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2023 (II) ILR-Cut…… 872

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State of Orissa -V- Mangulu Munda & Ors.
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CRIMINAL TRIAL – Commission of offence under section 302 – Conviction based on the testimony of two eyewitnesses – One witness is the son of deceased and aged about 13 years when his evidence was recorded – Another is a co-villager who is a chance but natural witness – There were minor discrepancies in the deposition of both the witnesses – Whether the evidence of these witness should be rejected? – Held, No. – Minor discrepancies is natural as these witnesses are being examined after about two years of the occurrence.

Nilu @ Nihar Ranjan @ Niharkanta Biswal -V- State of Odisha.
2023 (II) ILR-Cut…… 679

CRIMINAL TRIAL – Commission of offence under section 376(2)(n) 506 of IPC r/w section 3(2)(v) of Schedule Cast and Schedule Tribe (Prevention of Atrocities) Act and Section 4 of POCSO Act – The victim voluntarily accompanying the appellant deep into the jungle every day where they used to have sexual intercourse and she was not complaining before anybody nor raising any protest against the overt act committed by the appellant nor disclosed before anyone till she was found pregnant for seven months – The prosecution have not taken any step for conducting DNA Test to determine the paternity aspect of child – Effect of – There is absence of cogent materials that the appellant committed any act of criminal intimidation and the prosecution has failed to establish the charges U/s 376(2)(n)/506 of the IPC.

CRIMINAL TRIAL – The Offences charged are under section 5(1)(d) r/w section 5(2) of the P.C. Act, 1947 and sections 468, 471 of the IPC – The trial Court framed six charges – Trial initiated against the Appellant for the same series of acts allegedly committed by him – Whether framing of six charges for the same series of act is maintainable? – Held, Yes. – Since the offences which were committed in series of acts extended for a period of six years, the learned trial court split it into six parts in the form of six separate charges confining each part within the space of one year – It seems perfectly appropriate without violating the legal provisions concerning charge, keeping each part of the offence not beyond the period of twelve months, the trial court did not commit any irregularity or illegality and his approach cannot be viewed with any error.

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2023 (II) ILR-Cut…… 900

DISCIPLINARY PROCEEDING – The appellate authority rejected the appeal without assigning any reason – Effect of – Held, the impugned order set aside and the matter is relegated to the Appellate authority to pass a reasoned order.

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2023 (II) ILR – CUT - 657

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

W.A. NO. 378 OF 2023

PREMALATA PATNAIK .....Appellant

.V.

JOINT COMMISSIONER,SETTLEMENT & CONSOLIDATION, BERHAMPUR & ORS. .....Respondents

ORISSA SURVEY & SETTLEMENT ACT, 1958 – Section 15(b) – Delay of 27 years – Petitioner filed the revision petition twenty seven years after the entry was made in the ROR – Effect of – Held, the explanation offered by the petitioner for the extraordinary delay of 27 years can hardly be said to be convincing – The Appellant failed to make out a case even on merit before the joint commissioner; the court is not satisfied that any ground has been made out for interference with the impugned order.

Case Laws Relied on and Referred to :-

1. (2013) 1 SCC 353 : Tukaram Kana Joshi Vs. M.I.D.C.
2. 103 (2007) CLT 803 : Bhagaban Jena Vs. State of Orissa.

For Appellant :Mr. G.N. Sahu

For Respondents :Mr. Debakanta Mohanty, AGA

ORDER Date of Order: 24.04.2023

Dr. S. MURALIDHAR, C.J.

1. The challenge before the learned Single Judge in the writ petition by the Appellant was to an order passed by the Joint Commissioner, Settlement and Consolidation, Berhampur dismissing her revision petition being SRP No.659 of 2017 under Section 15(b) of the Orissa Survey and Settlement Act, 1958. Strangely, the revision petition questioned an order passed by the Tahasildar, Berhampur which was even passed twenty-seven years earlier, whereby the entry in the Record of Right (RoR) in respect of the land in question was made in favour of the Berhampur Municipality. In seeking to explain the delay in approaching the Joint Commissioner, the Appellant filed an application under Section 5 of the Limitation Act where in para 2, she stated as under:

> "2. That the Petitioner being a Govt. employee working as a Teacher at Gopalpur-on-Sea is always residing away from the suit land and as such she could not able to know the settlement operation convened in the locality where the suit land is situated and hence she could not produce the relevant documents before the authority concerned for mutating the same in her favour."

2. In its reply to the SRP No.659 of 2007, the Berhampur Municipality pointed out that the Appellant had not challenged the RoR by filing any case in any civil Court or the settlement Court, although thirty years had elapsed from the date of final publication of the RoR.

3. In an order dated 17th August, 2010 dismissing the above revision petition SRP No.659 of 2007, the Joint Commissioner noted that even on merits, the Appellant failed to place documents to establish her title to the property in question.

4. The writ petition challenging the above order dated 17th August 2010 of the Joint Commissioner was filed only on 3rd February, 2013 i.e., nearly three years after the order was passed. In the entire writ petition, no explanation was offered for the delay in filing the writ petition. Therefore, there was delay at both stages, i.e., at the stage of filing the revision petition and again at the stage of filing the writ petition.

5. The learned Single Judge, has in the impugned order dated 30th January 2023, noted that with the initial proceedings itself being barred by limitation, the condonation of delay of almost three decades would amount to unsettling a settled position. The learned Single Judge, therefore, declined to examine the other grounds urged by the Appellant to assail the order of the Joint Commissioner.

6. Mr. G.N. Sahu, learned counsel appearing for the Appellant referred to the decision of the Supreme Court in ***Tukaram Kana Joshi v. M.I.D.C. (2013) 1 SCC 353*** to urge that the High Court must exercise its discretion judiciously and reasonably and "in the event the claim made by the Applicant is legally sustainable, delay should be condoned." He also relied on the decision of the learned Single Judge of this Court in ***Bhagaban Jena v. State of Orissa 103 (2007) CLT 803***.

7. As far as the decision in ***Tukaram Kana Joshi v. M.I.D.C.*** (supra) is concerned, it arose from land acquisition proceedings where, as noted by the Supreme Court in para 14 of the decision, the Appellants there "had been pursuing their case persistently" and were "illiterate and inarticulate persons". Noting that the Appellants there were 'poor farmers', the Supreme Court further noted that they belonged "to a class which did not have any other vocation or any business/calling to fall back upon, for the purpose of earning their livelihood".

8. In the present case, the Appellant does not fall under any of the above categories. She has been a Teacher in a Government School and was in fact not living on the property in question and not earning from it in any manner whatsoever. She filed the aforementioned revision petition twenty-seven years after the entry was made in the RoR to reflect the ownership of the Berhampur Municipality over the land in question. The explanation offered by her for the extraordinary delay of 27 years, as noted above, can hardly be said to be convincing.

9. The Court also notes from the order passed by the Joint Commissioner dismissing SRP No. 659 of 2007 that even on merits, the Appellant had failed to

make out any case for questioning the entry in the RoR since there were no documents to substantiate her claim.

10. As far as the decision in ***Bhagaban Jena v. State of Orissa*** (supra) is concerned, there the learned Single Judge of this Court noted that the Commissioner was "already convinced and has noted in the impugned order that the claim of the Petitioners has merit". In those circumstances, it was of the view that the delay of nineteen years should not come in the way of the Petitioners in that case pursuing their remedy. In the present case, however, as already noted, the Appellant failed to make out a case even on merits before the Joint Commissioner.

11. In the above circumstances, the Court is not satisfied that any ground has been made out for interference with the impugned order of the learned Single Judge. The writ appeal is accordingly dismissed.

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2023 (II) ILR – CUT - 659

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

GCRLA NO. 36 OF 2007

STATE OF ORISSA .....Appellant

-V-

MANGULU MUNDA & ORS. .....Respondents

CRIMINAL TRIAL – Benefit of doubt – Offences punishable U/s 452/302/201 r/w section 34 of IPC – There was no evidence regarding the recognition of three accused by the two witnesses either by voice, appearance, gait etc. – learned sessions judge acquitted the accused person – Government filed the present Appeal – Held, in a case of circumstantial evidence each of the links of the chain has to be proved sufficiently well in order to bring home the guilt of the accused – By that yardstick, the evidence brought on record by the prosecution failed to meet the requisite standard, no error has been committed by the trial court in granting the Respondents/Accused the benefit of doubt and thereby acquitting them from the offences charged. (Para7,8)

For Appellant : Mr. Gajendra Nath Rout, ASC

For Respondents : None.

JUDGMENT Date of Judgment: 22.06.2023

Dr. S. MURALIDHAR, C.J.

1. This appeal filed by the Government is directed against the judgment dated 3rd August, 2004 passed by the learned Sessions Judge, Keonjhar in S.T. Case No.129 of 2002 acquitting the Respondent-Accused of the offences punishable under Sections 452/302/201 read with Section 34 of IPC.

2. The Respondent-Accused was charged with having committed the murder of one Dasma Munda on 23rd October, 2001 at around 9 pm suspecting her of practicing witch-craft.

3. The case of the prosecution rested essentially on the testimonies of two eye-witnesses, namely, Gardi Munda (PW-1), the nephew of the deceased and his wife-Rupi Munda (PW-2).

4. According to both PWs-1 and 2, at 9/10 pm in the night of the occurrence, i.e., 23rd October, 2001 the accused came to the house of PW-1, broke and opened the front door, entered the house and dragged out the deceased saying that she is a witch. Thereafter, she did not return to the house. After five days of the occurrence, PW-1 lodged a report (Ext.1) alleging that the deceased had gone missing. It is further the case of the prosecution that in the presence of James Samal (PW-6), Sub-Inspector (SI) attached to the Joda Police Station (PS), the three accused one by one confessed to the guilt of having killed the deceased and thrown her dead body in river Baitarani, It is the further case of the prosecution that at the instance of the accused persons, the dead body was traced and inquest the same and then the body was dispatched for postmortem. PW-6 then arrested the three accused after recording the statement, made some seizures at their instance and after completing the investigation filed the charge sheet.

5. PWs-1 and 2 were unable to support the case of the prosecution on material aspects of the case. While PW-1 claimed that the dibiri (night lamp) was burning in the house at the time of occurrence. He made no such claim in the statement previously made to the police. Moreover, PW-1 admitted that before going to sleep he would normally extinguish the dibiri. PW-2 did not support PW-1. According to her, out of fear, neither she nor her husband came out of the house when certain persons dragged the deceased outside. As rightly noticed by the trial Court although the accused and the two witnesses were perhaps known to each other, belonging to the same village, there was no means by which on a dark night in the absence of any light, they could have identified precisely the three accused as the persons who dragged away the deceased. There was no evidence regarding the recognition of the three accused by the two witnesses either by the voice, the manner of talking, the general appearance, gait, etc. Consequently, the prosecution evidence on the point of identification of the accused by PWs-1 and 2 was indeed very weak. It was unsafe to rely upon their evidence to prove the circumstance of last seen.

6. The trial Court also found discrepancies in the medical evidence that purported to fix the precise time of death. The postmortem was held on 30th October, 2001 and the Medical Officer (PW-5) could only offer a wide approximation as to the date of death being anywhere between 21st and 26th October, 2001. This too therefore was not a reliable piece of evidence. Moreover, the dead body was found floating in the river Baitarani for some days and that by itself could have softened the abdominal wall resulting in the stomach and intestine of the deceased bursting open. The body was also infested with maggots. Therefore, the evidence of PW-5 was unhelpful in fixing the precise time of death.

7. In a case of circumstantial evidence, each of the links of the chain has to be proved sufficiently well in order to bring home the guilt of the accused. The links must form a continuous chain and must point unerringly to the guilt of the accused and to no one else. By that yardstick, the evidence brought on record by the prosecution failed to meet the requisite standard. The statements purportedly made by the accused leading to the recovery of the body of the deceased were made at a time when they were not in police custody and, therefore, could not be relied upon under Section 27 of the Evidence Act. This further weakened the case of the prosecution.

8. Having examined the evidence carefully with the assistance of learned counsel for the Appellant-State, the Court is satisfied that no error has been committed by the trial Court in granting the Respondents-Accused the benefit of doubt and acquitting them of the offences with which they were charged.

