMPOSED PENALTY**
>
> Please refer to your appeal dated 27th August, 2011.
>
> 2. The Appellate Authority i.e. the Bank's Chairman thoroughly examined your appeal and upheld the penalty imposed on you by the Competent Authority and General Manager-I vide Head Office letter No.**VIGIL/249 dt.13.07.2011**.
>
> 3. Please return to us immediately the duplicate copy of this letter duty signed by you with date in token of your having received the original.
>
> xxx xxx xxx"

27. It is trite law that reasons are heart and soul of an order which allows the Court to examine the same in the factual matrix of a case and in the absence of the same, the order becomes vulnerable. And, the impugned order passed by the Appellate Authority is like "inscrutable face of sphinx". In this context this Court respectfully refers to the judgment of the Apex Court in the case of ***Kanti Associates vs. Masood Ahmed Khan*** reported in ***2010 (9) SCC 496.*** In fact in the said case several judgments reiterating the principle of furnishing reasons have been succinctly stated in as much as the vanishing distinction between administrative and quasi judicial orders relating to giving reasons was also noticed referring to the celebrated judgment of the Apex Court in the case of ***A.K. Kraipak V. Union of India (1969) 2 SCC 262***.

28. In the factual matrix of the case at hand where serious allegation of non-supply of relevant documents, manipulation of records which has prima facie substance in the background in which it has been made, this Court is of the considered view that such allegation(s) require adjudication.

29. Hence, keeping in view the limited scope of this Court to interfere in a departmental proceeding (Ref: **State Bank of Bikaner and Jaipur v. Nemi Chand Nalwaya**, **(2011) 4 SCC 584**) and considering the manner in which the appellate authority has failed to discharge his responsibility and keeping in view the nature of allegation which is also the subject-matter of criminal trial, this Court is persuaded to hold that interest of justice would be subserved if the matter is remanded to the stage of appeal. And, the appellate authority is directed to re-examine the matter taking into account the defence of the Petitioner and pass a reasoned order, if necessary by giving an opportunity of hearing to the Petitioner.

30. Accordingly, the order of the appellate authority dated 05.10.2011, vide Annexure-2, is hereby quashed.

31. Since the Petitioner is agitating his grievance before this Court since 2012, the appellate authority shall do well to pass necessary order within a period of six months from the date of receipt/production of a copy of the order.

32. It is needless to state that while hearing the appeal de novo the appellate authority shall consider the matter on its own merit without being prejudiced by the earlier finding of the appellate authority and it shall be open to the Petitioner to file any additional document which shall be taken into account by the said appellate authority keeping in view the peculiar nature of accusation and the allegation of the Petitioner that the relevant documents were not available to be supplied to him and there has been manipulation of documents, on which reliance is placed, even before this Court.

33. It is made clear that this Court has not expressed any opinion regarding allegation of such manipulation and other contentions of the Petitioner which shall be gone into in an independent manner by the appellate authority.

34. The writ petition is accordingly disposed of. No costs.

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2023 (II) ILR - CUT- 622

BIRAJA PRASANNA SATAPATHY, J.

W.P.C.(OAC) NO. 4272 OF 2014

KRUSHNA CHANDRA PATANAIK .....Petitioner

.V.

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

PRINCIPLE OF NATURAL JUSTICE – Non-compliance of – The authority passed the impugned order of recovery without issuing any show-cause and without providing the petitioner any opportunity of hearing – Effect of – Held, on the ground of non-compliance of the principle of natural justice, this court is inclined to interfere with the impugned order and quash the same with certain direction. (Para 6)

Case Law Relied on and Referred to :-

1. (2021 (II) OLR 486 : Sanjay Pradhan Vs. State of Odisha & Ors.

For Petitioner : M/s. D.K. Panda, G. Sinha & A. Mishra

For Opp. Parties : Mr. A.P. Das, Addl. Standing Counsel

JUDGMENT Date of Hearing: 12.01.2023 : Date of Order: 20.01.2023

BIRAJA PRASANNA SATAPATHY, J.

This present writ petition has been filed challenging the order/letter dtd.02.03.2012 under Annexure-7, wherein O.P. No. 3 directed for recovery of the salary paid to the Petitioner for the period from 03.08.2005 to 01.01.2007.

2. The factual backdrop giving rise to the filing of the present writ petition is that the Petitioner entered into service as a Pharmacist and posted to MKCG Medical College & Hospital, Berhampur. The post of Pharmacist in MKCG Medical College & Hospital was a State Cadre post. But **p**ursuant to the resolution issued by the Govt. in the Health & Family Welfare Department under Annexure-1, on 03.04.02, the staffs working in the three (3) medical colleges of the State in Class-III & IV were treated as District Cadre employees instead of their position as State Cadre earlier. Pursuant to the resolution issued under Annexure-1, the Petitioner in terms of the letter issued by the O.P. No. 2 on 18.06.2002 was allotted to the district of Gajapati and his name was reflected at Sl. No. 23 of the District Cadre allotment of Pharmacist.

2.1. Thereafter, vide office order dtd.03.08.2005 issued by the Superintendent, MKCG Medical College & Hospital, Berhampur under Annexure-4 the Petitioner was relieved for his joining in the establishment of CDMO, Nabarangpur along with 6 (six) other similarly situated Pharmacists, who were also posted to different districts. After issuance of Annexure-4, Govt. in the Department of Health & Family welfare vide its letter dtd.08.12.2006 requested the O.P. No. 2 to adjust the present Petitioner and three (3) others in the vacant post available in the district of Ganjam. On receipt of Annexure-5, O.P. No. 2 vide his Office order dtd.30.12.2006 posted the Petitioner under CDMO, Ganjam and the Petitioner joined in his duty on 02.01.2007 in PHC (N), Dengaosta under CHC, Adapada of CDMO, Ganjam.

2.2. After his joining under CDMO, Ganjam on 02.01.2007, the period of service of the Petitioner from 03.08.2005 to 01.01.2007 was regularized for the purpose of drawal of his salary by the O.P. No. 2 vide office order dtd.21.01.2008 under Annexure-6 and the Petitioner was allowed to draw the salary for the period from 03.08.2005 to 01.01.2007. But all and sudden vide the impugned order issued on 02.03.2012 under Annexure-7, O.P. No. 2 while cancelling his earlier order issued on 21.01.2008 under Annexure-6, requested the CDMO, Ganjam to recover the salary of the Petitioner so paid to him for the period from 03.08.2005 to 01.01.2007. Basing on the impugned order passed under Annexure-7, CDMO, Ganjam-O.P. No. 3 vide his letter dtd.28.01.2014 under Annexure-8 requested the concerned CHC to recover the amount from the salary of the Petitioner. Thereafter, the Medical Officer –in charge, CHC Gallery directed the Petitioner vide letter dtd.06.12.2014 to deposit the recoverable amount of the duty pay from 03.08.2005 to 01.01.2007 amounting to Rs.2,86,163/- (Rupees Two lakh eighty six thousand one hundred sixty three).

3. It is the main contention of the learned counsel for the Petitioner that the Petitioner was initially posted as a Pharmacist in MKCG Medical College & Hospital and the said posting of the Petitioner in MKCG Medical College & Hospital as a Pharmacist was initially treated as State Cadre post. But Govt.-O.P. No. 1 vide its resolution dtd.03.04.2002 under Annexure-1 declared the Class-III & IV employees working in MKCG Medical College & Hospital and other two (2) Medical Colleges of the State as District Cadre employees.

3.1. Pursuant to the said resolution issued under Annexure-1, O.P. No. 2 vide his letter dtd.18.06.2002 under Annexure-2 deployed the Petitioner to Gajapati district. The policy decision taken by the Govt. under Annexure-1 though was challenged by the Association in O.A.No.1279(C) of 2002, but the Tribunal vide order dtd.18.06.2003 while dismissing the Original Application, upheld the policy decision of the Govt. so taken under Annexure-1. Subsequent thereto vide office order dtd.03.08.2005 of the Superintendent, MKCG Medical College & Hospital, Berhampur the Petitioner, who was earlier deployed to Gajapati district, was posted as a Pharmacist under CDMO, Nabarangpur.

3.2. It is contended that the Petitioner along with 5 (five) other similarly situated employees, who were transferred vide order dtd.03.08.2005 under Annexure-4 to different districts, challenging the same approached the Tribunal, in O.A. No.63(C) of 2006. But during pendency of the matter before the Tribunal, Govt.-O.P. No. 1 vide its letter issued on 08.12.2006 under Annexure-5 decided to adjust the Petitioner under CDMO, Ganjam. In terms of the said request made by the Govt. under Annexure-5, O.P. No. 2 vide his office order dtd.30.12.2006 under Annexure-10 posted the Petitioner under CDMO, Ganjam. Thereafter, CDMO, Ganjam vide order under Annexure-E dtd.02.01.2007 posted the Petitioner as a Pharmacist to PHC(N), Dengaosta under CHC, Adapada by showing the Petitioner to have joined in his service on 02.01.2007. After his joining pursuant to the order issued under Annexure-10, O.P. No. 2 vide his office order dtd.21.01.2008 under Annexure-6 decided to regularize the services of the Petitioner for the purpose of drawing his salary for the period from 03.08.2005 to 01.01.2007.

3.3. It is contended that in terms of the said order issued under Annexure-6, the Petitioner was released with his salary for the period from 03.08.2005 to 01.01.2007. But all and sudden the impugned order dtd.02.03.2012 under Annexure-7 was issued by the O.P. No. 2 by recalling his earlier order passed on 21.01.2008 and request was made to the CDMO, Ganjam to recover the salary released in favour of the Petitioner for the period from 03.08.2005 to 01.01.2007. Basing on the impugned order passed under Annexure-7, O.P. 3 vide his letter dtd.28.11.2014 under Annexure-8 requested O.P. No. 4 to recover the duty pay paid to the Petitioner for the period from 03.08.2005 to 01.01.2007.

3.4. On receipt of Annexure-8 O.P. No. 4 vide his letter dtd.06.12.2014 under Annexure-9 when directed the Petitioner to deposit a sum of Rs.2,86,163/- (Rupees

Two lakh eighty six thousand one hundred sixty three) i.e. the salary drawn by him for the period from 03.08.2005 to 01.01.2007, the present writ petition was filed challenging the order dtd.02.03.2012 under Annexure-7 and the consequential orders issued under Annexure- 8 & 9.

3.5. Learned counsel for the Petitioner vehemently contended that in terms of order under Annexure-4 the Petitioner when was posted as a Pharmacist under CDMO, Nabarangpur, the same was challenged by the Petitioner and 5 (five) others before the Tribunal in O.A. No.63(C) of 2006. But during pendency of the matter before the Tribunal, O.P. No. 2 on his own passed the order under Annexure-6 on 21.01.2008 directing regularization of the services of the Petitioner for the said period and the Petitioner was accordingly paid with his salary for the break period from 03.08.2005 to 01.01.2007. But it is contended that without issuing any show-cause and without providing him any opportunity of hearing, the impugned order was issued by the O.P. No. 2 on 02.03.2012 under Annexure-7 by cancelling the order dtd.21.01.2008 under Annexure-6 and with a request to the O.P. No. 3 to recover the salary of the Petitioner so released in his favour for the period from 03.08.2005 to 01.01.2007.