9. Since no grounds have been made out for interference, the appeal is dismissed.

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2023 (II) ILR – CUT - 661

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

JCRLA NO. 89 OF 2006

BIMADA PATAMAJHI .....Appellant

-V-

STATE OF ODISHA .....Respondent

INDIAN PENAL CODE, 1860 – Section 302 and 376(2)(e) – The appellant was charged under the offences of rape and murder of the deceased, who at the time of death was seven months pregnant – Appellant's plea that conviction could not be based only on the post-mortem report – Held, having examined the entire evidence, the court is satisfied that

prosecution has discharged the burden satisfactorily of proving each of the links in the chain of circumstances, no grounds have been made out to interfere with the impugned judgment of the Trial Court.

Case Law Relied on and Referred to :-

1. AIR 1976 SC 2488 : State of Orissa Vs. Brahmananda Nanda.
2. (2021) 10 SCC 725 : Nagendra Sah Vs. State of Bihar.

For Appellant : Mr. B.C.Parija

For Respondent : Mr. R.Tripathy, ASC

JUDGMENT Date of Judgment: 28.06.2023

Dr. S. MURALIDHAR, C.J.

1. The present appeal is directed against the judgment dated 21st June, 2006 passed by the Sessions Judge, Phulbani in ST Case No. 40 of 2004 convicting the appellant for the offences punishable under section 302 of IPC and section 376 (2)(e) of IPC. The trial Court has sentenced the appellant to imprisonment for life for the offence punishable under Section 302 IPC and to R.I. for 10 years for the offence under section 376 (2) (e) of IPC and directed both the sentences to run concurrently.

2. The appellant was charged with having committed the rape and murder of the deceased Tumkuli Patamajhi who at the time of death was seven months pregnant. The motive for the crime was that the villagers compelled the appellant to marry the deceased with whom he was having a relationship. However, he did not agree. A meeting was convened in the village just the night previous to the occurrence and it was decided that the marriage of the appellant with the deceased would be solemnized after Christmas.

3. On 23rd December, 2002, the appellant visited the house of the deceased and took her away with him. This is spoken to by PW 2 the sister of the deceased. The cross-examination of PW 2 did not yield much for the defense. Since this case is based on circumstantial evidence, the evidence of P.W. 2 establishes that the deceased was last seen with the appellant just prior to the incident. A suggestion was made by the defence to P.W. 2 about the deceased having an illicit relationship with someone else, but this was denied by P.W. 2.

4. As to what happened in the Madipeta Jungle is spoken to by P.W. 4 who states that the murder took place near a Kendu tree inside the said forest. On the date of the occurrence, PW 4 was in the said forest to search for his missing bullock. He noticed the appellant pulling a rope on a branch of Kendu tree and the other end of the rope was tied to the neck of the deceased. In effect, this witness was speaking about the appellant making it appear as if the deceased had hung herself.

5. In the cross-examination PW 4 states that he noticed the appellant lifting the dead body of the deceased with the help of the rope. However, this witness did not

disclose this fact to anyone till such time he was examined by the Police more than a week after the incident.

6. Counsel for the appellant has relied on the decision of the Supreme Court in ***State of Orissa v Brahmananda Nanda AIR 1976 SC 2488*** to urge that an eye witness who does not disclose the name of the assailant for a day and half after the incident cannot be reliable.

7. In the present case PW 4 is not projected as an eye witness, but at best a post-occurrence witness. Considering that P.W.4 was naturally scared on seeing the way the appellant was dealing with the dead body, it is not unusual for him not to immediately go to the Police with that information. Therefore, the Court is not prepared to discard the evidence of P.W. 4 altogether. Moreover, the said evidence has to be seen in the context of the other circumstances put forth by the prosecution to prove the guilt of the appellant.

8. The prosecution has relied on the evidence of Dr. Trinath Panda (P.W.6) who conducted the post mortem of the deceased. Apart from noticing external injuries and abrasions, he in particular noted that the absence of dribbling or saliva which raised a suspicion that this was a case of perimortem hanging i.e. hanging the dead body after the death. Further, he categorically stated that he found signs of forcible sexual intercourse prior to the death. In cross-examination, he was categorical that there was no fracture of hyoid bone. After perusing the chemical examination report, he was able to opine that "the death of the deceased was homicidal with perimortem hanging." In his cross-examination by the defence counsel he was categorically that it was not a case of suicidal hanging.

9. The appellant having being last seen with the deceased, the burden was on him to explain this incriminating circumstance, but he was unable to do so. Apart from suggesting that the deceased had an illicit relationship with someone else the appellant was unable to satisfactorily explain any of the circumstances against him.

10. In a case of circumstantial evidence, the prosecution has to demonstrate that each of the links of the chain of circumstances has been satisfactorily proved and that the said links form a continuous chain which points to the guilt of the appellant.

11. Having examined the entire evidence, with the assistance of counsel for the parties, the Court is satisfied that the prosecution has discharged the burden of satisfactorily proving each of the links in the chain of circumstances noted hereinbefore.

12. Counsel for the appellant sought to place reliance in the judgment of ***Nagendra Sah v. State of Bihar (2021) 10 SCC 725*** to urge that conviction could not be based only on the postmortem report.

13. In the present case, the trial Court has not arrived at the conclusion of the guilt of the appellant only based on the post mortem report, but on an overall

conspectus of the evidence led by the prosecution including the evidence of PWs. 2 and 4.

14. This Court is of the view that no grounds have been made out to interfere with the impugned judgment of the trial Court. The appeal is accordingly dismissed. A copy of the judgment be delivered to the Superintendent of the Jail concerned for being further transmitted to the appellant and if necessary to explain it to him in a language understood by him.

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2023 (II) ILR – CUT - 664

Dr. S. MURALIDHAR, C.J.

CRLMC NO. 1247 OF 2020

SWADHEEN KUMAR RAUT .....Petitioner

-V-

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Petitioner is working as "Input Editor'' in OTV – An audio recording of a telephonic conversation between two men, one of whom claimed to have returned from COVID Hospital after being identified as a Corona+ve was telecast by the OTV NEWS channel on 6th Aug, 2020 – The said conversation was also uploaded on YouTube and other social media platform by OTV – One FIR was lodge against the petitioner U/s 269, 270, 120-B, 505(1)(b) of the IPC r/w section 52 of Disaster Management Act, 2005 with an allegation that by telecasting and circulating the above audio recording was dissuading the public from availing the requisite treatment thereby causing an increase in the spread of COVID – Whether the interference U/s 482 Cr.P.C is called for? – Held, Yes – Upon a careful perusal of the complaint/ FIR and transit of conversation as placed on record by the petitioner, the court is satisfied that offences under which FIR has been registered are not even prima facie made out against the petitioner – The continuation of such criminal case against the petitioner who is an input Editor of OTV is likely to have a chilling effect in press freedom.

Case Laws Relied on and Referred to :-

1. AIR 1992 SC 604 : State of Haryana Vs. C.S. Bhajanlal.
2. 2015 (II) OLR 93 : Prakash Mishra Vs. State of Odisha.
3. AIR 1960 Ori. 65 : Kali Charan Mohapatra Vs. Srinivas Sahu.
4. (2020) 14 SCC 12 : Arnab Ranjan Goswami Vs. Union of India.
5. (2014) 7 SCC 215 : Rishipal Singh Vs. State of Uttar Pradesh.
6. W.P. (Civil) No.468 of 2020 :Alakh Alok Srivastava Vs. Union of India.

For Petitioner : Mr. Gautam Misra, Sr. Adv.
Mr. Anupam Dash

For Opp. Party : Mr. Prasanna Kumar Mohanty, ASC

JUDGMENT Date of Judgment: 28.06.2023

Dr. S. MURALIDHAR, C.J.

1. The Petitioner, who is at presently working as 'Input Editor' in Orissa Television Ltd. (OTV), Bhubaneswar has filed this petition under Section 482 of the Code of Criminal Procedure, 1972 (Cr.P.C.) seeking the quashing of the criminal proceeding in G.R. Case No.3245 of 2020 pending in the Court S.D.J.M., Bhubaneswar against him under Sections 269, 270, 120-B and 505(1)(b) of the Indian Penal Code (IPC) read with Section 52 of the Disaster Management Act, 2005.

2. The background facts are that the audio recording of a telephonic conversation between two men, one of whom claimed to have returned from a COVID Hospital after being identified as a Corona +ive was telecast by the OTV News Channel on 6thAugust, 2020. The said conversation also was uploaded on Youtube and other social media platform by OTV. The allegation was that one of the men in the conversation had undermined the seriousness of the corona pandemic and claimed that it would be cured without treatment and medicines.

3. An FIR was registered in Capital Police Station (PS) as Capital PS Case No.303 of 2020 under the aforementioned provisions on the ground that by telecasting and circulating the above audio recording, OTV was dissuading the public from availing the requisite treatment thereby causing an increase in the spread of COVID. It was further alleged that as a result of such circulation of the audio recording, fear/alarm was being spread in the public as regards the medical treatment protocol and clinical management of COVID patients. It was further alleged that the OTV was spreading false information regarding misappropriation of central government funds for the treatment of COVID patients and admission of fake cases just to meet the daily targets by the Bhubaneswar Municipal Corporation (BMC) and other private COVID hospitals. It was alleged that by creating a trust deficit between the government and the public, the telecast by OTV of the aforementioned audio clip was likely to spread panic and fear and induce the public to commit offences against the State.

4. The Petitioner on the other hand claims that the intention behind uploading the audio clip was to alert the government about its existence and requiring the government to go into the root of the matter and verify the claim. An additional affidavit has been filed by the Petitioner placing on record the complete transcript of the conversation including an English translation thereof.

5. Mr. Gautam Misra, learned Senior Advocate appearing for the Petitioner submits that the audio recording that was uploaded on the social media platform of

OTV was a casual conversion between two friends and did not attract any of the offences for which the aforementioned FIR has been registered against the Petitioner. Far from creating panic and anxiety, the conversation has pointers on how to prevent the disease and the importance of using masks. Mr. Misra relies on a series of judgments including ***State of Haryana v. C.S. Bhajanlal AIR 1992 SC 604 and Prakash Mishra v. State of Odisha 2015 (II) OLR 93*** to urge that this Court should interfere under Section 482 Cr PC in order to prevent a miscarriage of justice.

6. Further, it is contended by Mr. Misra that inasmuch as OTV is a media platform, registering a criminal case in the above background against it would amount to curtailing the freedom of the press. Reliance is placed on a judgment of this Court in ***Kali Charan Mohapatra v. Srinivas Sahu AIR 1960 Ori. 65*** and of the Supreme Court in ***Arnab Ranjan Goswami v. Union of India (2020) 14 SCC 12***.

7. Mr. Prasanna Kumar Mohanty, learned Additional Standing Counsel (ASC), appearing for the State referred to the transcript of the conversation and submitted that it had the potential to unnecessarily cause panic amongst the public and amounted to spreading fake news. In this context, he referred to certain observations of the Supreme Court in its order dated 31st March, 2020 in Writ Petition (Civil) No.468 of 2020 (***Alakh Alok Srivastava v. Union of India***).

8. The above submissions have been considered. At the outset, it must be noted that the learned ASC has not questioned the correctness of the English transcript of the audio recording which has been placed on record by the Petitioner along with an additional affidavit dated 18th June, 2023. While it is not necessary to set out the entire conversation, the portions thereof which are relevant for the issue on hand are set out below. It must be noted that PW 1 is the caller and PW 2 (who apparently underwent treatment for Corona) is the person answering the call,:

> "P1: Are you back home now?
> P2: yes, I returned last Tuesday.
> P1: Oh, you are back since last Tuesday .. aa! Ha!
> Ha! How was your experience?
>
> P2 : Nothing, they are just taking us from here.
> P1: Really.
> P2 : They just keep us there and give us no medicines..
> P1: and.
> P2 : They tell us we would get cured on our own.
> P1: You swear?
> P2 : Just vitamin, that A to Z multi vitamin..
> P1: Ha haha.
> P2 : We just take that at night.
> P1: Okay.
>
> P2 : If you get a cold, you will have a medicine for cold.

P1: Ha Ha.

P2 : If you get a fever, you will have medicine for fever; those who have cough, they give a cough syrup.

P1: Okay, which cough syrup ?

P2 : What ?

P1: Which cough syrup ?

P2 : A cough syrup called Tasarikor something like that.

P1: okay.. okay.. okay..

P2 : Someone who has no symptoms he would take no medicines of course."

9. A major part of the conversation is about P2 claiming that he did not take any medicine but had in any event recovered. The other relevant portions of the conversation are as under:

"P2 :The way the BMC people are spreading panic..

P1 : Ha..ha..ha..
P2 : There is nothing to it..
P1 : Nothing?
P2 : No, nothing..
P1 : Oh God..

P2 : The ones who have some lungs related problems..

P1 : Yes..yes..yes..

P2 : The ones having trouble breathing, would have certain convenience there in the sense that they would get access to oxygen, antibiotics, saline, etc..

P1: Okay..okay..okay..
P2 : Otherwise there are about a thousand.. a hundred.. two hundred just like me..

P1: Ha..ha..ha..ha..
P2 : Just eating and loitering around..
P1: Oh..Okay..okay..okay..
P2 : And they return when they are released.. ahn!.. ahn!..
P1: He!.. he!.. he! he!.. Okay.. okay.. okay..
P2 : And you.. If you ever go there, you will get the real picture..
P1: Oho! Then there is nothing to panic about ?
P2 : Nothing..

10. One portion relied upon by the State to sustain registering the complaint reads as under:

"P2 :These BMC people are deliberately taking us there to meet their target.

P1 : There is a target, plus they must be siphoning of something from the medicine bills. Did you complete the billing formalities during discharge?

P2 :For one patient..
P1: Yes..

P2 : If they register a patient they get something from the Central Government..
P1 : Really..
P2 : For the eight days period, the Central Government is paying about 1.5 to 2.5 lakhs per patient.
P1 : Okay.. okay.. okay..
P2 : They are siphoning of these funds.. these hospitals.. these health people..
P1 : Hmm.. hmm.. hmm..
P2 : BMC, all of them together..
P1 : Okay.. okay.. okay.."

11. Learned ASC was unable to point out which precise portion of the above conversation answered the description of the offence of spreading panic and causing alarm amongst the members of the public. On the other hand, Mr. Gautam Misra, learned Senior Advocate for the Petitioner, maintained that the conversation was indeed a casual one between two persons in private which did not intend to cause any alarm.

12. A perusal of the conversation in its entirety reveals that it does give certain pointers to the precautions a COVID +ive might want to take and the kind of treatment he/she may or may not require. It does highlight the importance of using masks and taking steps to prevent the spread of the COVID pandemic. This, even while it is critical of some of the measures put in place by the government.

13. Viewed objectively, it cannot be said that the telecasting of the above audio clip would cause unnecessary panic among the public as claimed by the State. In this connection, the following observations of the Supreme Court in ***State of Haryana v. Bhajanlal*** (supra) in the context of instances where interference under Section 482 Cr. PC may be called for are relevant:

> "(a) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;
>
> (b) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;
>
> (c) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;
>
> (d) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;
>
> (e) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;
>
> (f) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and

> continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;
>
> (g) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

14. Again in ***Prakash Mishra v. State of Odisha*** (supra) this Court reiterated the decision of the Supreme Court in ***Rishipal Singh v. State of Uttar Pradesh (2014) 7 SCC 215*** to the effect that the High Court should not allow a vexatious complaint to continue, which would be a pure abuse of the process of the law and the same has to be interdicted at the threshold.

15. Considering that the OTV is a media platform and is essentially discharging the function of disseminating news, the following observations in ***Kali Charan Mohapatra v. Srinivas Sahu*** (supra) would be relevant:

> "(5) Clauses (a) and (b) of S. 505 I.P.C. have obviously no application. The Magistrate issued summons presumably under clause (c) of that Section. That clause (omitting immaterial portions) penalizes the publication or circulation of any statement with intent to incite or which is likely to incite any class or community. Long before the commencement of the Constitution in Shib Nath Banerjee v. Emperor, 40 Cal WN 1218, it was pointed out that this section deals with the liberty of the subject and must be construed very strictly in favour of the defence.
>
> This principle applies with greater force now because the right of freedom of speech and expression has been made one of the Fundamental Rights guaranteed under Article 19(1)(a) of the Constitution. In a democratic set up a citizen has a right subject to certain restrictions to point out, either by means of a pamphlet or by holding public meetings, what he considers to be the various instances of acts of commission and omission on the part of the officials of a particular place in consequence of which the public of that place are suffering. The exception to S. 505 I.P.C. grants him immunity from prosecution if he had reasonable grounds for believing these allegations to be true and if he did not have the necessary intention as required by that Section. In the Constitution also, the only restriction placed on the exercise of this fundamental right is that imposed by clauses (2) of Article 19."

16. In ***Arnab Ranjan Goswami v. Union of India*** (supra) it was observed by the Supreme Court as under:

> "Article 32 of the Constitution constitutes a recognition of the constitutional duty entrusted to this Court to protect the fundamental rights of citizens. The exercise of journalistic freedom lies at the core of speech and expression protected by Article 19(1)(a). The petitioner is a media journalist. The airing of views on television shows which he hosts is in the exercise of his fundamental right to speech and expression under Article 19(1)(a). India's freedoms will rest safe as long as journalists can speak truth to power without being chilled by a threat of reprisal. The exercise of that fundamental right is not absolute and is answerable to the legal regime enacted with reference to the provisions of Article 19(2). But to allow a journalist to be subjected to multiple

> complaints and to the pursuit of remedies traversing multiple states and jurisdictions when faced with successive FIRs and complaints bearing the same foundation has a stifling effect on the exercise of that freedom. This will effectively destroy the freedom of the citizen to know of the affairs of governance in the nation and the right of the journalist to ensure an informed society. Our decisions hold that the right of a journalist under Article 19(1)(a) is no higher than the right of the citizen to speak and express. But we must as a society never forget that one cannot exist without the other. Free citizens cannot exist when the news media is chained to adhere to one position. Yuval Noah Harari has put it 36 succinctly in his recent book titled "21 Lessons for the 21st Century": "Questions you cannot answer are usually far better for you than answers you cannot question."

17. Upon a careful perusal of the complaint/FIR and the transcript of the conversation as placed on record by the Petitioner with the additional affidavit, the Court is satisfied that the offences under which the FIR has been registered are not even prima facie made out against the Petitioner. Indeed, the conversation appears to be a casual one not intended to cause panic in the public. It is highly unlikely that this one conversation would somehow induce the public to avoid treatment for Covid thus resulting in the spread of the pandemic and much less still induce the public to commit offences against the State. The Court is of the view that the continuation of such criminal case against the Petitioner, who is an Input Editor of OTV is likely to have a chilling effect on press freedom.

18. For the aforementioned reasons, the criminal proceeding in G.R. Case No.3245 of 2020 pending in the Court S.D.J.M., Bhubaneswar and all proceedings consequent thereto are hereby quashed. The petition is accordingly allowed.

19. A copy of this judgment be sent forthwith to the concerned trial Court.

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2023 (II) ILR – CUT - 670

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

JCRLA NO. 39 OF 2005 & CRLA NO.346 OF 2004

NABA BEHERA & ANR. …….Appellants

-V-

STATE OF ORISSA ……..Respondent

AND

(IN CRLA NO.346 OF 2004)

DILLIP KUMAR DAS .....Appellant

-V-

STATE OF ORISSA .....Respondent

CRIMINAL TRIAL – Offence U/s. 302/34 of Indian Penal Code – Conviction was based upon the direct evidence – Principle regarding categorization of witness as interested witness – Discussed.

Case Laws Relied on and Referred to :-

1. AIR 2010 SC 917: Ram Bharosey Vs. State of U.P.
2. AIR 1947 PC 67 : Pulukuri Kottaya Vs. Emperor

For Appellants : Mrs. Sujata Jena

For Respondent : Mr. Janmejaya Katikia, AGA

JUDGMENT Date of Judgment: 06.07.2023

G. SATAPATHY,J.

1. The convicts in S.T. Case No.34/13/135 of 2003/2002 and S.T. Case No.11/157 of 2003 herein are in appeal against the common judgment of conviction and order of sentence passed on 21.09.2004 by learned Adhoc Additional Sessions Judge, First Track, Khurda convicting the Appellants for offences punishable under Sections 302/34 of IPC and sentencing each of three Appellants to undergo imprisonment for life and to pay a fine of Rs.5,000/- in default whereof to undergo Rigorous Imprisonment for three months.

2. It requires to be noted that both the appeals involving three convicts having arisen out of a common judgment in two Sessions trials for the murder of one Chaitanya Hota, are heard simultaneously and disposed of by this common judgment with the consent of the learned counsel for the parties, who are same in both the appeals. By separate orders of this Court, Appellant No.1 Naba Behera & Appellant No.2 Shanti Behera in JCrlA No. 39 of 2005 and Appellant Dillip Kumar Das in CRLA 346 of 2004 were enlarged on bail during the pendency of the appeals.

3. The prosecution case in brief is on 17.08.2001 at about 10 a.m., the father of the deceased received information from his co-villager Jatia,S/O Baidhar Panda that Naba Behera, Dillip Das and Shantilata Behera, W/O Naba Behera (hereinafter referred to as 'convicts') had assaulted his elder son Chaitanya Hota (hereinafter referred to as 'deceased') by means of 'lathies' and 'Farsa' and murdered him. On receipt of such information, Lachhman Hota rushed to the spot along with his younger son Pratap Hota and thereafter, found the dead body of the deceased lying on the Danda (verandah) of his house with cut injuries on his left leg, right leg, left elbow and on the back side of his head as well as bleeding injuries on his body. On this incident, Lachhman Hota lodged an FIR before the OIC, Bolagarh P.S., who registered P.S. Case No.75 of 2001 and took up investigation, in the course of which he examined the witnesses, visited the spot, seized blood stained earth and sample earth. He further seized two bamboo lathis from the spot and conducted inquest over the dead body of the deceased and got the autopsy done over the dead body of the deceased at DHH, Khurda. On 18.08.2001 at about 5 p.m., the I.O. also apprehended

the convicts Dillip Das and Naba Behera in the market at Rajsunakhala and thereafter, recorded their disclosure statements of convicts, whereafter, convict Naba Behera gave recovery of one polyester check lungi stained with blood at different places and one green colour napkin stained with blood, from inside the heap of straw kept on the back side of bari (backward) of his house in presence of witnesses, which were seized by the IO and thereafter, convict Dillip Das gave recovery of the weapon of offence "Farsa" having 16 & ½" blade with a bamboo handle, one sporting banyan of light blue colour, one striped napkin and one striped lungi from the eastern side of heap of the straw in presence of witnesses pursuant to his disclosure statement which were seized by the IO. On receipt of post mortem report, the IO by sending the weapons of offence i.e. such as 'Farsa' made query to the Doctor, who submitted his report affirmatively stating therein that the incised wounds can be caused by Farsa and such injuries can lead to death. On conclusion of investigation, the I.O. submitted charge-sheet against the accused Dillip Kumar Dash and Naba Behera for offence punishable U/Ss. 302/34 of IPC by showing convict Shanti Behera as an absconder, but she was apprehended later on and the case against her was committed to the Court of Sessions subsequently and she faced trial in a separate case in S.T. Case No. 11/157 of 2003.

4. Of these two Sessions cases, the trial against convict Dillip Kumar Dash and Naba Behera in S.T. Case No. 34/13/135 of 2003/2002 (hereinafter referred to as 'former case') commenced earlier than the trial against convict Shanti Behera in S.T. Case No. 11/157 of 2003 (hereinafter referred to as 'later case').