3.6. Mr. Panda, learned counsel for the Petitioner contended that since the Opp. Parties on their own released the salary in favour of the Petitioner for the period from 03.08.2005 to 01.01.2007 in terms of the order issued under Annexure-6, the impugned order under Annexure-7 should not have been issued after more than 5 (five) years without following the principle of natural justice. It is accordingly contended that the impugned order having been passed in violation of the principle of natural justice it is a nullity in the eye of law.

3.7. Mr. Panda also relied on a decision of the Hon'ble Apex Court reported in the case of ***Rafiq Masih Vs. State of Punjab***. It is contended that in the said decision Hon'ble Apex Court as framed the guideline for recovery of any amount which was earlier paid to the employee without any fault of his own. It is contended that since the Petitioner by the time the impugned order under Annexure-8 & 9 were issued, had availed the benefits for more than 5 years, in view of the decision of the Hon'ble Apex Court in the case of ***Rafiq Masih,*** no recovery can be effected from the Petitioner. While on the question of non-compliance of principle of natural justice the Petitioner relied on a decision of this Court reported in the case of ***Sanjay Pradhan Vs. State of Odisha & Ors. (2021 (II) OLR 486,*** on the question of recovery which is not permissible, Mr. Panda relied on a decision of the Hon'ble Apex Court in the case of ***Rafiq Masih Vs. State of Punjab***.

3.8. This Court in Para 35 of the said Judgment in the case of ***Sanjay Pradhan*** has held as follows:-

> *"35. First and foremost, it is pertinent to note, that the apex Court in its judgment in* ***Syed Abdul Qadir's*** *case (supra) recognized, that the issue of recovery revolved on the*

action being iniquitous. Dealing with the subject of the action being iniquitous, it was sought to be concluded, that when the excess unauthorised payment is detected within a short period of time, it would be open for the employer to recover the same. Conversely, if the payment had been made for a long duration of time, it would be iniquitous to make any recovery. Interference because an action is iniquitous, must really be perceived as, interference because the action is arbitrary. All arbitrary actions are truly, actions in violation of Article 14 of the Constitution of India. The logic of the action in the instant situation, is iniquitous, or arbitrary, or violative of Article 14 of the Constitution of India, because it would be almost impossible for an employee to bear the financial burden, of a refund of payment received wrongfully for a long span of time. It is apparent, that a government employee is primarily dependent on his wages, and if a deduction is to be made from his/her wages, it should not be a deduction which would make it difficult for the employee to provide for the needs of his family. Besides food, clothing and shelter, an employee has to cater, not only to the education needs of those dependent upon him, but also their medical requirements, and a variety of sundry expenses. Based on the above consideration, we are of the view, that if the mistake of making a wrongful payment is detected within five years, it would be open to the employer to recover the same. However, if the payment is made for a period in excess of five years, even though it would be open to the employer to correct the mistake, it would be extremely iniquitous and arbitrary to seek a refund of the payments mistakenly made to the employee."

3.9. Similarly, Hon'ble Apex Court in the case of ***Rafiq Masih*** in Para 12 of the Judgment has held as follows:-

"12. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion. that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

3.10. Accordingly, it is contended that since the Petitioner has no fault of his own in getting the benefit of the salary for the period in question and the order of recovery having been issued after 5 years of such payment, the order of recovery issued under Annexure-7 and the consequential order issued under Annexure-8 & 9 are not sustainable in the eye of law and liable for interference of this Court.

4. Mr. A.P.Das, learned ASC though on the other hand made his submission basing on the stand taken in the counter affidavit filed by the Opp. Party No. 2. It is contended that pursuant to the order dtd.03.08.2005 under Annexure-4 when the Petitioner was posted under CDMO, Nabarangpur, the same though was challenged by the Petitioner and the other 5 (five) employees before the Tribunal in O.A. No. 63(C) of 2006, but the Tribunal never passed any interim order staying the operation of the said order. But in terms of the order issued under Annexure-4, the Petitioner never joined under CDMO, Nabarangpur and remained on unauthorized leave.

It is contended that the order under Annexure-4 was issued by the Superintendent, MKCG Medical College & Hospital, Berhampur in terms of the order passed by the O.P. No. 2 on 01.08.2005 under Annexure-C to the counter affidavit. But the Petitioner never joined in the establishment of CDMO, Ganjam though no interim order was passed by the Tribunal in O.A. No. 63(C) of 2006, wherein the order dtd.03.08.2005 was under challenge. It is also contended that pursuant to the letter issued by the Govt. on 08.12.2006 under Annexure-5, O.P. No. 2 vide order dtd.30.12.2006 posted the Petitioner under CDMO, Ganjam and in terms of the said order the Petitioner joined as a Pharmacist on 02.01.2007, in PHC(N), Dengaosta. It is also contended that subsequent to his joining under CDMO, Ganjam on 02.01.2007 the Establishment Officer working in the office of O.P. No. 2 on his own issued a letter to CDMO, Nabarangpur to furnish the vacancy position of the post of Pharmacist for the period from 03.08.2005 to 01.01.2007 for the purpose of regularization of the service of the Petitioner.

4.1. In terms of the said letter issued on 22.12.2007 under Annexure-11, CDMO, Nabarangpur vide his letter dtd.05.01.2008 indicated the vacancy position available for the period from 03.08.2005 to 01.01.2007 under Annexure-12. Thereafter, O.P. No. 2 without proper verification of the fact that the Petitioner had never joined under CDMO, Nabarangpur directed for regularization of the service of the Petitioner with payment of salary for the period from 03.08.2005 to 01.01.2007 vide his order dtd.21.01.2008 under Annexure-6. But the matter was reported to the S.P. (Vigilance), Berhampur and on completion of the enquiry, DSP (Vigilance), Paralakhemundi, submitted the report to S.P. (Vigilance), Berhampur. Basing on the said report the Director & Additional D.G. of Police, Odisha, Cuttack suggested the O.P. No. 1 for initiation of disciplinary action against the erring officers, who are involved with regard to regularization of unauthorized absence of 5 (five) nos. of Pharmacists, which includes the present Petitioner.

4.2. It is also contended that out of the 5 nos. of Pharmacists, who are extended with the benefit of the salary for the period in question, recovery has been effected from 3 (three) such employees in the meantime. Disciplinary Proceeding has also been initiated against the erring officers basing on the report of the S.P. (Vigilance), Berhampur. The stand taken by the O.P. No. 2 in Para 14 of the counter affidavit is reproduced hereunder:-

"14. That, the DSP Vigilance, Paralakhemundi after receiving the documents which were called for submitted his report to the S.P. Vigilance, Berhampur, who finalized the Inquiry. Basing on the S.P's report of Vigilance Division, Berhampur, the Director-cum-Addl. D.G of Police, Vigilance, Odisha, Cuttack suggested to the Health & F.W. Department regarding initiation of disciplinary action against the erring officers who were involved in regularisation of unauthorized absence of 5(five) Pharmacists working under CDMO,Ganjam and Superintendent, MKCGMCH, Berhampur and in sanctioning of duty pay unduly. Accordingly, disciplinary proceeding has been drawn up as per OCS (CCA) Rules, 1962.

It is pertinent to mention here that there were 5(five) such Pharmacists including the petitioner in favour of whom erroneous shown-posting orders were issued and they were given duty pay although during that period they were unauthorized absent. It is submitted that in the meantime 3(three) out of afore- said 5 Pharmacists in favour of whom duty pay was drawn for the period of unauthorized absence have deposited their recoverable amount as per the order of recovery."

4.3. Accordingly, it is contended by the learned ASC that no illegality or irregularity has been committed by O.P. No. 2 in issuing the order at Annexure-7.

5. I have heard Mr. D.K. Panda, learned counsel for the Petitioner and Mr. A.P. Das, learned Addl. Standing Counsel appearing for the Opp. Parties. On their consent the matte was finally heard and disposed of vide the present common order at the stage of admission.

6. Having heard learned counsel appearing for the Parties and after going through the materials available on record, this Court finds that pursuant to the order passed on 03.08.2005 under Annexure-4 since no document was filed by the Petitioner showing his joining under CDMO, Nabarangpur, this Court vide order dtd.16.12.2022 passed the following order:-

*"**2.** Heard Mr. D.K. Panda, learned counsel for the Petitioner and Mr. D.K. Mohanty, learned Addl. Standing Counsel appearing for the Opp. Parties.*

***3.** The present writ petition has been filed challenging the order under Annexure-7, 8 & 9. It is vehemently contended by Mr. Panda, learned counsel for the Petitioner that pursuant to the order passed under Annexure-6 the services of the Petitioner for the period from 03.08.2005 to 01.01.2007 was not only regularized, but also he was paid with the salary for the said period.*

***4.** It is contended that pursuant to the order passed by the Directorate of Health Services on 01.08.2015, Superintendent, MKCG Medical College & Hospital, Berhampur passed an order on 03.08.2005 under Annexure-4. The Petitioner accordingly was relieved from his duty on 03.08.2005 in order to enable him to join in the establishment of CDMO, Nabarangpur. It is also contended that subsequently vide order dtd.08.12.2006 under Amnexure-5 the Petitioner was brought back to MKCG Medical College & Hospital, Berhampur where he joined on 02.01.2007. Subsequently vide order dt.21.01.2008 under Annexure-6, the services of the Petitioner for the period 03.08.205 to 01.01.2007 was regularized with release of salary.*

***5.** It is submitted that without giving any opportunity of hearing the order dtd.21.01.2008, was recalled by the Director under Annexure-7 and subsequently order of recovery was passed under Annexure-8 & 9.*

> ***6.*** *This Court after going through the materials available on record finds that pursuant to the order dtd.03.08.2005 under Annexure-4, the Petitioner though was relieved for his joining under CDMO, Nabarangpur, but the Petitioner has not filed any document nor has made any averment showing the date of joining in the establishment of CDMO, Nabarangpur after passing of the order dt.03.08.2005. No document has also been annexed to the writ petition showing the date of release of the salary for the period from 03.08.2005 to 01.01.2007 in terms of the order passed under Annexure-6 dt.21.01.2008.*
>
> ***7.*** *In view of that learned counsel for the Petitioner as well as learned Addl. Standing Counsel are directed to obtain instruction on the aforesaid point and file respective affidavits accordingly.*
>
> ***8.*** *As requested, list this matter on 09.01.2023.*
>
> ***9.*** *A free copy of the order be provided to Mr. D.K. Mohanty, learned Addl. Standing Counsel for compliance."*

6.1. In spite of the order passed by this Court on 16.12.2022, learned counsel for the Petitioner could not produce any document showing the joining of the Petitioner under CDMO, Nabarangpur in terms of the order issued under Annexure-4. However, the contention raised by the learned counsel for the Petitioner that the order under Annexure-4 was subsequently modified basing on the letter issued by the Govt. under Annexure-5 and consequential letter under Annexure-10, though shows the joining of the Petitioner under CDMO, Ganjam, but this Court was not provided with any document showing the joining of the Petitioner under CDMO, Nabarangpur in terms of the order issued under Annexure-4 and his continuance till he was brought back under CDMO. Ganjam vide order dtd.30.12.2006 under Annexure-6.

6.2. This Court also finds that basing on the Vigilance report not only Disciplinary Proceeding has been initiated against the erring officers, who are responsible for release of the salary in favour of the Petitioner and similarly situated 4 (four) employees, but also it is found that the salary wrongly paid to 3 (three) nos. of Pharmacists have been recovered in the meantime. This Court is also unable to accept the contention of the learned counsel for the Petitioner that since the Petitioner has enjoyed the benefit of the salary for more than 5 (five) years, in terms of the decision of the Hon'ble Apex Court in the case of ***Rafiq Masih***, no recovery can be effected.

It is the view of this Court that the impugned order was originally passed by the O.P. No. 2 on 02.03.2012 under Annexure-7 by recalling the earlier order passed on 21.01.2008 and the said action is before completion of the 5 years period. The order under Annexure-7 was also communicated to the Petitioner vide Memo No. 7472 dtd.02.03.2012 and the said fact is not disputed by the Petitioner. The Petitioner only woke up when the consequential orders under Annexure-8 & 9 were issued directing him to pay the salary amounting to Rs.2,86,163/- (Rupees two lakh eighty six thousand one hundred sixty three) drawn by him for the period from

03.08.2005 to 01.01.2007. Hence, the decision in the case of ***Rafiq Masih*** is not applicable to the facts of the present case.

However, this Court finds that even though the Petitioner was extended with the benefit of the salary for the period in question vide order issued under Annexure-6 on dtd.21.01.2008, but prior to withdrawal of the same vide the impugned order under Annexure-7, the Petitioner was never show-caused nor any opportunity of hearing was provided to him. Therefore, placing reliance on the decision of this Court rendered in the case of ***Sanjay Pradhan*** and on the ground of non-compliance of the principle of natural justice, this Court is inclined to interfere with the impugned order under Annexure-7 and consequential orders issued under Annexure-9. While quashing the orders at Annexure-7 to 9, this Court remits the matter back to the O.P. No. 2 to take a fresh decision with regard to recovery of the amount in question by giving an opportunity of hearing to the Petitioner. This Court directs O.P. No. 2 to take a fresh decision after providing due opportunity to the Petitioner, within a period of two (2) months from the date of receipt of this order. Learned ASC is directed to provide a copy of this order before O.P. No. 2 for compliance.

7. The writ petition is disposed of with the aforesaid observation and direction.

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2023 (II) ILR - CUT- 630

BIRAJA PRASANNA SATAPATHY, J.

FAO NO.159 OF 2011

RABINDRA KU. ROUT .....Appellant

.V.

STATE OF ODISHA & ORS. .....Respondents

ODISHA EDUCATION ACT, 1969 – Section 7-B r/w Rule 16(2) of Odisha Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Education Institution) Rules, 1974 – The appellant was appointed without having any training qualification and he failed to acquired B.Ed qualification as on date – Whether the appellant is entitled to get the benefit of approval of his service as against a Trained Graduate post? – Held, not entitled – The appellant was required to acquire the B.Ed qualification for his continuance in the school – The provision contained under Rule 16(2) of 1974 Rules is also of no help. (Para-7)

Case Law Relied on and Referred to :-

1. 1997(II) OLR 122 : Bibekananda Das Vs. State of Odisha & Ors.
2. 1999 (II) OLR 185 : Manamohan Tripathy Vs. State of Odisha & Ors.

For Appellant : Mr. S.K. Das

For Opp. Parties : Mr. R.N. Mishra, AGA, for Respondent Nos. 1 to 3
Mr. S.D. Routray, for Respondent No.5.

JUDGMENT Date of Hearing:20.04.2023 and Date of Order: 27.06.2023

BIRAJA PRASANNA SATAPATHY, J.

1. Even though the matter is listed today for orders, but on the consent of the learned counsels appearing for the parties, the matter was finally heard and disposed of.

2. The present Appeal has been filed challenging the judgment dated 14.03.2011 so passed by the State Education Tribunal hereinafter called as 'Tribunal' in GIA Case No.455 of 2008.

3. It is the case of the Appellant that the Appellant even though an untrained hand, but he was appointed as an Assistant Teacher against a Trained Graduate Post on 10.07.1990 by the Managing Committee of Batabihari Anchalika Sahayoga High School, Tadhana. Appellant pursuant to the order of appointment so issued on 10.07.1990 joined in his post on the very same day. It is also the case of the Appellant that the School in question was established in the year 1990 and got its recognition in the year 1993. The School subsequently was notified to receive grant-in-aid in terms of Grant-in-aid order, 2004 vide notification dated 27.09.2008.

3.1. It is contended that even though the Appellant with qualification of B.A. was appointed as against a Trained Graduate Post on 10.07.1990, but such appointment of Untrained Teacher was permissible at the relevant point of time, in view of the law laid down by this Court in the case of ***Bibekananda Das Vrs. State of Odisha and Others***, reported in ***1997(II) OLR 122,*** Appellant's appointment as an Untrained Teacher against a trained graduate post was to be held permissible. But after the school was notified to receive Block Grant w.e.f. 01.04.2008 in terms of GIA Order, 2004, when the services of the private Respondent No.5 was approved as against the post of TGT (Arts), in which the Appellant was continuing, the Appellant challenging the same and with a further prayer to approve his services for the purpose of release of Grant-in-aid, approached the Tribunal in GIA Case No.455 of 2008.

3.2. It is contended that in view of the decision rendered in the case of ***Bibekananda Das*** (supra) the appointment of the Appellant on 10.07.1990 as against the Trained Graduate Post is permissible and the approval of the services of the Respondent No.5 as against the post, in which the Appellant was appointed, is not permissible in the eye of law. It is also contended that by the time the Respondent No.5 was so appointed, there was no vacancy as against a Trained Graduate post in the School in question. Such appointment of Respondent No.5 having been made as against a non-existent post, the said appointment should not

have been approved by the Government vide its notification dated 27.09.2008 with release of grant-in-aid.

3.3. It is contended that the Tribunal without proper appreciation of the claim of the Appellant vis-à-vis the claim of Respondent No.5 rejected the same vide the impugned judgment dated 14.03.2011 under Annexure-3. Therefore, the said judgment is not sustainable in the eye of law.

4. Mr. S.D. Routray, learned counsel appearing for the Respondent No.5 made his submission taking into account the stand taken by him before the Tribunal. It is contended that even though by the time the Appellant was appointed as against a Trained Graduate Post, he does not have the required training qualification, but after such appointment, even though, the Appellant was given opportunity to acquire the B.Ed. training, but the Appellant failed to acquire the same. It is also contended that as on date, the Appellant has not passed the B. Ed. Examination. Appellant though was permitted to appear the B.Ed. examination under Berhampur University, but Appellant failed to qualify the same.

4.1. Mr. Routray further contended that since the Appellant failed to qualify the training, which is a requirement for his continuance in the School Managing Committee of the School taking into account the Educational Qualification of the Respondent No.5 appointed him as against a Trained Graduate Post vide order of appointment issued on 09.08.1997. By the time, the Respondent N.5 was so appointed, he had already passed the B.Ed. examination held in the month of November, 1996, result of which was published on 26.11.1997. The appellant in terms of his order of appointment issued on 09.08.1997, joined in the School on 11.08.1997. Since Respondent No.5 does possess the required qualification for holding the Trained Graduate Post, his services was also approved by the Inspector of Schools, Puri vide office order dated 23.04.2011. Respondent No.5 was also allowed the benefit of revised scale in terms of subsequent orders passed by the District Education Officer, Puri.

4.2. It is contended that since the Appellant was appointed without having any training qualification and he failed to acquire the B.Ed. qualification, he is not entitled to get his services approved as against a trained graduate post. Not only that in view of the provisions contained under Section 7-B of the Orissa Education Act, 1969, the appointment of the Appellant cannot be treated as a valid appointment. In support of his aforesaid submission Mr. Routray relied on the decision of this Court reported in ***1999 (II) OLR 185 Manamohan Tripathy Vrs. State of Odisha and Others***. This Court in para 8 to 13 of the said judgment has held as follows:-

> *"8. We are unable to accept the submission of Mr. Swain that the State Government is bound to approve the appointment of untrained graduates in trained graduate posts even after introduction of new pattern of teaching staff in 1981. When Subordinate Service Rules, 1972 were made, the posts of Assistant Teachers need not be necessarily trained*

graduate. The posts of Assistant Teachers being basically graduate posts at that time, the prescribed minimum qualification was graduation for earning eligibility for direct recruitment to the posts of Assistant Teachers either through Selection Board in the non-Government Aided Schools or through competitive examination in Government Schools. But that could not mean where higher qualification was expressly and specifically prescribed for a particular post or posts, persons not having such prescribed qualification could be appointed against such specified posts. Rule 7 (c) of Recruitment Rules, 1974 read with Rule 7 (d) of the Subordinate Rules, 1972 pre- supposed that the posts of Assistant Teachers were not trained graduate posts. The situation changed with the issuance of Government Order No. 28465/EYS dated July 8, 1981 whereby new pattern of standard staff was introduced for all non-Government Secondary Schools with effect from July 1, 1981.

9. After July 1, 1981 all the posts of Assistant Teachers excepting the Classical Teachers and Hindi Teachers were made trained posts. After introduction of the said new pattern expressly providing that the posts were trained posts, the schools were not free to appoint untrained Graduate or Intermediate or Matriculate as Assistant Teacher in Hindi School at their will excepting under unavoidable circumstances justifying appointment of untrained persons, such as non-availability of suitable trained graduate.

10. Subsequent change in the situation may make provisions of a particular rule unusable under normal circumstances even though it -retains its place in the Rule Book and is not expressly repealed or modified. Eligibility or permissibility is only for consideration and it does not ipso facto give a right to get appointment or approval. Even where there is power, exercise of such power is also required to satisfy the test of reasonableness and good faith. Power is conferred with an object and such power can be exercised to achieve the object and not to defeat it. Assuming that power to appoint untrained persons continued even after introduction of new pattern, the management of School must justify appointment of an untrained person in a trained post. If appointment of untrained Graduate in trained Graduate posts are automatically allowed after July 1, 1981 without any justifying circumstances,it would make the new pattern totally redundant, produce undesirable results and affect the interest of the education inasmuch as it is an accepted position that teaching of student should be entrusted to appropriately trained teachers.The decision in Bibekananda Das's case cannot be said to have laid down any proposition that the management of the School was free to appoint untrained persons at their will without making any effort to get trained persons. According to us, after new pattern was introduced with effect from July 1, 1981, untrained persons could be appointed against trained post only under unavoidable circumstances justifying such appointment.

11. However,if any trained graduate was validly appointed in accordance with the prescribed process before July 1,1981,his services could not be dispensed with without giving him reasonable opportunity and facility from getting himself trained.