5. In substantiation of its case, the prosecution examined 24 nos. of witnesses in former case and 23 nos. of witnesses in later case, but most of the witnesses were common and examined in both the cases with different PW nos. Be it noted, the Informant-cum-PW 1 in former case could not be examined in the later case because of his death. Further, PW 2 Janaki Hota and PW 18 Arjun Hota in former case were not examined in later case, whereas PW 1 Shantilata Hota and PW 11 Jagannath @ Nikhilesh Panda were examined for the first time in later case. Out of the witnesses examined in both the cases, Satyabhama Panda, Sabita Panda and child witness Susanta Kumar Hota were projected as eye witnesses and examined as PW5/PW8, PW19/PW9 and PW24/PW2 in former/later case respectively. In the same fashion Bharat Hota was examined as a witness to an oral dying declaration of the deceased as PW 9 in former case and as a eye witness as PW 7 in later case. Wahid Khan and Musa @ Wohid Khan were examined to prove the disclosure statement of both the accused as (PW 14/ PW 17) and (PW 17/ PW 20) in former and later case respectively. Similarly, in both the cases a number of documents have been exhibited and the weapon of offence i.e. two 'lathis' were identified as MO-I and II, whereas the other weapon offence 'Farsa' was identified as MO-III/IV in former/later case and the chemical examination report was marked as Ext. 20 in both the cases, whereas FIR was marked as Ext. 1/Ext. 8 in former/later case and the

Postmortem Report & Opinion of the Doctor to the query of the I.O. were marked as Ext. 19 &17/1 in both the cases. Similarly, the disclosure statements of the accused persons were marked as Exts. 4 & 5 and Exts.4 & 12.

6. The plea of defence in both the cases was one of complete denial and false implication. Further, no witness was examined by the defence in any of the two cases.

7. A careful perusal of the impugned judgment passed in both the cases, it appears that the learned trial Court had convicted the appellants mainly relying upon the direct evidence of Bharat Hota (PW9/PW7), Satyabhama Panda (PW5/PW8), Sabita Panda (PW19/PW9) and the child witness Susant Kumar Hota (PW24/PW2). Admittedly, these four witnesses whose evidence was relied upon by the prosecution had more or less stated alike against the convicts-appellants with regard to main substratum of evidence in both the cases. Firstly, on coming to scrutinize the testimony of the child witness Susant Kumar Hota (PW24/PW2), it transpires that while he and his deceased father were returning after taking bath from Badapokhari at about 9 a.m. on the relevant date of occurrence, both the appellants Dillip Das and Naba Behera who were hiding themselves near the boundary wall of Sridhar Das with bamboo lathis, assaulted the deceased by means of bamboo lathis (MOI and MOII) as a result, the deceased fell down and at that time, appellant Naba's wife Shanti came there with a 'Farsa' (MO-III/IV) and handed over it to the appellant Naba who assaulted the deceased by means of Farsa on his both legs and thereafter, Naba handed over the said Farsa to the appellant Dillip who assaulted the deceased on the backside of his head and left arm by means of said Farsa. Susant Kumar Hota (PW24/PW2) further stated that he was standing in the broken house of Baidhar Samantray and was witnessing the occurrence and the appellants entered inside the house of Naba. There is of course a little bit of variation in the evidence of Susant Kumar Hota while deposing in both the cases, which is quite natural for a truthful witness deposing about the same occurrence at separate point of time, but the testimony of the child witness (PW24/PW2) with regard to assault by the two male appellants on the deceased by means of lathis and Farsa and appellant Shanti Behera supplying the weapon of offence (MO-III/IV) to appellant Naba remains same in both the cases. This child witness was put to the stiff test of cross-examination by the defence in both the cases, but he came out successfully in such test and remained firmed and stood embedded to the ground in respect to the substance of evidence that appellants Naba and Dillip assaulted the deceased by means of MO-I & II and MOIII/IV and the appellant Shanti Behera supplying MOIII/IV to the appellant Naba and appellants Dillip and Naba using the said MOIII/IV to assault the deceased.

8. Ms. Sujata Jena, learned counsel appearing for the appellants in both the appeals assailed the impugned judgment by submitting that if PW24/PW2 was a witness to the occurrence and the grand-son of the informant, his name would have

been figured out in the F.I.R. as an eye witness, but there was no mention or reference to the name of such child witness in the F.I.R. which was lodged after the informant came to the house and learnt about the occurrence from different persons. According to her, the omission of name of such eye witness in the F.I.R. itself discloses about the embellishment and exaggeration made by the prosecution by citing child witness as a witness to the occurrence. Ms. Jena also submitted that the name of so-called eye witnesses were not referred to/ mentioned in the F.I.R. which itself rendered the prosecution case suspicious. Once the so-called eye witnesses' account as appearing in the evidence is taken away/eschewed, there would be no case against the appellants for the commission of the murder of the deceased.

9. On the other hand, Mr. J. Katakia, learned AGA, submitted that time and again it has been held by a catena of decisions by the Apex Court that F.I.R. is not an encyclopedia of events containing minute details of the occurrence. The prosecution case cannot be disbelieved merely because the names of eye witnesses have not been mentioned in it.

10. True it is that the case against accused persons cannot be disbelieved at the very inception merely because the FIR does not contain the name of the eye witnesses nor is there any reason to disbelieve the testimony of crucial witnesses on account of this, especially when the accused persons are facing the charge of murder.

11. Another submission on behalf of the appellants was that it would not be safe to rely upon the evidence of child witness who was product of afterthought. It was further submitted that the remaining eye witnesses were relations of the deceased and were therefore interested witnesses. Convicting the Appellants on such evidence of interested witnesses, according to counsel for the Appellants, would be a travesty of justice.

12. On the other hand, learned AGA took the Court through the evidence of the eye witnesses and submitted that there is no reason to disbelieve their evidence since their account would be truthful and would bring to book the real culprits. He submitted that by no stretch of imagination an interested witness like father or son of the deceased would falsely depose against innocent person and leave out the real culprit.

13. The above submissions have been considered. There is absolutely no bar in law to rely upon the evidence of child witness, provided the same is truthful and free from tutoring. Since the child witness by its tender age is prone to tutoring, the Court, while evaluating the evidence of child witness is, therefore, very careful, but once a child witness is found to be competent and his evidence is free from any infirmity or tutoring, the same can be relied upon like evidence of any other witness.

14. In this case, the trial Court before recording the evidence of child witness set out a certificate at the beginning of the deposition that the witness rationally

answered all questions. Besides, the defence had not been able to make any dent in the evidence of the child witness by eliciting anything that would render his evidence unbelievable or make it appear to have been tutored. There was no suggestion by the defence to the child witness that he had been tutored. On the other hand, there were other eye witnesses to the occurrence who have corroborated the evidence of the child witness. These include Satyabhama Panda (PW5/PW8) and Sabita Panda (PW19/PW9) who were independent eye witnesses to the occurrence.

15. From the evidence of Satyabhama Panda (PW5/PW8) in both the cases, it transpires that at the relevant time she was working inside her house and she heard the shout "MARI GALI MARI GALI" (screaming of the deceased). She opened the front door of her house and saw the Appellants Dillip Das and Naba Behera assaulting Chaitanya (deceased) by means of lathis. It was her further evidence that the Appellant Shanti Behera went there and gave a Farsa to one of those two accused persons.

16. Similarly, corroborating the evidence of Satyabhama Panda (PW5/PW8), another eye witness Sabita Panda (PW19/PW9) had stated in her evidence that she knows the appellants and about three years back (from the date of her deposition) at about 9.30 a.m. the occurrence took place and hearing the sound of assault by thengas, she and her mother came out of house and saw appellants Dillip Das and Naba Behera assaulting the deceased Chaitanya Hota by means of bamboo lathis and the deceased fell down by shouting "MARI GALI MARI GALI" and at that time, wife of Naba Behera came there with a Farsa and handed over to appellant Naba Behera instigating him to assault the deceased and thereafter the appellant Naba dealt a blow on the legs and hands of the deceased and appellant Dillip Das took the Farsa from the hand of Dillip Behera and dealt a blow on the head of the deceased and all the three appellants fled away from the spot.

17. These two witnesses were not only withstood the grueling cross-examination by the defence in both the cases, but also did not break out or deflected from the main substratum of their evidence about "appellants Dillip and Naba assaulting the deceased by means of bamboo lathis and thereafter with Farsa and appellant Shanti Behera handing over the Farsa to Naba".

18. The defence had made sincere endeavour to demolish the evidence of these two witnesses, but remained unsuccessful in impeaching the credibility of these two witnesses.

19. One other witness was Bharat Hota (PW9/PW7) from whose evidence it transpired that on being asked, the deceased narrated that the accused persons assaulted him. However, while deposing in the second case, PW9/PW7 improved his version and stated that the Appellants Naba Behera and Dillip Das assaulted Chaitanya (deceased) and Shanti handed over a Farsa to appellant Naba Behera who dealt blows by Farsa on both legs of the deceased and appellant Dillip Das took out

the said Farsa from Naba Behera and dealt blows on the head of Chaitanya (deceased). In the cross-examination of PW9/PW7 in the second case it was elicited by the defence that: "by the time he reached, he saw Naba Behera assaulting Chaitanya by means of Farsa on his two legs and thereafter, Dillip Das snatched away the Farsa and dealt blows on his (deceased) head". Further, the cross-examination of Bhart Hota in former case did not yield much for the defence so as to disbelieve his evidence.

20. In any event, even if one were to keep aside the evidence of Bharat Hota, there is the other strong evidence of Satyabhama Panda, Susant Kumar Hota and Sabita Panda who are not only consistent, but also corroborate each other in material particulars.

21. The defence of course had made a feeble attempt to categorize all the above three as interested witnesses, but law in this regard is very well settled. On this aspect, in ***Ram Bharosey v. State of U.P. AIR 2010 SC 917***, the Apex Court has explained and laid down on this point in the following words:

> *"A close relative of the deceased does not, per se, become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the Court only with that intention and not to further the cause of justice. The law relating to appreciation of evidence of an interested witness is well settled, according to which, the version of an interested witness cannot be thrown overboard, but has to be examined carefully before accepting the same. In the light of the above judgments, it is clear that the statements of the alleged interested witnesses can be safely relied upon by the Court in support of the prosecution's story. But this needs to be done with care and to ensure that the administration of criminal justice is not undermined by the persons, who are closely related to the deceased. When their statements find corroboration by other witnesses, expert evidence and the circumstances of the case clearly depict completion of the chain of evidence pointing out to the guilt of the accused, then we see no reason why the statement of so called `interested witnesses' cannot be relied upon by the Court."*

22. Keeping in view the above legal aspect, this Court does not find any infirmity in the trial Court relying upon the evidence of the above eye witnesses whose evidence has received ample corroboration by the medical evidence of the Doctor PW23 in both the cases. The medical evidence of PW23 is as under:

> *" i. Incised wound 3"x1" over left arm 1 & 1/2" below wrist joint.*
>
> *ii. Incised wound right occipital region 2"x1".*
>
> *iii. Haemotoma right occipital region with 200ml of clotted blood under dura.*
>
> *iv. Incised wound 2"x1" over below right calf.*
>
> *v. Incised wound 3"x1,1/2" over left calf with 300 ml of clotted blood.*
>
> *Multiple haemorrhage from major sides like brain and calf caused shock and death. Injury no. ii and v are sufficient in ordinary course of nature to cause death. Time since death was within 24 hours. Injury no.iii can be caused by lathi. The incised wounds can be possible by Farsa M.O.IV. This is my report Ext. 19 and Ext.19/1 is my signature. I have given opinion Ext. 17/1 regarding the nature and cause of injury if can be possible by the weapon of offence produced before me."*

23. The above evidence of PW 23 together with the evidence of eye witnesses, sufficiently proves the homicidal death of the deceased. This is one aspect that has not been questioned by the defence.

24. It was submitted on behalf of the Appellants that the F.I.R. has not been proved in the later case. However, the Court finds that the informant was neither an eye witness to the occurrence nor was he having any personal knowledge of the occurrence. Rather his evidence as PW1 in former case suggests that he derived knowledge about the occurrence from one Jatia, son of Baidhar Panda of his village. Therefore, this contention is rejected.