12. Besides, the School was an un-aided private School till May 31,1994. Neither the Recruitment Rules of 1974 nor the Subordinate Service Rules of 1972 were directly applicable to the School. The petitioner was appointed on March 23, 1991 long after the standard pattern of 1981 was introduced.The notification dated July 8, 1981 introducing new pattern of standard staff was applicable to all non-Govt. Secondary Schools, aided or un-aided. Recruitment Rules, 1974 were applicable only to the teachers and members of staff of aided educational institutions. It further appears from the letter of the State

Government dated July 11, 1995 (Annexure-A/4) that it was expressly made clear that only the teaching staff appointed in accordance with the recruitment procedures and having requisite qualifications would be approved for the purpose of giving grand-in-aid. The Government cannot be compelled to pay salary to a person who did not have the requisite qualification at the time of his appointment of even at the time of consideration for approval. The decision in OJC No. 1024 of 1990 relied on by Mr. Swain cannoi be applicable to the facts of the present case. In that case the writ petitioner was appointed on September 5,1 980 i.e. before introduction ¦ of new standard pattern. The writ petitioner's appointment was also approved there on the condition that the writ petitioner would have to get herself trained within a period of two years. Said approval was cancelled subsequently before expiry of the two years period granted for securing training. In the said factual context, the writ application was allowed. The said decision cannot be of any help to the writ petitioner in the present case.

13. It appears that the writ petitioner herein was in fact given an opportunity to undergo B.Ed, training when his application was forwarded on June 27. 1995. Although more than two and half years had passed in the meantime, the petitioner failed to avail of the said opportunity and could not obtain B.Ed, qualification. Accordingly, we do not find any illegality or infirmity in the action of the Superintendent of Sanskrit Studies in not approving the appointment of the petitioner."

4.3. Mr. Routray further contended that the Appellant after his joining in School, he appeared the B.Ed. examination under Berhampur University. But the Appellant failed to qualify the said examination and the information provided by the University on 07.07.2009 under RTI Act also reflect the same. It is accordingly contended that the Tribunal has rightly rejected the claim of the Appellant while upholding the approval of the services of the Respondent No.5.

5. To the submissions made by Mr. Routray, Mr. Das, learned counsel for the Appellant contended that since the very appointment of the Appellant as an untrained hand is permissible in view of the decision of this Court in the case of ***Bibekananda Das*** (supra), in view of the provisions contained under Rule 16(2) of the 1974 Rules, the Appellant is not required to undergo the training on attaining the age of 48 years. Since by the time the Tribunal disposed of the matter vide the impugned order, the appellant was approaching the age of 48 years, the Tribunal should have taken into consideration that aspect. But the Tribunal neither considered the decision of this Court in the case of ***Bibekananda Das*** (supra) in its proper perspective nor the provision contained under Rule 16(2) of the 1974 Rules. It is also contended that as per notification issued by the Govt.-Respondent No.1 on 30.07.2008, Untrained Teachers appointed prior to 18.12.1993 may be approved notionally in the untrained scale till acquisition of training qualifications.

6. Mr. R.N. Mishra, learned Addl. Govt. Advocate on the other hand contended that taking into account the fact that the Respondent No.5 was duly appointed as against the Trained Graduate Post and the Appellant since has not acquired B.Ed. training as yet, the services of private Respondent No.5 was duly

approved by the Respondent No.3, enabling him to get the benefit of Block Grant as per GIA order, 2004. Mr. Mishra,learned AGA further contended that since the Appellant has failed to acquire the B.Ed. training even as on date, he is not eligible and entitled to held the said post.

7. Having heard learned counsel for the parties and after going through the materials available on record, it is found that the Appellant by the time he was appointed vide order dated 10.07.1990, was an untrained hand. Even though in terms of the decision reported in the case of ***Bibekananda Das*** (supra), such an appointment is permissible but the Appellant was required to acquire the B.Ed. qualification for his continuance in the School. Since the Appellant as on date has not acquired the B.Ed. qualification, this Court is of the view that the appellant is not entitled to get the benefit of approval of his service as against a trained graduate post. The provision contained under Rule 16(2) of 1974 Rules is also of no help as by the time the matter was decided by the Tribunal, the appellant had not attained the age of 48 years. This Court accordingly finds no illegality or irregularity in the impugned judgment and the Tribunal has rightly rejected the claim of the Appellant. Therefore, this Court is not inclined to interfere with the impugned judgment and dismiss the Appeal.

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2023 (II) ILR - CUT- 635

S.K. MISHRA, J.

W.P.(C) NO.11925 OF 2016

TAPAN NARAYAN MOHANTY .....Petitioner

.V.

ODISHA STATE SEED CORPORATION LTD. & ORS. .....Opp. Parties

(A) ODISHA STATE SEEDS CORPORATION SERVICE (CLASSIFICATION CONTROL AND APPEAL) RULES, 1994 – Disciplinary authority disagree with the enquiry authority and framed additional charges against the delinquent officer – Relying on the said additional charges, proposed penalties imposed against the petitioner without affording any opportunity to his say in a regular departmental proceeding – Effect – Held, the order of disciplinary authority being pre-determined, is not sustainable.

(B) DISCIPLINARY PROCEEDING – Continuation of disciplinary proceeding after superannuation – Effect of – Held, when there is no

such provision under the Odisha State Seeds Corporation Service (Classification,Control and Appeal) Rule,1994 for continuance of departmental proceeding even after superannuation of an employee, entire process of inquiry starting from impugned show-cause notice to imposition of additional charges is illegal,unjustified and unsustainable in the eyes of law and deserved to be set aside. (Para 22)

Case Laws Relied on and Referred to :-

1. AIR 1998 SC 2713 : Punjab National Bank & Ors. Vs. Kunj Behari Misra.
2. AIR 1999 SC 3734 : Yoginath D. Bagde Vs. State of Maharashtra & Anr.
3. (2006) 12 SCC 33 : Siemens Ltd. Vs. State of Mharashtra & Ors.
4. AIR 1987 SC 943 : State of Uttar Pradesh Vs. Brahm Datt Sharma.
5. AIR 2005 (11) SCC 451 : State of U.P. Vs. Anil Kumar Ramesh Chandra Glass Works.
6. AIR 1999 SC 1841 : Bhagirathi Jena Vs. Board of Directors, O.S.F.C. & Ors.
7. (2003) 6 SCC 545 : Chandra Singh Vs. State of Rajasthan & Anr.
8. 2009(Supp-II) OLR 377 : Pratap Kishore Dash Vs. High Court of Orissa, represented by its Registrar (Admn.) & Anr.

For Petitioner : Mr. A.K. Acharya

For Opp. Parties : Mr. S. Das

JUDGMENT Date of Judgment : 11.05.2023

S.K. MISHRA, J.

1. The Petitioner, who was working as Seed Production Officer (Headquarters) in charge of Marketing Manager in the Odisha State Seeds Corporation Limited, shortly, hereinafter "the Corporation", being aggrieved by the 2nd Show Cause Notice dated 24th June, 2016 has preferred the Writ Petition with a prayer to quash the same, so also the Charge Sheet dated 28th June,2014 and command the Opposite Party No.1 to release all the consequential terminal dues and service benefits, as admissible to the Petitioner, within a stipulated time frame along with interest.

2. The brief background facts which lead to filing of the Writ Petition is that the Petitioner, while working as Seed Production Officer (Headquarters) and was in additional charge of Marketing Manager, was placed under suspension vide Office Order dated 20th December, 2014 in terms of the Orissa State Seeds Corporation Service (Classification Control and Appeal) Rules, 1994, shortly, hereinafter "Rules, 1994" on the ground that he had miserably failed to discharge the duty regarding procurement of groundnut seeds and proper distribution of the same in various districts of the State during Rabi 2013-14, improper inventory management causing dislocation in supply of seeds during 'Rabi', so also financial loss to the Corporation due to collusion with the private suppliers. Accordingly, a charge sheet was issued on 28th June, 2014 along with Statement of Imputations and the Articles of Charge. When the matter stood thus, the Petitioner, on attaining the age of 58 years, was

superannuated from service with effect from 31st July, 2014 vide Office Order dated 30th July, 2014.After his retirement, vide letter dated 24th January, 2015, one Sukanta Kishore Jena, Director of OSSOPCA was appointed as the Enquiry Officer and Aditya Kumar Panda, Marketing Manager of the Corporation as the Marshalling Officer in terms of the said Rules,1994. Finally, the Enquiry Officer, after conducting an enquiry,submitted his report on 30th January, 2016. Though Petitioner was not aware about the findings of the Enquiry Officer, a communication was made to him vide letter dated 24th June, 2016, indicating therein that the findings of the Enquiry Officer is unjust and devoid of application of judicial mind and subsequently, the Authority consider the Petitioner to be responsible for the lapses occurred in the seeds transaction. The relevant portions of the said communication are extracted below:

> "*The Marketing Manager is the initiator of file and custodian of marketing wing. Supply of seeds by the supplier violating the schedule of supply occurred for non-monitoring by you. You could have intimated the ten M.D. to intimate all SPOs not to receive the seeds, beyond schedule of supply.*
>
> *You have also not pointed out in file, the post facto agreement made by MD OSSC Ltd. with the supplier violating the terms and conditions of supply. Rather you were a silent spectator during the whole transaction period. Had you been more vigilant the OSSC would not have incurred such huge financial liabilities."*

3. Accordingly, it was communicated vide the said letter that the Petitioner is responsible for the lapses occurred in the seeds transaction and he is liable for the punishment as proposed in the said communication i.e. suspension period shall be treated as such and the increment shall be withheld with cumulative effect. The Petitioner was requested to submit his representation, if any, against the proposed penalty within fifteen days from the date of issue of the said letter, failing which further course of action, as deemed proper, shall be taken against him without any further correspondence. Pursuant to the said Show Cause Notice, the Disciplinary Authority, vide letter dated 2nd July, 2016, furnished a copy of the Enquiry Report to the Petitioner indicating therein to furnish his representation, if any, by 8th July, 2016, for taking further needful action in the said matter. Being aggrieved by the said communication dated 24th June, 2016, the Petitioner has preferred present Writ Petition on 12th July, 2016 and as an interim, this Court vide Order dated 21st July, 2016, ordered that the Disciplinary Proceeding initiated against the Petitioner, may continue but the result thereof shall not be published without leave of this Court. Immediately after communication of the impugned order dated 24th June, 2016, Petitioner preferred the present Writ Petition.

4. During hearing, a query being made by this Court, the Petitioner filed an Additional Affidavit enclosing thereto the explanation tendered by him dated 12th August, 2016, wherein the said additional charges brought against the Petitioner were duly dealt with and were denied with proper explanation, so also dealing with various correspondences made in the said regard to demonstrate that the Petitioner is

also not responsible or liable to be prosecuted for such additional charges brought against him in form of a second Show Cause Notice given by the Disciplinary Authority.