25. The prosecution sought to prove the recoveries made pursuant to disclosure statements of the Appellants Naba and Dillip. Independent witnesses Wahid Khan (PW14/PW17) and Musa @ Wohid Khan (PW17/ PW20) were examined to prove such disclosure statement and seizure of articles pursuant to such disclosure statements. However, only PW17/ PW20 Musa @ Wohid Khan stated in evidence about Appellants Naba and Dillip giving recovery of lathis, Farsa and their wearing apparels out of the place of concealments. The seizure was made by the IO PW22 from whose evidence it transpires that he had recorded the disclosure statement of Appellants Dillip Das and Naba Behera vide Exts. 4 & 5/ Exts.4 & 12 and pursuant to such disclosure statement, the appellant Dillip Das had given recovery of Farsa (MO-III/IV) from a heap of straw and one striped lungi (MO-VI/VII) along with other articles. Besides, the evidence of I.O. also discloses seizure of two lathis MO-I & II from the spot and all these articles namely, Farsa with mark "A", lathis "B and C", lungi of appellant Dillip Das "E" were sent to SFSL Rasulgarh, Bhubaneswar along with other articles for chemical examination vide Ext. 18 and the chemical examination report was obtained vide Ext. 20 which reveals presence of blood stains of human origin of "B-Group" on Farsa (MO-III/IV) and on lungi of appellant Dillip (MO-VI/VII) as well as presence of human blood on one of the lathis. The aforesaid evidence clearly suggests that the blood stain of deceased was found on the lungi worn by the Appellant Dillip Das at the time of occurrence since human blood stain of "B-Group" was found on Farsa which was proved to have been used for murder of the deceased. No explanation was offered by the Appellant Dillip to the aforesaid incriminating evidence. It is, however, true that no question has been put to appellant Dillip with regard to this incriminating substance, but the Appellant Dillip having aware of such incriminating evidence had preferred not to explain as to how the blood stain of deceased was found in his wearing apparels (MO-VI/VII) or weapon of offence Farsa and human blood on one of the lathis.

26. What is the evidentiary value of recovery of weapon made pursuant to disclosure statement of the accused had been succinctly explained in the oft quoted decision in ***Pulukuri Kottaya v. Emperor AIR 1947 PC 67*** which have become locus classicus, in the following words:

> *"10. ....It is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and* ***if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant****. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."*

27. Evaluating the evidence of recovery of lathis and Farsa in this case in the backdrop of decision of ***Pulukuri Kottaya (supra)***, it appears that one of the lathis recovered contained the stains of human blood and the other weapon of offence Farsa also contained the stains of human blood of "B-Group" and such weapon of offences were proved to have used by the appellants Dillip Das and Naba Behera and these are definitely adverse circumstance against these two appellants. Moreover, the consistent evidence of witness also discloses that appellant Shanti Behera had handed over the Farsa (MOIII/IV) to Naba Behera who in turn after assaulting the deceased with such Farsa had handed over it to appellant Dillip Das who had also assaulted the deceased by such weapon of offence and therefore, the common intention of Shanti Behera is also forthcoming and squarely established by the evidence on record to finish the deceased. Besides, the evidence of I.O. also reveals prior enmity between the deceased and the appellants which reveals corroboration from the evidence of other witnesses. The defence had tried to impeach the veracity of prosecution witnesses by cross-examining them, but such cross-examination did not yield much. Rather it provided assurance to the evidence of main witnesses in material particulars, such as assault made on the deceased, place of occurrence, prior enmity as motive of the crime and the role of each of the appellants in executing the crime.

28. Having carefully and meticulously examined the evidence on record with the assistance of learned counsel for the parties, this Court finds that the prosecution has successfully proved its case against the Appellants beyond all reasonable doubt and the learned trial Court has not committed any illegality in convicting the appellants under section 302/34 of IPC. No grounds have been made out to interfere with the finding of the learned trial Court.

29. In the result, both these appeals i.e. JCRLA No. 39 of 2005 and CRLA No. 346 of 2004 stand dismissed with no order as to costs. The impugned judgment passed by the learned Ad-hoc Additional Sessions Judge, Fast Track Court, Khurda in S.T. Case No.34/13/135 of 2003/2002 and S.T. Case No.11/157 of 2003 is affirmed.

30. The bail bonds of Appellant No.1 Naba Behera & Appellant No.2 Shanti Behera in JCRLA No. 39 of 2005 and Appellant Dillip Kumar Das in CRLA 346 of 2004 are hereby cancelled. They are directed to surrender forthwith and in any event not later than 5th August 2023 failing which the IIC of the concerned PS will take steps forthwith to take them into custody to serve out the remainder of their respective sentences. A copy of this judgment be delivered forthwith to the IIC of the concerned PS for necessary action.

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2023 (II) ILR - CUT- 679

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

JCRLA NO.45 OF 2005

NILU @ NIHAR RANJAN @ NIHARKANTA BISWAL ……...Appellant

-V-

STATE OF ODISHA ……Respondent

CRIMINAL TRIAL – Commission of offence under section 302 – Conviction based on the testimony of two eye witnesses – One witness is the son of deceased and aged about 13 years when his evidence was recorded – Another is a co-villager who is a chance but natural witness – There were minor discrepancies in the deposition of both the witnesses – Whether the evidence of these witness should be rejected? – Held, No. – Minor discrepancies is natural as these witnesses are being examined after about two years of the occurrence. (Para-18)

Case Laws Relied on and Referred to :-

1. 1983 Criminal Law Journal 811:(1983) 2 SCC 277: Mithu Vs. State of Punjab.
2. (2010) 12 SCC 91 : Bipin Kumar Mandal Vs. State of West Bengal.
3. (2003) 11 SCC 367 : Sunil Kumar Vs. State Govt. of NCT of Delhi.
4. (2007) 14 SCC 150 : Namdeo Vs. State of Maharashtra.
5. AIR 2008 SC 1381 : Kunju @ Balachandran Vs. State of Taml Nadu.
6. AIR 1994 SC 1251 : Jagdish Prasad Vs. State of M.P.
7. AIR 1957 SC 614 : Vadivelu Thevar Vs. State of Madras.

For Appellant : Mr. Manoranjan Kar

For Respondent : Ms. Saswata Pattnaik, AGA

JUDGMENT Date of Judgment : 31.03.2023

MISS. SAVITRI RATHO, J.

1. Challenging his conviction for commission of offence under Section 302 of the Indian Penal Code (in short "IPC") by the First Additional Sessions Judge, Puri

in S.T. Case No.6/316 of 2002 vide judgment dated 25.01.2005, the appellant has filed this Criminal Appeal. By the said impugned judgment, the appellant has been sentenced to undergo rigorous imprisonment for life. No fine has been imposed.

2. It is apparent from the impugned judgment that the appellant was earlier convicted in S.T. Case No.293/1993 arising out of G.R. Case No.121/1993 corresponding to Konark P.S. Case No.21/93 under Sections 302/324 of IPC and sentenced to undergo R.I. for life under Section 302 of IPC and R.I. for one year under Section 324 of IPC by order dated 21.02.1995 by the First Additional Sessions Judge, Puri and this conviction had been confirmed by the High Court in Criminal Appeal No.76/95.

Referring to the decision of the Supreme Court in the case of ***Mithu v. State of Punjab reported in 1983 Criminal Law Journal, 811: (1983) 2 SCC 277***, where the provision of Section 303 of IPC has been held to be arbitrary and oppressive and has been struck down as unconstitutional, while sentencing the appellant the learned trial Court has held that the Section 303 IPC has no application.

PROSECUTION CASE

3. The prosecution case in brief is that the deceased had a tea stall in Balianimuhan Chhak in village Mankaragoradi. One Basanta who was staying as a tenant in the house of the deceased-Lokanath Jena, had kidnapped Bandita, the sister of the accused a few days before the occurrence. On the date of occurrence i.e. 08.08.2001, at about 5.00 P.M., the accused had come to the tea-stall of the deceased holding an axe and enquired about the whereabouts of Basanta. When the deceased denied any knowledge, the accused got enraged and dealt a number of blows with the sharp side of the axe on the deceased who sustained several bleeding injuries and fell down. After he fell down, the deceased dealt some more blows. When many persons including the sons of the deceased rushed to the spot, the accused first threatened them showing the axe and then ran away from the spot alongwith the blood stained axe. P.W.13-Trilochan Badjena, son of the deceased lodged a written report before P.W 20 the IIC, Konark Poilce Station. P.W.20, registered Konark P.S. Case No.79/01 and took up investigation on the same day. He visited the spot, held inquest over the dead body of the deceased, forwarded the dead body for postmortem report and prepared the spot map, seized the incriminating articles, examined the other witnesses and arrested the accused. The accused while in police custody, made disclosure statement and gave recovery of the weapon of offence, i.e., axe (M.O.II) alongwith his blood stained wearing apparels (M.O.III and M.O.IV) which were seized vide seizure lists Ext.3 and Ext.4. After completion of investigation, P.W.20 submitted charge sheet against the accused under Section 302 IPC.

DEFENCE PLEA

4. The plea of the defence was one of denial and false implication.

WITNESSES

5. To prove its case, the prosecution examined as many as 21 witnesses. P.W.5 Anama Jena son of the deceased and P.W.15 Bhaskar Mallik, who was having tea in the tea stall of the deceased, are the eye witnesses to the assault on the deceased. P.W.13-Trilochana Badjena is the informant and another son of the deceased. P.W.2-Bichitra Kumar Jena saw the accused entering into the tea stall of the deceased and after sometime leaving the tea stall holding the blood stained axe. P.W.4-Niranjan Sahu, P.W.7 - Sarbeswar Naik, P.W.9 - Kartika Pradhan and P.W.16 - Bishnu Charan Jena are the post occurrence witnesses, who hearing hue and cry rushed to the tea stall of the deceased and found the accused coming out from the tea stall with the blood stained axe and running away towards the jungle. P.Ws. 9 and 16 were cross examined under Section – 154 of the Evidence Act by the prosecution as they did not state a part of what they had stated before the police during investigation. They saw the deceased lying in his shop with bleeding injuries on his person. P.W.1-Bidyadhar Jena brother of the deceased and P.W.3-Jambeswar Raut are two other post occurrence witnesses, who found the deceased lying in his shop with severe bleeding injury. P.W.8-Krushna Chandra Swain is the witness to the disclosure statement of the deceased and seizure of the weapon of offence by the P.W.20, the I.O. P.W.6-Pabitra Kumar Jena, P.W.10-Dwijabar Behera, P.W.11-Constable Sumanta Singh Raut and P.W.12-Police Constable Prabhat Kumar Pradhan are the witnesses to the seizure of different incriminating articles by the I.O., i.e., command certificate, bicycle, axe, sample blood, blood stained apparel etc. P.W.14-Budhanath Jena is a witness to the inquest. P.W.17-Kanhei Charan Sethi is the photographer and P.W.19-Arun Kumar Swain is the Scientific Officer of D.F.S.L., Puri. The two of them took pictures and collected the incriminating articles from the spot. P.W.18-Dr. Pramod Chandra Swain is the Medical Officer, who conducted the postmortem examination on the dead body of the deceased. P.W.20, Prafulla Kumar Baliarsingh was the then IIC, Konark Police Station and the Investigating Officer who registered the case, conducted investigation and submitted charge sheet. P.W.21-Deba Narayan Das is the C.S.I. of the Sadar Courts, Puri who proved the previous conviction of the accused under Sections 302/324 of IPC in S.T. Case No.293 of 1993.

6. The prosecution proved a number of documents marked as Exts 1-21 and produced the material objects marked as M.Os-I to VIII.

No witness was examined on behalf of the defence nor any document exhibited on its behalf.

IMPUGNED JUDGMENT

7. The trial court after scrutiny and appreciation of the material evidence on record, came to the conclusion that the prosecution had successfully brought home the guilt of the appellant in committing the murder of the deceased and convicted him under Section 302 IPC and sentenced him to undergo imprisonment for life vide judgment and order dated 25.01.2005.

SUBMISSIONS

8. Mr. Manoranjan Kar, learned counsel for the appellant has challenged the impugned judgment on the following grounds:

(i) P.W.5-Anama Jena should be disbelieved as he is a child witness and his evidence does not inspire confidence.

(ii) There is difference between the ocular evidence and medical evidence as the alleged eye witnesses have stated that the accused dealt 7-8 blows to the deceased as per P.W.5 and more than 3-4 blows as per P.W.15. But during post mortem examination only five cut injuries were found on the deceased.