5. Being noticed, the Opposite Party No.1-Corporation has filed a Counter Affidavit. The sum and substance of the said Counter Affidavit is that, though the Enquiry Officer submitted his Report vide reference No.253 dated 30th January, 2016, to the Managing Director of the Corporation, exonerating the Petitioner from all the charges framed against him, he being the Disciplinary Authority, vide letter dated 3rd May, 2016, communicated the Enquiry Officer to re-enquire as the enquiry has not covered all the aspects by the Enquiry Officer. Further, the Enquiry Officer, vide communication dated 28th May, 2016, intimated that the enquiry made by him stands. Hence, the Disciplinary Authority, in terms of Clause-ii in Sub-Rule (10) under Rule, 15 of the Rules, 1994 [wrongly indicated as Rule-10(ii)] proposed the penalty vide communication dated 24th June, 2016 disagreeing with the findings of the Enquiring Authority and requested therein to submit representation, if any, against the proposed penalty within fifteen days from the date of issue of the said letter.That apart, a stand has been taken in the Counter Affidavit that the Corporation is a Government of Odisha undertaking. The mandate of the Corporation is to supply certified seeds inside the State of Odisha through Dealers/PACs as per the indent of the DA & FP, Odisha. The Petitioner was working as Marketing Manager in the Corporation. During Rabi-2013-14, while the Petitioner was discharging the duties as Marketing Manager,did not monitor the supply of seeds by the suppliers violating the supply schedule and not intimated to the Managing Director to give suitable intimation to all SPOs (Seed Production Officers) not to receive the seeds. Further, as Marketing Manager, he has not pointed out in the file, the post-facto agreement made by the then Managing Director of the Corporation with the Supplier violating the terms & conditions of supply. Rather, the Marketing Manager was a silent spectator during the whole transaction period. Had he been serious and vigilant, the Corporation would not have incurred financial losses. A stand has also been taken in the Counter Affidavit that the Petitioner has miserably failed to discharge the duties regarding procurement of groundnut seeds, and thus proper distribution of seeds in various districts were hampered causing loss to the Corporation. From the video conference with DDAs, held on 18th December, 2013, it was revealed that, while there was excess stock at some places, there was deficit of stock in other places. The season for groundnut showing is fast approaching an end and the Corporation has huge excess stocks. Thus, the inventory management has been awful which is the primary job of a Marketing Manager. Considering the aforesaid facts, the Petitioner was placed under suspension, followed by the Disciplinary Proceeding which was rightly initiated against him. It has also been stated that the Enquiry Officer had not covered all the aspects as per the point of charges framed against the Petitioner. The Disciplinary Authority, being independent, imposed the penalties against the Petitioner based on the factual position and the role and responsibility of the

Marketing Manager in due discharging responsibilities. Accordingly, proposed the penalties and suitably communicated to the Petitioner. The act of the Disciplinary Authority is within the framework of the Rules of the Corporation. The findings of the Enquiry Officer by exonerating the Petitioner (delinquent) is not at all justified considering the fact that the delivery of seeds by the Suppliers during the period Rabi, 2013-14 and the payment made by the Petitioner to the Agencies could not be settled in time and as a matter of fact, a private Supplier M/s. Pallavi Farm and Nurseries filed Arbitration Proceeding against the Corporation before this Court, which is still continuing and the Corporation is defending the case. It has also been contended in the Counter Affidavit that, the Disciplinary Authority proposed the penalties based on the factual position and records available in the file and the contention of the Petitioner that no reason has been assigned by the Opposite Party No.1, to differ with the findings of the Enquiry Officer, is not at all correct and justified and due provision of law has been observed and the Petitioner was informed to reply for proving his innocence against the imposition of proposed penalties. It has also been stated that the Petitioner was given opportunity to Show Cause against the proposed penalties in terms of the Rules, 1994. In fact, the Petitioner has submitted a detailed Show Cause against the proposed penalties. However, in obedience to the interim order passed by this Court, no final decision could be taken in the said Disciplinary Proceeding.

6. Mr. Acharya, learned Counsel for the Petitioner submits that the impugned notice dated 24th June, 2016 is bad and unsustainable in the eye of law, as the Disciplinary Authority has not indicated vide the said notice, as to what was the reason for differing with the findings given by the Enquiry Officer. That apart, the said notice contains additional charges, which were never indicated in the statement of imputations and articles of charge. The said 2nd Show Cause Notice was issued on 24th June, 2016, without furnishing a copy of the Enquiry Report. Contrary to the said notice, the same Disciplinary Authority, few days thereafter i.e. 2nd July, 2016, issued a formal notice to the Petitioner without referring to the earlier notice given by him, requesting therein to furnish his representation in response to the Enquiry Report, though in the earlier notice, in addition to the said additional charges, the proposed punishment was also suggested by the Disciplinary Authority. Mr. Acharya draws attention of this Court as to the Rules, 1994 and submits that though there is no such ground agitated in the Writ Petition, in view of the settled position of law, in absence of any such provision under Rules, 1994 as to continuance of Disciplinary Proceeding, even after superannuation of a delinquent, even though the charge sheet was issued prior to superannuation of the Petitioner, all subsequent action taken by the Disciplinary Authority as to appointment of Enquiry Officer, so also Marshalling Officer and continuance of the Departmental Proceeding was after superannuation of the Petitioner. In absence of such provision under Rules, 1994, all subsequent actions of the authority concerned, being beyond authority, are liable to be set aside. He further submits, law is well settled that where the Disciplinary

Authority itself holds an enquiry, an opportunity of hearing has to be granted to the delinquent. The Disciplinary Authority differed with the views of the Enquiry Officer came to a different conclusion without any basis and indicating any reason to the said effect in the impugned notice. Even if his client succeeded before the Enquiry Officer and was exonerated from all the charges, the Petitioner was deprived of leading evidence, so also to have his say before the Disciplinary Authority proposed punishment by the impugned notice. Apart from asking his client to submit his representation, if any, against the proposed punishment, before tendering his explanation to the additional charges, the Disciplinary Authority came to a conclusion with an observation that, the delinquent is total responsible for lapses occurred in the seed transaction with regard to the said additional charges and proposed the penalties, to treat his period of suspension as such and to withhold his increment with cumulative effect.

7. Mr. Acharya further submits that though law is well settled that, it is open for the Disciplinary Authority either to agree with the findings recorded by the Enquiry Officer and or disagree with the findings, it is obligatory on the part the Disciplinary Authority to record his own findings from the materials available in the enquiry file that the charges were established and the Delinquent Officer is liable to be punished. The Delinquent Officer has a right of getting an opportunity of hearing in terms of the Rules of the employer. He further submits that even Rules are in the said regard are silent, still it is obligatory on the part of the Disciplinary Authority to give an opportunity of hearing to the Delinquent Officer and record his findings, different from those of the Enquiring Authority that the charges were established. Mr. Acharya draws attention of this Court to Rule-14 of Rules, 1994 pertaining to procedure for imposing Major Penalties and submits that Clause (ii) in Sub-Rule (10) under Rule-15 of the said Rules, 1994 mandates that the order passed by the Disciplinary Authority shall be communicated to the employee, who shall also be supplied with the copy of the Report of the Enquiring Authority and where the Disciplinary Authority is not the Enquiring Authority, a statement of its findings together, with brief reasons for disagreement, if any, with the findings of the Enquiring Authority. Neither his client was supplied with a copy of the Enquiry Report with the said impugned Show Cause Notice nor the reason for disagreement with the findings given by the Enquiry Officer, was indicated in the said notice.

8. To substantiate his submission, Mr. Acharya relies on the judgments in **Punjab National Bank and others Vs. Kunj Behari Misra**, reported in AIR 1998 SC 2713, in **Yoginath D. Bagde Vs. State of Maharashtra and another**, reported in AIR 1999 SC 3734 and in **Siemens Ltd. Vs. State of Mharashtra and others**, reported in (2006) 12 SCC 33.

9. Mr. Das, learned Counsel for the Opposite Parties-Corporation, in addition to the stand taken in the Counter Affidavit, submits that since the Petitioner has challenged the Show Cause Notice dated 24th June, 2016, the said action of the

Petitioner being premature, the Writ Petition is not maintainable and liable to be dismissed limine. He further submits that the impugned Show Cause Notice dated 24th June, 2016, well demonstrates the reason for disagreement with the findings given by the Enquiry Officer.

Mr. Das further submits, the Writ Petition being premature, the Petitioner should be directed to appear before the Disciplinary Authority to have his say, so that a final decision can be taken on the said written submission of the Petitioner and thereafter, if any further cause of action arises, the Petitioner may approach this Court and at this stage, the Writ Petitioner is not maintainable.

10. To substantiate his argument, Mr. Das relies on the Judgments of the apex Court in **State of Uttar Pradesh Vs. Brahm Datt Sharma**, reported in AIR 1987 SC 943 and in **State of U.P. Vs. Anil Kumar Ramesh Chandra Glass Works**, reported in AIR 2005 (11) SCC 451

11. On bare perusal of the Statement of Imputations and Articles of Charge, as detailed in the Memorandum of Charges dated 28th June, 2014, it is amply clear that the said allegations/charges made in the second Show Cause Notice dated 24.06.2016 were never part and parcel of the charges brought against the Petitioner and those are in addition to the charges of gross negligence and dereliction in duty, improper inventory management causing dislocation in supply of seeds during Rabi 2013-14. It is also clear from the impugned notice dated 24th June, 2016, though the Petitioner was requested to submit his representation in response to the said notice giving him fifteen days time to do so, before getting his response to the said notice dated 24th June, 2016, the Disciplinary Authority opined in the said notice that, he considers the Petitioner to be totally responsible for the said lapses occurred in the seeds transaction and accordingly, proposed the punishment as detailed above. That apart, additional charges/allegations were brought against the Petitioner while proposing the penalties to be imposed against him vide the impugned Notice dated 24th June, 2016. Though law is well settled that during enquiry, if it would come to the notice of the Disciplinary Authority as to omission of any charges to be brought against the Petitioner, he can be additionally charge sheeted and further enquiry can be made with regard to the said additional charges, but in the present case, instead of doing so, the Disciplinary Authority framed the said additional charges and relying on the said additional charges, proposed the penalties to be imposed against the Petitioner without affording him opportunity to have his say and by facing a regular Departmental Proceeding and to lead evidence to the said effect, to prove his innocence.

12. In **Punjab National Bank** (supra), the apex court vide paragraphs-18 to 21 held/observed as follows:

> **"18.** *Under Regulation - 6 the inquiry proceedings can be conducted either by an inquiry officer or by the disciplinary authority itself. When the inquiry is conducted by*

the inquiry officer his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with decision of the disciplinary authority. It is the disciplinary authority which can impose the penalty and not the inquiry officer. Where the disciplinary authority itself holds an inquiry an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the inquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. ***It will be most unfair and iniquitous that where the charged officers succeed before the inquiry officer they are deprived of representing to the disciplinary authority before that authority differs with the inquiry officer's report and, while recording of guilt, imposes punishment on the officer. In our opinion, in any such situation the charged officer must have an opportunity to represent before the Disciplinary Authority before final findings on the charges are recorded and punishment imposed****. This is required to be done as a part of the first stage of inquiry as explained in Karunakar's case(supra).*

19. *The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7(2). As a result thereof whenever the disciplinary authority disagrees with the inquiry authority on any article of charge then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings.* ***The report of the inquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favorable conclusion of the inquiry officer****. The principles of natural justice, as we have already observed, require the authority, which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer.*

20. *The aforesaid conclusion, which we have arrived at, is also in consonance with the underlying principle enunciated by this Court in the case of Institute of Chartered Accountants (supra). While agreeing with the decision in Ram Kishan's case (supra), we are of the opinion that the contrary view expressed in S.S. Koshal and M.C. Saxena's cases (supra) do not lay down the correct law.*

21. *Both the respondents superannuated on 31st December, 1983. During the pendency of these appeals Misra died on 6th January, 1995 and his legal representatives were brought on record.* ***More than 14 years have elapsed since the delinquent officers had superannuated. It will, therefore, not be in the interest of justice that at this stage the cases should be remanded to the disciplinary authority for the start of another innings. We, therefore, do not issue any such directions and while dismissing these appeals we affirm the decisions of the High Court which had set aside the orders imposing penalty and had directed the appellants to release the retirement benefits to the respondents****. There will, however, be no order as to costs."*

(Emphasis supplied)

13. Similarly in **Yoginath D. Bagde** (supra), the apex Court vide paragraphs-28 to 30, 33, 34, 36, 37 and 39 held/observed as follows:

"28. *In view of the provisions contained in the statutory Rule extracted above, it is open to the Disciplinary Authority either to agree with the findings recorded by the*

Inquiring Authority or disagree with those findings. If it does not agree with the findings of the Inquiring Authority, it may record its own findings. Where the Inquiring Authority has found the delinquent officer guilty of the charges framed against him and the Disciplinary Authority agrees with those findings, there would arise no difficulty. So also, if the Inquiring Authority has held the charges proved, but the Disciplinary Authority disagrees and records a finding that the charges were not established, there would arise no difficulty. ***Difficulties have arisen in all those cases in which the Inquiring Authority has recorded a positive finding that the charges were not established and the delinquent officer was recommended to be exonerated, but the Disciplinary Authority disagreed with those findings and recorded its own findings that the charges were established and the delinquent officer was liable to be punished****. This difficulty relates to the question of giving an opportunity of hearing to the delinquent officer at that stage. Such an opportunity may either be provided specifically by the Rules made under Article 309 of the Constitution or the Disciplinary Authority may, of its own, provide such an opportunity.* ***Where the Rules are in this regard silent and the Disciplinary Authority also does not give an opportunity of hearing to the delinquent officer and records findings, different from those of the Inquiring Authority that the charges were established, "an opportunity of hearing" may have to be read into the Rule by which the procedure for dealing with the Inquiring Authority's report is provided principally because it would be contrary to the principles of natural justice if a delinquent officer, who has already been held to be `not guilty' by the Inquiring Authority, is found `guilty' without being afforded an opportunity of hearing on the basis of the same evidence and material on which a finding of "not guilty" has already been recorded****.*

29. *We have already extracted Rule 9(2) of the Maharashtra Civil Services (Discipline & Appeal) Rules, 1979 which enables the Disciplinary Authority to disagree with the findings of the Inquiring Authority on any article of charge. The only requirement is that it shall record its reasoning for such disagreement. The Rule does not specifically provide that before recording its own findings, the Disciplinary Authority will give an opportunity of hearing to a delinquent officer. But the requirement of "hearing" in consonance with the principles of natural justice even at that stage has to be read into Rule 9(2) and it has to be held that before Disciplinary Authority finally disagrees with the findings of the Inquiring Authority, it would give an opportunity of hearing to the delinquent officer so that he may have the opportunity to indicate that the findings recorded by the Inquiring Authority do not suffer from any error and that there was no occasion to take a different view.* ***The Disciplinary Authority, at the same time, has to communicate to the delinquent officer the "TENTATIVE" reasons for disagreeing with the findings of the Inquiring Authority so that the delinquent officer may further indicate that the reasons on the basis of which the Disciplinary Authority proposes to disagree with the findings recorded by the Inquiring Authority are not germane and the finding of "not guilty" already recorded by the Inquiring Authority was not liable to be interfered with****.*

30. *Recently, a three-Judge Bench of this Court in Punjab National Bank & Ors. vs. Kunj Behari Mishra (1998) 7 SCC 84 = AIR 1998 SC 2713, relying upon the earlier decisions of this Court in State of Assam vs. Bimal Kumar Pandit (1964) 2 SCR 1 = AIR 1963 SC 1612; Institute of Chartered Acountants of India vs. L.K. Ratna & Ors. (1986) 4 SCC 537 as also the Constitution Bench decision in Managing Director, ECIL, Hyderabad & Ors. vs. B. Karunakar & Ors. (1993) 4 SCC 727 and the decision in Ram Kishan vs. Union of India (1995) 6 SCC 157, has held that :*

"It will not stand to reason that when the finding in favour of the delinquent officers is proposed to be overturned by the disciplinary authority then no opportunity should be granted. The first stage of the enquiry is not completed till the disciplinary authority has recorded its findings. ***The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing****. When the enquiring officer holds the charges to be proved, then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer.* ***When, like in the present case, the enquiry report is in favour of the delinquent officer but the disciplinary authority proposes to differ with such conclusions, then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard****. In departmental proceedings, what is of ultimate importance is the finding of the disciplinary authority."*

33. *In view of the above, a* ***delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the Enquiry Officer into the charges levelled against him but also at the stage at which those findings are considered by the Disciplinary Authority and the latter,namely, the Disciplinary Authority forms a tenative opinion that it does not agree with the findings recorded by the Enquiry Officer.If the findings recorded by the Enquiry Officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the Disciplinary Authority has proposed to disagree with the findings of the Enquiry Officer****. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the Disciplinary Authority does not bring about the closure of the enquiry proceedings.* ***The enquiry proceedings would come to an end only when the findings have been considered by the Disciplinary Authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away by any legislative enactment or Service Rule including Rules made under Article 309 of the Constitution****.*

34. *Applying the above principles to the facts of this case, it would be noticed that in the instant case the District Judge (Enquiry Officer) had recorded the findings that the charges were not proved. These findings were submitted to the Disciplinary Committee which disagreed with those findings and issued a notice to the appellant requiring him to show-cause why he should not be dismissed from service. It is true that along with the show-cause notice, the reasons on the basis of which the Disciplinary Committee had disagreed with the findings of the District Judge were communicated to the appellant but the Disciplinary Committee instead of forming a tentative opinion had come to a final conclusion that the charges against the appellant were established. The Disciplinary Committee, in fact, had acted in accordance with the statutory provisions*

contained in Rule 9(4)(i)(a)&(b). He was called upon to show-cause against the proposed punishment of dismissal as will be evident from the minutes of the Disciplinary Committee dated 21st June, 1993 which provide as under:-

"Decision : Discussed.

For the reasons recorded in Annexure "A" hereto, the Committee disagrees with the finding of the Enquiry Officer and finds that the charges levelled against the delinquent Judicial Officer have been proved.

It was, therefore, tentatively decided to impose upon the Judicial Officer penalty of dismissal from service.

Let notice, therefore, issue to the delinquent Judicial Officer calling upon him to show cause why penalty of dismissal from service as prescribed in Rule 5(1)(ix) of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 should not be imposed upon him.

Show cause notice will be accompanied by a copy of the Report of the Inquiring Authority and the reasons recorded by this Committee."

These minutes were recorded after the Disciplinary Committee had considered the Enquiry Report and differed with the findings and recorded its final opinion in para 10 of its reasons as under:-

"10. The Disciplinary Committee is of the opinion that the findings recorded by the Enquiry Officer on both the charges cannot be sustained. ***The Committee, after going through the oral and documentary evidence on record, is of the opinion that both the charges against the delinquent are proved****. The delinquent is a Judicial Officer who has failed to maintain the absolute integrity in discharge of his judicial duties."*

36. *Along with the show-cause notice, a copy of the findings recorded by the Enquiry Officer as also the reasons recorded by the Disciplinary Committee for disagreeing with those findings were communicated to the appellant but it was immaterial as* ***he was required to show-cause only against the punishment proposed by the Disciplinary Committee which had already taken a final decision that the charges against the appellant were proved. It was not indicated to him that the Disciplinary Committee had come only to a "tentative" decision and that he could show cause against that too****. It was for this reason that the reply submitted by the appellant failed to find favour with the Disciplinary Committee.*

37. Since the Disciplinary Committee did not give any opportunity of hearing to the appellant before taking a final decision in the matter relating to findings on the two charges framed against him, the principles of natural justice, as laid down by a Three-Judge Bench of this Court in Punjab National Bank & Ors. vs. Kunj Behari Mishra, (1998) 7 SCC 84 = AIR 1998 SC 2713, referred to above, were violated*.*

39. *The contention apparently appears to be sound but a little attention would reveal that it sounds like the reverberations from an empty vessel.* ***What is ignored by the learned counsel is that a final decision with regard to the charges levelled against the appellant had already been taken by the Disciplinary Committee without providing any opportunity of hearing to him****. After having taken that decision, the members of the Disciplinary Committee merely issued a notice to the appellant to show-cause against the major punishment of dismissal mentioned in Rule 5 of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979.* ***This procedure was contrary to the law***

laid down by this Court in the case of Punjab National Bank (supra) in which it had been categorically provided, following earlier decisions, that if the Disciplinary Authority does not agree with the findings of the Enquiry Officer that the charges are not proved, it has to provide, at that stage, an opportunity of hearing to the delinquent so that there may still be some room left for convincing the Disciplinary Authority that the findings already recorded by the Enquiry Officer were just and proper*. Post-decisional opportunity of hearing, though available in certain cases, will be of no avail, at least, in the circumstances of the present case."* (Emphasis supplied)

14. As to the maintainability issue raised by the learned counsel for the Corporation, in **Siemens Ltd.** (supra), the apex Court vide, paragraph-9 held/observed as follows:

*"**9.** Although ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including State of Uttar Pradesh v. Brahm Datt Sharma and Anr. AIR 1987 SC 943, Special Director and Another v. Mohd. Ghulam Ghouse and Another, (2004) 3SCC 440 and Union of India and Another v. Kunisetty Satyanarayana, 2006 (12) SCALE 262], but the question herein has to be considered from a different angle, viz, **when a notice is issued with pre-meditation, a writ petition would be maintainable. In such an event, even if the courts directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose [See K.I. Shephard and Others v. Union of India and Others (1987) 4 SCC 431 : AIR 1988 SC 686]. It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter affidavit as also in its purported show cause notice**."*

(Emphasis supplied)

15. So far as the view of the apex Court in **State of Uttar Pradesh** (supra), relied upon by the learned Counsel for the Corporation, in view of the facts and circumstances of the present case, this Court is of the view that the said judgment is not applicable to the case of the Petitioner. Similarly, in **State of U.P.** (supra), the subject matter of Writ Petition being with regard to challenge to the Show Cause Notice under the U.P. Trade Tax Act, for alleged illegal continuance, there having the provision of Appeal in the said Act, is also not applicable to the present case.