(iii) The testimonies of P.W 5 and P.W 15 should be disbelieved became of their unnatural conduct- none of them tried to stop the assault on the deceased.

(iv) In appellant had not motive or enmity with the deceased . He had come looking for Basanta and not with the intention of causing the death of the deceased.Therefore, a case under Section 302 of IPC is not made out against the appellant and at worst he can be convicted under Section 304 Part-I of the IPC

(v) Although the appellant had been granted bail but as he could not furnish the bail bonds he has remained in custody and completed more than 20 years in custody.

9. Ms. S. Pattanaik, learned Additional Government Advocate has supported the impugned judgment stating that the prosecution has proved beyond reasonable doubt that the appellant had come armed to the spot with an axe looking for Basanta and when the deceased denied knowledge about the whereabouts of Basanta, the appellant assaulted him with sharp side of the axe inflicting 5 cut injuries and other injuries. This assault on the deceased had been seen by P.W.5 son of the deceased and P.W. 15 who are the eye witnesses to the occurrence and who have no reason to falsely implicate him. Their evidence is corroborated by P.W.13 and P.W.16 who are post occurrence witnesses. Apart from that, the appellant has made disclosure statement which was recorded under Section 27 of the Indian Evidence Act and has led to discovery of the weapon of offence namely the axe and his blood stained clothing which have been seized. On chemical examination, these articles were found to contain blood of human origin. As he has dealt at least five blows with the axe on the deceased and also assaulted him after he had fallen down, there is no question of modifying his conviction to one under Section- 304 Part I of the I.P.C.

EVIDENCE OF WITNESSES (MEDICAL EVIDENCE)

10. Although P.W.18, the doctor who conducted post mortem examination of the deceased has not stated specifically that death of the deceased was homicidal in nature, but the same is evident from the nature of injuries sustained by the deceased. The time of death as mentioned in the postmortem report and by P.W 18 in his evidence matches with the time the eye witnesses have stated the deceased was assaulted by the appellant. P.W 18 who was working as Assistant Surgeon on the relevant date i.e., 9.8.2001 found the following injuries of the deceased :

"…External-

1. Chop wound on the anterior aspect of right arm, size 5" x 2 1/2" x bone deep, vertically placed, its upper end touching the right side shoulder joint.

2. Chop wound: present over medial aspect of rt.arm size 3/2" x 2" x bone deep, vertically placed, its upper end was 1" below to the bit of rt. axillary.

3. Chop wound on rt. Side chest vertically placed, size 4" x 2" x bone deep, its upper end is 2 ½" below to the bit of rt. Side axillary.

4. Chop wound on the left side chest, size 3 ½" x ½" x bone deep obliquely placed, its medial end was 2" away from xiphistphrna and its later end was in the 4th inter-costal space.

5. Chop wound on the left side parietal region of head, size 2 ½" x ½" x bone deep (external deploy of parietal bone was cut), obliquely placed, adjacent to the lower part of parietal eminence.

6. Linear abrasion on the rt. Side hypochondrum of abdomen, size 2 1/2 " long obliquely placed, tailing downwards.

Internal injury

1.There were fractures of ribs over rt. Chest and their angles, 5th, 6th and 8th ribs were fractured.

2.The lateral aspect of middle and lower ribs of rt. Lung were lacerated of size 4 1/2" x ½" x 1/6", the rt. Side of lung was covered with clotted blood on the anterior and lateral surface.

3.The intra-coastal muscles in the 5th and 6th space on the left side chest were lacerated, size 2 1/2 " x 2.

4.There was sub-dural haemorrhage of size ½ cm thickness over left side hemisphere of brain."

He has further stated as follows :

" Opinion:-

Cause of death was injuries to vital organs like brain and lung .

2. The injury mentioned above are ante mortem in nature. The time since death from the P.M. exmn. was from 18 to 24 hours.

3. Blood samples collected in dry-swab and kept in a glass-bowel, sealed and handed over to accompanied police.

The injuries found on the dead body of deceased are possible by axe. I also examined one axe being produced by police. The seize of axe was 3" x ¾" breadth fitted with wooden handle. The injuries found by me are possible by axe, which I examined (the weapon of offence i.e. axe has not been submitted to Court by the I.O.).

I have prepared the P.M. report in carbon process. The report bears by signature. Ext.13 is the P.M. report and Ext.13/1 is my signature thereon (Marked with objection). Ext.14 is my report regarding examination of axe, the weapon of offence. Ext.141 is my signature thereon.

Cross – exmn. by SDC

All the injuries are possible by the weapon of offence. Injuries no.1, 2 and 3 are possible by sharp glasses. The injuries to the brain are possible by fall. It is not a fact that the deceased died due to fall."

EYE WITNESSES

11. In order to be satisfied with the finding of the learned trial court that the appellant is the author of the injuries, which culminated in his death, we need to examine the evidence of the eye witnesses.

P.W.5-Anama Jena is the son of the deceased. He was aged about 11 and ½ years on the date of occurrence and is an eye witness to the occurrence. He has stated that the occurrence took place 1 and ½ years back and they have a tiffin stall and a betel shop at Balianimuhan Chhak of Konark NAC and he and his father were there in the tiffin shop while his brother –Bailochana Jena was present but had gone for marketing. After providing betel to the customer when he went to the tiffin shop he found the accused inflicting 7 to 8 blows by a kuradhi (axe) to his father, as a result of which his father fell on the ground with severe bleeding injury. The accused then fled away with the axe. He denied a suggestion that he has not stated before police that he was in the betel shop or that they had a betel shop and that he was not present in the shop and that he had not seen anything and that he is deposing falsely. No other questions were asked to him during the cross-examination.

P.W.15-Bhaskar Malik has stated that the occurrence took place two years back at about 4 P.M. at Balianimuhan Chhak in the tea stall of Lokanath Jena. He, Dhaneswar and Radheshyam Khatua were there and were taking tea. At that time, the accused came holding an axe and entered into the tea stall and talked with the deceased. All of a sudden, he heard some shout and turned around and found the accused giving blows with axe on the right arm of the deceased. Receiving the blow the deceased fell down and thereafter the accused gave further three to four blows on the deceased and blowing the axe towards others came outside and fled away towards jungle side. Soon thereafter, the deceased was carried to hospital where he was found dead. During cross-examination, he has stated that he was examined by the police after 2 to 3 days of the date of occurrence. The tea-stall of the deceased is at the corner of the main road and the branch road. He saw the occurrence from a distance of about 15 feet. He has further stated that seeing the accused assaulting the deceased, he shouted at him and ran towards him. But seeing the accused coming "blowing" the axe, he re-treated to the side and the accused ran away. He has stated further that the accused dealt blow in his presence and the accused dealt blow on the right arm, left arm-pit, belly and the back side spinal. The deceased fell after receiving first blow towards his right and he was conscious when he arrived there. Simultaneously many persons arrived there. There was dense forest near the place of occurrence and half an hour thereafter he heard that the deceased died. He has denied the suggestion that he has not seen the occurrence and was deposing falsely at the instance of the informant.

INFORMANT

12. The informant P.W.13-Trilochan Badjena is another son of the deceased. He is not an eye witnesses as at the relevant time he had gone to a grocery shop nearby. He has stated that the occurrence took place on August, 2001 at Balinimuhan Chhak in their tiffin stall at about 4.30 P.M. At that time, his father and younger brother were present in the tiffin stall and he had been to the grocery shop nearby. One Baina Jena and Bisnu Jena called him saying that the accused dealt blows with axe. When he turned back, he found the accused running away with the axe from the tiffin stall. He rushed to the tiffin stall and found his father had sustained bleeding injury on his right arm, belly and back. Then they removed his father to the hospital. The doctor declared him to be dead. His younger brother –Anam Jena stated before him that the accused came to their tiffin stall and enquired from his father about Basu of Nimapara. His father denied knowledge about whereabouts of said Basu and the accused abused him and assaulted by the axe giving 4 to 5 blows. Prior to the occurrence, the sister of accused Bandita had eloped with someone of Nimapara. The accused suspected the hand of Basu and enquired about him as Basu was acquainted with his father. He has further stated that he lodged a written report at Konark P.S. soon after the occurrence and the report was scribed by Bidyadhar Jena (P.W.1) who is his uncle. The report was scribed as per his instruction. Ext.9 is the FIR and Ext.9/1 is his signature and Ext.9/2 is the signature of his uncle Bidyadhar Jena. He has stated that he was present at the time of inquest and has signed the inquest report which is Ext.10. In cross-examination, he has stated that he had been to the grocery shop which is about 20 ft. from the tea stall and the place of occurrence is not visible from that shop and he has not seen the accused dealing the blows and he had no direct knowledge regarding the manner of giving blows. He denied a suggestion that his father connived with Basu and was harassing the accused and that there was no such occurrence and that he was deposing falsely.

POST OCCURRENCE AND SEIZURE WITNESSES

13. Apart from P.W.13, the evidence of the two eye witnesses is corroborated by the evidence of six other occurrence witnesses - P.W.2-Bichitra Kumar Jena, P.W.4-Niranjan Sahu, P.W.7-Sarbeswar Naik, P.W.9-Kartika Pradhan and P.W.16 - Bishnu Charan Jena, who rushed to the tea stall of the deceased on hearing hue and cry and saw the appellant coming out from the tea stall with the blood stained axe and running away towards the jungle. They saw the deceased lying in his shop with bleeding injuries. Their evidence has not been shaken in cross examination.

P.W.2-Bichitra Kumar Jena has stated that the occurrence took place on 08.08.2001 at about 5.00 P.M. and he was in his shop and saw the accused was going to the sweet shop of the deceased. After providing tea to the customers inside the stall when he came out of the stall, he saw the accused coming out of the shop of the deceased with a blood stained axe (kuradhi) and running away from the shop.

Immediately thereafter, the deceased –Lokanath with bleeding injury was taken to Konark hospital in a rickshaw. Subsequently, he ascertained that he died in the hospital. He has stated that one Bhaskar Malik (P.W.5), Radhashyam Khatua and Jalandhar Khatua were present in his shop and had seen the incident. In the cross-examination, he has stated that he cannot name the person who was present in the shop of the deceased and that other shops were there close to the shop of the deceased. He has further stated that a road intervenes in between his shop and that of the deceased and he has not seen the accused inflicting the blow. He has denied the suggestion that he has no such shop and he has not seen anything.

P.W.4-Niranjan Sahu has stated that the occurrence took place one year back and he was present near a betel shop and Balianimuhan Chhak and hearing shout from the shop of the deceased, he rushed there and found that the accused armed with a blood stained axe (kuradhi) was coming out of the shop of the deceased. He went inside the shop and found that the deceased was lying on the ground with bleeding injuries on her chest, shoulder and back. He called an auto and took the deceased to Konark hospital where he was declared dead. On that day, the police seized an old Atlas Cycle in his presence at Baliani Chhak which the accused had left there. M.O.1 is the said cycle and Ext.1 is the seizure list and Ext.1/1 is his signature. He also stated that one Sarbeswar Naik also signed vide Ext.1/2. In the cross-examination, he has stated that he was examined by the police after two days and he was not a direct witness to the assault. The shop of the deceased situated at a distance of 100 feet from the Baliani Chhak and he did not recollect if the cycle was seized on the same day or on the next date. Many persons had assembled near the shop of the deceased. He has stated that he did not distinguish them and denied the suggestion that he was deposing falsely.

P.W.7-Sarbeswar Naik has stated that the occurrence took place one and half years hack and he was sitting on a platform in front of the shop of the deceased. Hearing shout that the accused had inflicted cut blows to the deceased-Lokanath Jena, he rushed to the spot and found the accused running away being armed with an axe (kuradhi) which was stained with blood. He went inside the shop house of the deceased and found him lying with bleeding injury. He and others took him to Konark hospital in an auto where he was declared dead. The police had come and seized the cycle M.O.1 in his presence vide seizure list, Ext.1 and Ext.1/2 is his signature. In the cross-examination, he has stated that soon after the occurrence, the police reached the spot and he was examined on the following day. The cycle was also seized on the following day. As a co-villager, he knew the cycle-M.O.1 belonging to the accused. For 3 to 4 years the accused was in jail in another murder case and the deceased died on the way to hospital. The accused fled away towards the forest after the occurrence and he denied the suggestion that out of enmity, he was deposing falsely.