16. At this Juncture, it is apt to deal with the Rules, 1994 of the Corporation, more particularly, Rule-15 which deals with procedure for imposing major penalties. The same is extracted below:

"15. <u>Procedure for Imposing Major Penalties:</u>

*(1) Without prejudice to the provisions of the Public Servants (inquiry) Act, 1950, **no order imposing on an employee any of the penalties specified in clauses (vi), to (ix) of rule-13 shall be passed except after an inquiry held as far as may be in the manner hereinafter provided**.*

(2) ***The disciplinary authority shall frame definite charges on the basis of the allegations on which the inquiry is to be held. Such charges, together with a statement of the allegations on which they are based, shall be communicated in writing to the employee and he/she shall be required to submit****, within such time as may be specified by the disciplinary authority, not ordinarily exceeding one month, a written statement of his/her defence and also to state whether he/she desires to be heard in person.*

EXPLANATION

In this sub-rule and in sub-rule (3), the expression "Disciplinary Authority" shall include the authority competent under these rule to impose upon the employee any of the penalties specified in Clauses (i) to (v) in rule 13.

(3) The employee shall, for the purpose of preparing his/her defence, be supplied with all the records on which the allegations are based. He/she shall also be permitted to inspect and take extracts from such other official records as he/she may specify, provided that such permission may be refused if, for reasons to be recorded in writing, in the opinion of the disciplinary authority such records are not relevant for the purpose or it is against public interest to allow him/her access thereto.

(4) On receipt of the written statement of defence of, if no such statement is received within the time specified, the disciplinary authority may itself inquire into such of the charges are not admitted or, if it considers it necessary so to do, appoint a board of inquiry or an inquiry officer for the purpose.

Provided that if, after considering the written statement of defence, the disciplinary authority is of the view that the facts of the case do not justify the award of major penalty, it shall determine, after recording reasons thereof, what other penalty of penalties, if any as specified in clauses (i) to (v) of rule 13 should be imposed and shall pass appropriate orders.

(5) The disciplinary authority may nominate any person to present the case in support of the charges before the authority inquiring into the charges (hereinafter referred to as the "inquiring authority"). The Employee shall have the right to engage a legal practitioner to present his case if the person nominated by the disciplinary authority, as aforesaid, is a legal practitioner. The inquiring authority may also, having regard to the circumstances of the case, permit the employee to be represented by a legal practitioner.

(6) The inquiring authority, shall, in the course of the inquiry consider such documentary evidence, and take such oral evidence as may be relevant or material in regard to the charges. The employee shall be entitled to cross examine witnesses examined in support of the charges and to give evidence in person. The person presenting the case in support of the charges shall be entitled to cross examine the employee and the witnesses examined in his/her defence. If the inquiring authority declines to examine any witness or the ground that his/her evidence is not relevant or material, it shall record its reasons in writing.

(7) At the conclusion of the inquiry the inquiring authority shall prepare a report of the inquiry recording its findings on each of the charges together with reasons therefor. ***If, in the opinion of such authority, the proceedings of the inquiry establish charges different from those originally framed, it may record its findings on such charges shall not be recorded, unless the employees has admitted the facts constituting them or has had an opportunity of defending himself/herself against them****. The inquiring authority may recommend the punishment to be inflicted when the charges are established on findings.*

(8) The record of the inquiry shall include:-

(i) the charges framed against the employee and the statement of allegations furnished to him/her under sub-rule(2).

(ii) his/her written statement of defence, if any;

(iii) the oral evidence taken in the course of the inquiry;

(iv) the documentary evidence considered in the course of the inquiry;

(v) the orders, if any, made by the disciplinary authority and the inquiring authority in regard to the inquiry;

(vi) a report setting out of findings on each charges and the reasons therefor; and

(vii) the recommendation of the inquiring authority, if any regarding the punishment to be inflicted.

(9) ***The disciplinary authority shall, if it is not the inquiring authority, consider the record of the inquiry and record its findings on each charge****.*

(10) (i) If the disciplinary authority having regard to its findings on the charges, is of the opinion that any of the penalties specified in clauses (i) to (ix) of rule-13 should be imposed, it shall pass appropriate orders in the case;

(ii) The orders passed by the disciplinary authority shall be communicated to the employee who shall also be supplied with a copy of the report of the inquiring authority and ***where the disciplinary authority is not the inquiring authority, a statement of its findings together, with brief reasons for disagreement, if any, with the findings of the inquiring authority****."* (Emphasis supplied)

17. Further, on perusal of the said Rules, 1994, it is ascertained that there is no such provision under the said Rules for continuance of the Departmental Proceeding, even after superannuation of an employee, even though Departmental Proceeding has been initiated against the delinquent employee before his superannuation. Law is well settled that unless and until there is a specific provision under the Service Rules for continuance of the Departmental Proceeding after superannuation of an employee/delinquent the same is not permissible, even though the Departmental Proceeding has been initiated prior to the superannuation of the delinquent employee.

18. The apex Court in **Bhagirathi Jena Vs. Board of Directors, O.S.F.C. and others,** reported in AIR 1999 SC 1841 held as follows:

"6. *In view of the absence of such provision in the abovesaid regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits of the appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30.6.95, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement."*

19. The apex Court in **Chandra Singh Vs. State of Rajasthan and another**, reported in (2003) 6 SCC 545 held as follows:

> *"A departmental proceeding can continue so long as the employee is in service. In the event, a disciplinary proceeding is kept pending by the employer the employee cannot be made to retire. There must exist specific provision in the pension rules in terms whereof, whole or a part of the pension can be withheld or withdrawn wherefor a proceeding has to be initiated. Furthermore, no rule has also been brought to our notice providing for continuation of such proceeding despite permitting the employee concerned to retire. In absence of such a proceeding, the High Court or the State cannot contend that the departmental proceedings against the appellant Mata Deen Garg could continue."*

20. In **Pratap Kishore Dash Vs.High Court of Orissa, represented by its Registrar (Admn.) and another**, 2009(Supp-II) OLR 377, the Division Bench of this Court relying on the aforesaid Judgments of the apex court took a similar view.

21. Admittedly, the Disciplinary Authority has acted contrary to Rules, 1994, while issuing the Show Cause Notice dated 24.06.2016 under challenge. Instead of giving reasons for disagreeing with the findings of the Enquiry Officer, the Disciplinary Authority brought two additional charges against the Petitioner, Before the Petitioner could tender his explanation to the said additional charges, the Disciplinary Authority simultaneously proposed the punishment to be imposed vide the impugned notice dated 24th June, 2016, thereby predetermined the issue. That apart, though there is no such provision under the said Rules, 1994 for continuance of Departmental Proceeding even after superannuation of an employee, entire process of enquiry, starting from appointment of Enquiry Officer till the date of issuance of Show Cause Notice, were after the Petitioner was superannuated on 31st July, 2014.

22. In view of the pleadings on record, so also submissions made by the learned Counsel for the parties and the settled provision of law as detailed above, this Court is of the view that the impugned Show Cause Notice dated 24th June, 2016, being beyond the provisions enshrined under Rules, 1994, bearing some additional charges, which were not in the Memorandum of Charges, is illegal, unjustified and unsustainable in the eye of law and deserves to be set aside. Accordingly, the same is set aside.

23. As the Enquiry Officer exonerated the Petitioner from all the charges brought against him by submitting a report to the said effect, the Memorandum of Charges dated 28th June, 2014 is also liable to be set aside. Accordingly, the same is set aside.

24. Apart from prayer to set aside Annexures-3 and 1 i.e. Memorandum of Charges, so also the Show Cause Notice respectively, a prayer has also been made to command the Opposite Party No.1-Corporation to release all the consequential

terminal dues and service benefits as admissible to the Petitioner, within a stipulated time along with interest.

25. Admittedly, the Petitioner was superannuated with effect from 31st July, 2014. There was no legal barrier for release of his after retiral dues including the gratuity. A query being made, the learned Counsel for the Opposite Party-Corporation also failed to demonstrate before this Court any Rules to the said effect permitting the Corporation to withheld the after retiral dues of the Petitioner on the ground of pendency of department proceeding. However, to the reason best known to the authority concerned, on the plea of interim order passed by this Court, though there is no such order, Petitioner's after retiral dues are yet to be released. Pursuant to the said query, learned Counsel for the Corporation filed a Memo along with instructions received from his client, wherein it has been indicated that this Court ordered the Disciplinary Proceeding initiated against the Petitioner may continue, but the result thereof shall not be published without leave of this Court. As no final order has been received from this Court, terminal benefits to the Petitioner has not been extended, as the calculation of leave encashment and gratuity is made on the basis of last drawn salary. Further, it has been stated vide the said instruction, the employees of the Corporation are entitled for pension under the Employees Pension Scheme, 1995 under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

26. Learned Counsel for the Petitioner submitted that the Petitioner is already getting pension under Employees Pension Scheme, 1995. Hence, this Court directs that the Petitioner shall be paid his differential salary, i.e. the salary what he would have been entitled to had he not been put under suspension, minus the suspension allowance already paid to him, from the date of his suspension till the date of retirement i.e. 31st July, 2014, within six weeks hence. That apart, last drawn salary of the Petitioner as on 31.07.2014 should be calculated and fixed before making such payment. Accordingly, calculation should be made as to entitlement of the Petitioner towards gratuity and leave encashment within six weeks as directed above. Further, in terms of the Payment of Gratuity Act, 1972, the Petitioner shall be paid 10% interest on the gratuity amount payable from the date of his superannuation, till the date of actual payment of the gratuity, based on the last drawn salary to be fixed by the authority concerned. The Petitioner is also entitled for 6% interest on leave encashment from the date of his superannuation till the date of actual payment, as directed above.

27. Accordingly, the Writ Petition stands disposed of. No Order as to cost.

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2023 (II) ILR - CUT-651

G. SATAPATHY, J.

CRLMC NO. 410 OF 2020

BISWAROOPA PATI @ MOHANTY .....Petitioner

.V.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Petitioner seeks to quash the criminal proceeding instituted against her for commission of offence punishable U/ss. 498A/294/506/34 of I.P.C. r/w Section 4 of D.P. Act pending before the IIC Mahila P.S. Cuttack – There is no specific allegation appearing against the petitioner except some casual reference to her name – Whether, the criminal proceeding against the petitioner is required to be quashed? – Held, Yes – There being some omnibus and unspecific allegations leveled against the petitioner who is the married sister-in-law of the informant, this Court does not find any justifiable reason to summon the petitioner to face the criminal proceeding which is nothing but an abuse of process of court and to secure the ends of justice, the criminal proceeding against the petitioner is required to be quashed. (Para 11)

Case Laws Relied on and Referred to :-

1. (2022) 6 SCC 599 : Kahkashan Kausar @ Sonam & Ors. Vs. State of Bihar & Ors.
2. (2010) 7 SCC 667 : Preeti Gupta & Anr. Vs. State of Jharkhand & Anr.
3. (2019) 8 SCC 642 : Seenivasan Vs. State & Anr.
4. (2020) 3 SCC 317 : Rajeev Kourav Vs. Baisahab & Ors.

For Petitioner : Mr. G. Mishra, Sr. Adv.