P.W.9-Kartika Pradhan has stated that the occurrence took place one and half years back. He had a grocery shop at Balianiamuhin Chhak and the deceased had a sweet stall near his shop and a road intervenes between their shops. He was present in his shop when the eldest son of the deceased came to his shop for purchase of some grocery articles. At that time, he heard hulla in the shop of deceased for which he rushed there and found the accused fled away from the shop being armed with a blood stained axe. Thereafter, on entering into the shop of the deceased they found the deceased lying with profuse bleeding and while he was being taken to Konark hospital in an auto, he succumbed to the injuries on the way and the doctor declared him dead. Out of fear, he did not obstruct the accused. He was examined by the police. He was declared hostile by the prosecution as he did not state in Court that he had seen the accused inflicting 4 to 5 axe blows upon the deceased, as a result of which the deceased fell down on the ground. In the cross-examination by defence, he has denied that there was no such occurrence and he was deposing falsely and he was deposing falsely and that the axe was of normal size.

P.W.16-Bishnu Charan Jena has stated that the occurrence took place about 2 years back at 4.30 P.M. while he was present in his tea stall. The accused came there. Hearing hue and cry, he came out of his tea stall and found the accused running away holding an axe from the tea stall of the deceased towards jungle. He went to the tea stall of the deceased and found the deceased lying with incised wounds on his person. Out of fear, he called Trilolochan who was present in the nearby grocery shop. Thereafter, the deceased was removed to hospital and half an hour thereafter, he heard that the deceased died. He was cross-examined by the prosecution but stated that he has not been examined by the police and he has not seen the accused entering the shop blowing the axe and running away towards the jungle and that he was suppressing the truth being gained over by the accused. In the cross-examination by the defence, he has stated that his tea stall is adjacent to the tea stall of deceased at a distance of 15 feet. The grocery shop was at a distance of 100 feet from the shop of the deceased and he has not been examined by the police. He denied the suggestion that he was deposing falsely at the instance of the informant.

SEIZURE OF WEAPON OF OFFENCE AND WEARING APPAREL.

14. P.W.8-Krushna Chandra Swain is the witness to recovery of the axe at the instance of the accused. He has stated that on 08.08.2001 at about 7.30 P.M. there was a huge gathering at Konark P.S. and he went there and found that the accused had been arrested by the police. After that the accused led the police, himself and other witnesses to the back side of Chhayadevi temple at Konark and gave recovery of an axe concealed under a cashew-nut tree saying to have used that axe for murdering the deceased. Police prepared the seizure list at the spot and he signed thereon. Ext.3 is the seizure list and Ext.3/1 is his signature. The seized axe was marked with blood. He has also stated that the accused led the police to the village tank and from under ditch gave recovery of a white cloth stained with blood saying

that he had worn that cloth at the time of occurrence. Police seized that cloth and prepared the seizure list, Ext.4 where he had signed. Ext.4/1 is his signature. He has also stated that one Raju Mohapatra was present and he had also signed on Exts.3 and 4 in his presence. In cross-examination, he has stated that he did not find the seized articles in Court and the axe was of normal size and was fitted with wooden handle and Chhayadebi temple is at a distance of 200 yards from the police station. The second seizure was successively after the first seizure. He has further stated that the tank is situated at a close distance from Chhayadebi temple. He has denied a suggestion that there was no such leading to discovery by the accused and that nothing was seized in his presence. He has further stated that police had recorded the confessional statement of the accused regarding leading to discovery wherein he had signed. Ext.5 is the said statement and Ext.5/1 is his signature and that the witness-Raju Mohapatra signed thereon and he has denied the suggestion that there was no such confession and that he was deposing falsely.

WITNESS TO INQUEST

15. P.W.14 –Budhanath Jena is the brother of the deceased. He has stated that getting information about the death of deceased, he went to the hospital and found him there. Police made inquest on the dead body. He was present alongwith one Raju Mohapatra at the time of inquest and Ext.10 is the inquest report which has already marked as inquest report. In the cross-examination, he has stated that there was mark of injury on the right arm, abdomen and back of the deceased and that while preparing the inquest report as the said report there was some mistake for which a second report was prepared and that he had signed the inquest report and he cannot say the colour of the lungi put on by the deceased.

SCRIBE OF FIR

16. P.W.1 Bidyadhar Jena is the brother of the deceased and scribe of the FIR. He has stated that the occurrence took place on 08.08.2001. He was at home after returning from school and heard that the accused had inflicted cut blows on his brother who had been shifted to hospital. He went to the Konark hospital and found his brother dead with cut injuries on upper part of his right chest close to the shoulder joint, mid portion of the belly, on the forehead and on the back. Trilochan Jena (P.W.13) who was present in the hospital told him that the accused inflicted those blows. He scribed the FIR on his instructions, read over and explained the contents to him where he signed and he also signed the FIR as the scribe. He also stated that prior to the incident, the accused was involved in a murder case for having caused the murder of an employee of the fishery department. He denied the suggestion that he has not stated before the police that his nephew Trilochan told him that the accused had inflicted cut blows on the deceased.

ANALYSIS AND DISCUSSION

17. We have examined the evidence of P.W.5 Anama Jena, a child witness. The learned trial Court has found him to be fully capable of understanding the questions

properly and giving rational answers. He was aged about 13 years when his evidence was recorded. He has stated about the incident in brief. His evidence has been discussed in extensor earlier in this judgment. He has stated that he was a student of Class-VI at the time of occurrence and he has denied the suggestions that he has not stated to the police that he was in the betel shop or that they had a betel shop and that he was not present in the betel shop and he had not seen anything and was deposing falsely. No other questions had put to him. We find no compelling reason discard his evidence.

18. The contention of the learned counsel for the appellant that many witnesses have been suppressed by the prosecution is not of any consequence as it is the settled position of law that it is quality of the evidence and not the number of witnesses which is important.

In the case of ***Bipin Kumar Mandal vs State of West Bengal : (2010) 12 SCC 91***, the Supreme Court upheld the conviction which was based on the testimony of a sole eye witness holding as follows :

> *…"25. In **Sunil Kumar Vs. State Govt. of NCT of Delhi, (2003) 11 SCC 367**, this Court repelled a similar submission observing that as a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony the courts will insist on corroboration. In fact, it is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise.*
>
> *26. In **Namdeo Vs. State of Maharashtra, (2007) 14 SCC 150**, this Court re-iterated the similar view observing that it is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence.*
>
> *27. In **Kunju @ Balachandran Vs. State of Taml Nadu, AIR 2008 SC 1381**, a similar view has been re-iterated placing reliance on various earlier judgments of this court including **Jagdish Prasad Vs. State of M.P., AIR 1994 SC 1251; and Vadivelu Thevar Vs. State of Madras, AIR 1957 SC 614**.*
>
> *28. Thus, in view of the above, the bald contention made by Shri Bagga that no conviction can be recorded in case of a solitary eye-witness has no force and is negatived accordingly."….*

In the present case there are two eye witnesses to the occurrence. P.W.5 is the son of the accused and P.W.15 is a co –villager who is a chance but natural witness who had come to the shop to have tea. Minor inconsistencies in the depositions of P.Ws.5 and 15 is not a ground to reject their evidence as it is natural

as these witnesses are being examined after about two years of the occurrence and P.W.5 was aged about eleven years at the time of occurrence. P.W.16 resiled from part of his evidence stating that he had not seen the accused entering the shop waving the axe or that he was earlier examined by the police. P.W.9 has stated in Court that he has not seen the assault on the deceased, but he has stated that he has seen the accused leaving the shop with blood stained axe. But even if their evidence is kept out of consideration, the evidence of the other post occurrence witnesses corroborates their evidence in material particulars. P.W.2- Bichitra Kumar Jena who has a sweet stall near the tea shop of the deceased has not seen the actual assault on the deceased but his testimony strengthens the prosecution case as he has stated he saw the accused entering into the tea stall of the deceased and after sometime leaving the tea stall holding the blood stained axe. He has stated as follows:

> *"The occurrence took place at 08.08.2001 at about 5.00 p.m. I was in my shop and saw the accused going to the shop of the deceased. After providing tea to the customers inside the stall when I came out of the stall I found the accused coming out of the shop of the deceased with a blood stained axe (kurdai) and running away from the shop."…..*

So the contention of the learned counsel for the Appellant is untenable.

19. The contention of learned counsel for the appellant that the evidence of the alleged eye witnesses cannot be accepted in view of their unnatural conduct in not preventing the appellant from assaulting the deceased is not tenable as the occurrence took place suddenly, without giving chance to any of the witnesses to intervene or stop the appellant. The appellant arrived at the spot and after talking with the deceased, suddenly assaulted him with the axe. There was no occasion or time for the eye witnesses P.W.5 and P.W.15 to suspect that the appellant would assault the deceased as there was no prior enmity between them. Moreover, P.W.5 was aged about eleven years at that time and P.W.15 has stated that he had tried to go to the spot, but the appellant brandished the axe to him for which he retreated to the side.

20. The contention that the prosecution case should be rejected as the ocular evidence is not supported by the medical evidence is also liable for rejection as P.W.5 has seen the appellant deal 7-8 blows with the axe on the deceased. P.W.15 has said that he has seen the appellant deal blows with the tangia on the deceased on the right arm, left arm-pit, belly and the back side spinal. As discussed earlier, the doctor has detected five external chop wounds and one abrasion on the deceased.The ocular and medical evidence corroborate each other to a great extent. The chop wounds were found by the doctor on the right arm, right side chest, left side chest and the abrasion on the abdomen. Although P.W 5 has not stated on which parts, the appellant dealt blows but that does not render his evidence suspect. Slight variation between the ocular and medical evidence is not a ground to disbelieve the eye witnesses. It is only where there is gross contradiction between medical evidence and oral evidence, and the medical evidence makes the eye

witness testimony totally improbable, the ocular evidence is to be disbelieved and this is not the case here. Hence, this contention of learned counsel for the appellant is rejected.

21. The contention of learned counsel for the appellant that the appellant cannot be convicted for committing murder under Section 302 IPC as no evidence has been adduced to prove the motive, is not acceptable as motive loses its importance, when eye witnesses are available.

22. The contention that the appellant had no intention to cause the murder of the deceased as he had come looking for Basu but got annoyed when the deceased did not reveal his whereabouts and assaulted him in fit of anger , for which he can at best be convicted for an offence punishable under Section 304 Part - I IPC is also not acceptable as the appellant has acted in an unusual cruel manner by inflicting number of serious cut injuries on the deceased for which the benefit of the Exception 4 under Section 300 IPC cannot be extended to him.

23. In view of the above discussion, we are satisfied that the impugned judgment does not suffer from any error or infirmity and hence does not call for any interference.

24. The appeal is accordingly dismissed.

25. Trial court records be sent back immediately.

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2023 (II) ILR – CUT - 691

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

W.P.(C) NO. 15738 OF 2022 (WITH BATCH OF CASES)

PRADYUMNA KUMAR PATRA & ORS. .....Petitioners

-V-

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

W.P.(C) NO. 10936 OF 2023
KHITISH KUMAR NAYAK & ORS. -V- STATE OF ODISHA & ORS.

W.P. (C) NO.10955 OF 2023
SAI SUMIRAN PANDA & ORS. -V STATE OF ODISHA & ORS.

W.P.(C) NO. 9435 OF 2023
MEERASHREE SUMAN & ORS. -V- STATE OF ODISHA & ORS.

W.P.(C) NO. 9440 OF 2023
BISWAJIT SAHOO & ORS. -V- STATE OF ODISHA & ORS.

W.P.(C) NO. 9443 OF 2023
NISPRAVA DASH & ORS. -V- STATE OF ODISHA & ORS.

W.P.(C) NO. 9445 OF 2023
SAMEER RANJAN SAHOO & ORS. -V- STATE OF ODISHA & ORS.

W.P.(C) NO. 9447 OF 2023
TARINI PRASAD SINGH & ORS. -V- STATE OF ODISHA & ORS.