For Opp. Parties : Mr. S.S.Pradhan, AGA (O.P. No.1)
Mr.B.Pujari (O.P. No.2)

JUDGMENT Date of Argument: 03.05.2023 : Date of Judgment: 01.06.2023

G. SATAPATHY, J.

1. By way of this application U/S. 482 of Cr.P.C. the petitioner seeks to quash the criminal proceeding instituted against her in G.R. Case No. 1818 of 2018 arising out of Cuttack Mahila P.S. Case No. 93 of 2018 pending in the file of learned S.D.J.M.(Sadar), Cuttack on the grounds inter alia some omnibus and unspecific allegations have been made against her.

2. The facts in background are that the petitioner being the elder sister of the groom is the sister-in-law of informant-bride and on 30.06.2017 the informant bride got married to the younger brother of the petitioner, but it was alleged by the informant that she was subjected to various mental and physical

Torture by her husband and other in-laws for demand of more dowry. Accordingly, the bride had lodged an FIR against her husband and in-laws including the petitioner before the IIC, Cuttack Mahila P.S. for commission of offence punishable U/Ss. 498-A/294/ 506/34 of IPC read with Section 4 of D.P. Act which was registered vide Cuttack Mahila P.s. Case No. 93 dated 25.09.2018 and the matter was investigated into resulting in submission of charge sheet against the petitioner and others for the aforesaid offences under which cognizance was taken by the learned S.D.J.M.(Sadar), Cuttack.

Feeling aggrieved with the order taking cognizance of offences, the petitioner has approached this Court in an application U/S. 482 of Cr.P.C. seeking to quash the criminal proceeding instituted against her on the grounds inter alia that no offence is made out against her and there is only some omnibus/general and unspecific allegations have been made by the informant against her.

3. In the course of hearing of CRLMC, Mr.Goutam Mishra, learned Senior Counsel for the petitioner has submitted the petitioner is the married younger sister-in-law of the informant who has made some reckless and vague allegations against her to rope the present petitioner in this case along with husband and in-laws. It is pointed out by the learned Senior Counsel that there is in fact no allegation appearing against the petitioner in the F.I.R. except some casual reference to her name and there is a long delay in lodging of F.I.R. and there are some bald and omnibus allegations which are unspecific have been stated to be mentioned in the F.I.R. and a bare perusal of the statement of the informant and other witnesses would further unveil only omnibus allegations against the present petitioner who being a married lady resides in a separate mess than that of her parental home. It is, accordingly, submitted by the learned Senior Counsel that the present proceeding against the petitioner is nothing but an abuse of process of Court and the same may kindly be quashed. In order to buttress his submissions, learned Senior Counsel has cited the authorities in ***(i) Kahkashan Kausar @ Sonam and Others vs. State of Bihar and Others; (2022) 6 SCC 599, (ii) Preeti Gupta and Another vs. State of Jharkhand and Another; (2010) 7 SCC 667 and (iii) Seenivasan vs. State and Another; (2019) 8 SCC 642***.

4. Mr. S.S. Pradhan, learned A.G.A. has submitted that there is not only prima facie allegations against the petitioner, but also the allegations appearing against her is specific for commission of offences whereunder cognizance of the offences has already been taken by the learned S.D.J.M. (S), Cuttack. It is further submitted that when a criminal case is sought to be quashed at initial stage, it has to be demonstrated on a conspectus of record that the uncontroverted allegations made in the F.I.R. and the evidence collected in support of the same do not

disclose commission of any offence or make out the case against the accused and in case the allegations made in the F.I.R. or complaint taken at their face value and accepted in entirety do not prima facie constitute any case against the accused, it would be in the realm of the High Court to quash such criminal proceeding, but when the case at hand discloses strong prima facie case against the petitioner, the criminal proceeding cannot and ought not to be quashed by merely terming it as to have been brought on some omnibus and general allegations. Learned A.G.A. accordingly has prayed to dismiss the CRLMC.

5. Mr. Basudev Pujari, learned counsel appearing for O.P. No. 02 has submitted that the submission of charge sheet itself is indicative of prima facie case against the petitioner for commission of offences and there is specific allegations made against the present petitioner by the informant in her F.I.R. and the same has been substantiated not only by her statement U/S. 161 of Cr.P.C., but also by the statement of her parents and other witnesses. It is further submitted that, the present petitioner has played a definite pivotal role in the marital dispute of the informant and her husband and she was instrumental in driving out the informant from her matrimonial house. Mr. Pujari, learned counsel for O.P. No. 02 has also relied upon the decisions in ***Rajeev Kourav vs. Baisahab and Others; (2020) 3 SCC 317*** to contend that assessing the statement of witness U/S. 161 of Cr.P.C. to quash the criminal proceeding is impermissible in the eye of law and it would be highly improper to appreciate contradictions/inconsistencies in the statement of witnesses at the stage of 482 Cr.P.C. In summing up his argument, learned counsel for O.P. No. 02 has prayed to dismiss the CRLMC by relying upon another decision in ***Md. Allauddin Khan Vrs. the State of Bihar & others*** in Criminal Appeal No. 675 of 2019 (Arising out of S.L.P.(Crl.) No. 1151 of 2018 disposed of on 15.04.2019).

6. Admittedly, the petitioner is the sister-in-law of the informant and she has approached this Court to quash the criminal proceeding against her on the grounds *inter-alia* that some general and omnibus allegations have been alleged against her by the informant. It is, however, clear that the offence of dowry torture U/S. 498-A of IPC has often being misused against the in-laws to pressurize the family of the husband and there is a tendency of over implication of relatives of the husband who often reside in separate mess or even at a distant place than the matrimonial home of the bride. In such situation, the Court has onerous duty to check the over implication of the relatives of a husband. It is also true that there are some genuine cases of dowry torture in which the mother-in-law and sister-in-law play vital role, apart from the errant husband and other in-laws and the Court has to be very careful while dealing with matter concerning matrimonial disputes between husband and wife to separate genuine case from

cases of over implication and vexatious cases. Section 498-A of IPC was enacted to ensure to prevent a married woman from harassment and cruelty at the hands of husband or relatives of husband of such woman, but it is a matter of great concern that a large number of cases continued to be filed U/S. 498-A of IPC alleging harassment of married woman and often such complaints are made/filed in the heat of passion over trivial issues and even many such complaints are not bonafide, however, some cases are genuine cases of dowry torture.

7. On proceeding to appreciate the rival submissions, this Court now falls back upon the allegation leveled against the petitioner in the FIR which on plain perusal discloses some allegation against the petitioner such as "she and her father forced the father of the informant to arrange the marriage at Pramod Resort at Cuttack" and "she and her mother expressed anguish on the informant for failure to bring more gold ornaments and not agreeing to keep her gold ornaments in the locker of her mother-in-law" and "they used to inflict mental torture on her" and "her husband and her younger sister-in-law had been scolding her very often". In concluding part of the FIR, the informant has alleged that since her husband, sister-in-law (petitioner) and mother-in-law had been torturing her using filthy language to get valuable property from her parents and depriving her from her conjugal life, she lodged the FIR. The informant has also stated that they had agreed for the marriage without any dowry. The statement of the informant also contains more or less the same allegation as stated in the FIR. The statement of the father of the informant also reveals that he was compelled to arrange marriage at Pramod Resort on the pressure of the petitioner and the petitioner and her mother were looking down upon the informant which is also the allegation as found in the statement of the mother of the informant.

8. In the course of argument, learned counsel for O.P. No.2 has relied upon the decision in ***Rajeev Kourav (supra)*** to contend that appreciation of statement of witnesses in a proceeding U/S. 482 of Cr.P.C. is impermissible and this Court is also conscious of such principle as laid down by Apex Court, but when the material allegations brought against an accused in statement of witness and FIR do not disclose commission of any offence, it is not legally tenable to prosecute such accused against whom there is no credible or reliable allegations leveled. On the other hand, the decision relied on by the petitioner in ***Kahkashan Kausar @ Sonam (supra)***, the Apex Court upon noticing absence of specific and distinct allegations against the appellants has allowed the application to quash the FIR against the appellants. In quashing the FIR, the Apex Court in the aforesaid decision has further held at paragraph-18 as under:-

> "Coming to the facts of this case, upon a perusal of the contents of the FIR dated 01.04.19, it is revealed that general allegations are leveled against the Appellants. The complainant alleged that "all accused harassed her mentally

> and threatened her of terminating her pregnancy". Furthermore, no specific and distinct allegations have been made against either of the Appellants herein, i.e., none of the Appellants have been attributed any specific role in furtherance of the general allegations made against them. This simply leads to a situation wherein one fails to ascertain the role played by each accused in furtherance of the offence. The allegations are therefore general and omnibus and can at best be said to have been made out on account of small skirmishes. Insofar as husband is concerned, since he has not appealed against the order of the High court, we have not examined the veracity of allegations made against him. However, as far as the Appellants are concerned, the allegations made against them being general and omnibus, do not warrant prosecution".

9. In this case, of course, an affidavit has been filed by O.P. No.2 to indicate that the petitioner is not residing in separate mess, but she very often resides/remains in the house of her father Nrushingha Charan Pati with the other accused persons, but how far such an affidavit would be relevant in this case is never understood since a married woman normally resides in her matrimonial home unless she has got some matrimonial disputes with her in-laws and in this case, there is hardly any allegation against the petitioner for having any dispute with her in-laws. Besides, the decision in ***Md. Allauddin Khan (supra)*** has been relied upon by O.P. No.2, but the same being for offences punishable U/Ss. 323/379/34 of IPC is not applicable to the present situation wherein the petitioner has sought for quashing of complaint on the ground of omnibus and general allegations made against her by relying upon the decision in ***Kahkashan Kausar @ Sonam (supra)***.

10. A perusal of the allegations made against the petitioner on record, this Court does not find any specific allegation against the petitioner, rather all the allegations made against the petitioner as narrated in the preceding paragraph are nothing sort of some omnibus and unspecific allegations leveled against her and thereby, the principle as laid down by Apex Court in ***Kahkashan Kausar @ Sonam (supra)***, would enure to the benefit of the petitioner.

11. In view of the discussions made hereinabove and taking into consideration the law laid down by the Apex Court in ***Kahkashan Kausar @ Sonam (supra)*** and there being some omnibus and unspecific allegations leveled against the petitioner who is the married sister-in-law of the informant, this Court does not find any justifiable reason to summon the petitioner to face the proceeding in the aforesaid case and the criminal proceeding, thereby, is nothing but an abuse of process of Court and to secure the ends of justice, the criminal proceeding against the petitioner is required to be quashed. It is, however, made clear that the criminal proceeding against rest of the accused persons having being not challenged and the learned Senior Counsel in the course of argument

has clearly submitted to have no objection if the criminal proceeding continues against the rest of the accused persons, the criminal proceeding may continue against the rest of the accused persons.

12. In the result, the CRLMC stands allowed on contest, but in the circumstance there is no order as to costs. The criminal proceeding against the petitioner in G.R. Case No. 1818 of 2018 arising out of Cuttack Mahila P.S. Case No. 93 of 2018 pending in the file of learned S.D.J.M.(Sadar), Cuttack is hereby quashed.

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