(A) ODISHA ENGINEERING SERVICE (Method of Recruitment and Condition of Service) Rule, 2012 – Rule 7 r/w Rule 4 of Amendment Rule, 2021 – Whether the amendment of Rule 7 of the 2012 Rule by substituting the method of selection by the OPSC on the basis of career marking, written test and viva-voce by the highest GATE score obtained in the last three years preceding, the advertisement is sustainable? – Held, No. (Para 26)

(B) CONSTITUTION OF INDIA, 1950 – Article 309 & 320(3)(a) – Whether merely sending for an opinion to Odisha Public Service Commission is enough to draw an inference that consultation is done – Held, no such inference can only be drawn when the opinion of the Public Service Commission is duly considered either by way of accepting or by way of descending with adequate reasons.
(Para 25,34,39)

Case Laws Relied on and Referred to :-

1. CWJ Case No. 8760 of 2019 : Ram Monohar Pandey & Ors. Vs. State of Bihar & Ors.
2. 2022 SCC Online Kerala 3090 : Aishwarya Mohan Vs. Union of India & Ors.
3. (1993) 2 SCC 573: Asha Kaul & Ors. Vs. State of Jammu and Kashmir & Ors.
4. (2013) 16 SCC 702 : Duddilla Srinivasa Sharma & Ors. Vs. V. Chrysolite.
5. (2019) 6 SCC 362 : Maharastra Public Service Commission Vs. Sandip Sriram Warade & Ors.
6. (2019) ILR MP 558 : Vikas Malik Vs. Union of India & Ors.
7. Civil Appeal No.136 of 2020 : Mohd Rashid Vs. The Director, Local Bodies, New Secretariat & Ors.
8. 1958 SCR 533 : State of U.P. Vs. Manbodhan Lal Srivastava.
9. (1974) 3 SCC 220 : 1973 SCC (L&S) 488 : (1974) 1 SCR 165 : State of Haryana Vs. Subhash Chander Marwaha.
10. (1986) 4 SCC 268 :1986 SCC (L&S) 759 : Neelima Shangla (Miss) Vs. State of Haryana.
11. (1985) 1 SCC 122 :1985 SCC (L&S) 174 : (1985) 1 SCR 899 Jitender Kumar Vs. State of Punjab.
12. 1958 SCR 533 : State of U.P. Vs. Manbodhan Lal Srivastava.
13. Civil Writ Jurisdiction Case No.8760 of 2019 : Ram Manohar Pandey Vs. State of Bihar.

W.P.(C) NO. 15738 OF 2022
For Petitioners : Mr. Ashok Mohanty, Sr. Adv. & Ms. Sujata Jena

For Opp. Parties : Mr. I. Mohanty,ASC
Mr. Bikash Jena(for Opp.Party No.3)
Mr. P.K. Mohanty, Sr. Adv.
Pranay Mohanty (for Opp. Party No.4)

W.P.(C) NO. 10936 OF 2023

For Petitioners : Mr. B. Routray, Sr. Adv. & Mr. S. Sekhar

For Opp. Parties : Mr. I. Mohanty, ASC

W.P. (C) NO.10955 OF 2023

For Petitioners : Mr. Saurav Tibrewal

For Opp. Parties : Mr. I. Mohanty, ASC (for Opp. Parties Nos. 1 and 2)

W.P.(C) NO. 9435,9440,9443,9445,9447 OF 2023

For Petitioners : Ms. Sujata Jena

JUDGMENT Date of Judgment: 01.05.2023

MISS. SAVITRI RATHO, J.

1. The common grievance of the petitioners in all these writ petitions is the substitution of the method of selection contained in Rule7 of the Odisha Engineering Service (Method of Recruitment and Condition of Service) Rules, 2012 (in short "OES Rules 2012") by Rule 4 of Odisha Engineering Service (Methods of Recruitment & Conditions of Service) Amendment Rules, 2021 (in short "the Amendment Rules 2021". Vide this amendment, marks awarded for career marking, written test and vive voce have been substituted by the highest GATE Score obtained in the last three years, preceding the advertisement.

So we have to decide whether the amendment of Section 7 of the Odisha Engineering Service (Method of Recruitment and Condition of Service) Rules, 2012 (in short "OES Rules 2012") by Rule 4 of Odisha Engineering Service (Methods of Recruitment & Conditions of Service) Amendment Rules, 2021 (in short "the Amendment Rules 2021") by substituting the method of selection by the OPSC on the basis of career marking, written test and vive voce by the highest GATE Score obtained in the last three years preceding the advertisement, is sustainable or is arbitrary, discriminatory and ultra vires the 2012 rules and also whether the Advertisement No 20 – 2022-23 dated 18.03.2023, published by the Orissa Public Service Commission is liable to be quashed.

PRAYERS IN THE WRIT PETITIONS

2. In **W.P.(C) No.15378 of 2022**, the following prayer has been made.

> *"In the facts and circumstances of the case the petitioners respectfully pray that the Hon'ble Court may graciously be pleased to admit this case, issue notice to the opp. parties to show cause to as to why the "Odisha Engineering Service (Methods of Recruitment & Conditions of Service) Amendment Rules, 2021" shall not declared as ultra virus to the constitution and if the opp. parties fail to show cause or show insufficient cause, the Hon'ble Court upon hearing the parties may further be pleased to*

allow this writ petition by striking down the amendment and may be further pleased to pass such other order/orders, direction/directions as may be deemed expedient in the interest of justice and for this act of kindness as the petitioners are duty bound shall ever pray."

3. In **W.P. (C) No.10936 of 2023**, the following prayer has been made :

....." (iii) Issue RULE NISI calling upon the opposite parties more particularly Opp. party Nos.1, 2 and 4 to show cause as to why the Rule 7 of the Odisha Engineering Service (Methods of Recruitment and conditions of Service) Amendment Rule, 2021 under Annexure:3 shall not be declared ultra vires and the consequential advertisement No.20 of 2022-23 under Annexure-5 shall not be quashed.

(iv) If the opposite parties fail to show cause or show insufficient cause, issue a writ in the nature of certiorari by declaring Rule 7 of the Odisha Engineering Service (Methods of Recruitment and conditions of Service) Amendment Rule, 2021 under Annexure-3 ultra vires and the consequential advertisement No.20 of 2022-23 issued by the Opposite Party No.4 under Annexure:5 be quashed;

(v) Issue a writ in the nature of mandamus or any other writ/writs direction/directions directing the opposite parties to accept the applications of the petitioners for the post of Assistant Executive Engineer (Civil) pursuant to the advertisement under Annexure-5 and their candidature be considered in terms of Odisha Engineering Service (Method of Recruitment and Condition of Service) Rules, 2012 without insisting for GATE within a reasonable time to be stipulated by this Hon'ble Court."……

4. In **W.P. (C) No.10955 of 2023**, the following prayer has been made:

"(i) To show cause as to why the Rule 7(3) and 7(4) of the Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Rules 2012 brought by 2021 amendment (Annexure 3)shall not be declared ultra vires and the consequential advertisement No. 20 of 2022 /2023 (Annexure 8) issued by Opp.Party No. 4 for recruitment to the post of Assistant Executive Engineer (Civil) and Assistant Executive Engineer(Mechanical) in Group A of the Odisha Engineering Service shall not be quashed and if they fail to show cause or show insufficient cause then the writ be made absolute.

(ii) further be pleased to direct the Opp.Parties to allow the petitioners and other similarly situated persons to apply for the post advertisement under Annexure 8 by issuing a fresh advertisement"….

5. In W.P.(C) No.9435 of 2023, W.P.(C) No. 9440 of 2023, W.P.(C) No.9443 of 2023, W.P.(C) No. 9445 of 2023 and W.P. (C) No.9447 of 2023, prayer identical to the one made in W.P.(C) No.15738 of 2022 has been made.

WRIT PETITIONS, COUNTER AFFIDAVITS & REJOINDER AFFIDAVIT.

6. Although notice had been issued to the opposite parties in W.P.(C) No.15738 of 2022, W.P.(C) No. 10936 of 2023 and W.P.(C) No.10955 of 2023. Counter affidavits have been filed by the opposite parties No. 1and 2 and Opposite Party No. 3 and rejoinder affidavit by the petitioners in W.P.(C) No.15738 of 2022 only.

7. As the grievances in these three writ applications and W.P.(C) No.9435 of 2023, W.P.(C) No.9440 of 2023, W.P. (C) No.9443 of 2023, W.P.(C) No.9445 of 2023 and W.P. No.(C) No.9447 of 2023, are more or less are same, all the writ applications were heard together.

8. In W.P.(C) No.15738 of 2022, the petitioners who claim to be qualified Engineers have challenged the amendment made by the opposite parties in Rule 7 of the Odisha Engineering Service (Methods of Recruitment & Conditions of Service) Rules, 2012 vide notification dated 28.01.2021 by introducing the clause to select the candidates for appointment as Assistant Executive Engineers on the basis of highest GATE score of preceding three years from the date of advertisement including the year of advertisement, on the ground that it is not in accordance with the constitutional provisions and is discriminatory in nature and liable to be struck down.

A rejoinder affidavit has been filed by the petitioners stating that Article 320 (3) of the Constitution of India specifically provides that at the time of recruitment to the Civil Post, the State shall consult the Public Service Commission but the impugned notification amending the rule has been made without considering the opinion of the OPSC and this is apparent from the statement made by the opposite party No.1 and 2 in paragraph-4 (vii) of their counter affidavit. Vide letter dated 4.3.2016 (Annexure-B/1 to the counter affidavit) suggestion had been given by the OPSC to make amendment as per suggestion No.2 so as to get better candidate to the post, but in complete disregard to the said suggestion, Rule 7 has been amending confining it to the GATE score which appears to be arbitrary and irrational. The opp. parties have the power to prescribe the qualification of the candidates for appointment but prescribing the GATE score as the only basis for recruitment bypassing objective written test and viva voce test and thereby depriving the more meritorious candidates who have never appeared in GATE is arbitrary and discriminatory. The plea of the State Government in their counter affidavit that GATE scores have been made the sole basis of recruitment by different Companies has been refuted by filing the advertisements published by (i) Bharat Heavy Electricals Ltd. (in short "BHEL') in the year 2020 for recruitment of Engineers on the basis of computer base examination and interview; and

(ii) Hindustan Aeronautics Ltd. (in short "HAL") on 9.2.2022 for appointment of Graduate Engineers on the basis of a test of 2 and 1/2 duration consisting of MCQ on General Awareness and 100% MCQ in concerned discipline.

9. In W.P.(C) No.10936 of 2023 apart from prayer to declare Rule 7 of the OES Rules 2012 ultra vires, prayer has been made to quash the consequential advertisement No.20 of 2022-23 under Annexure-5 and to issue a direction to the Opposite parties to accept the applications of the petitioners for the post of Assistant Executive Engineer (Civil) pursuant to the advertisement under Annexure-5 and their candidature be considered in terms of Odisha Engineering Service (Method of

Recruitment and Condition of Service) Rules, 2012 without insisting for GATE within a reasonable time .

10. In W.P. (C) No.10955 of 2023, apart from prayer to declare Rule 7(3) and 7(4) of the Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Rules 2012 brought by 2021 amendment (Annexure 3 ultra vires, additional prayer has been made to quash the consequential advertisement No. 20 of 2022 /2023 (Annexure 8) issued by the Opposite party No 4 OPSC for recruitment to the post of Assistant Executive Engineer (Civil) and Assistant Executive Engineer (Mechanical) in Group A of the Odisha Engineering Service and for a direction to the Opp. Parties to allow the petitioners and other similarly situated persons to apply for the post advertised under Annexure 8 by issuing a fresh advertisement.

11. As stated earlier, identical averments and prayers have been made in W.P.(C) No.9435 of 2023, W.P.(C) No. 9440 of 2023, W.P.(C) No.9443 of 2023, W.P.(C) No. 9445 of 2023 and W.P.(C) No.9447 of 2023.

12. Opposite party No.3 –AICTE has filed a preliminary counter affidavit in W.P.(C) No. 15738 of 2022 inter alia stating that the averments in the writ petition do not pertain to them and do not call for any reply from them and no relief has been came from them for which the writ application is liable to be dismissed against opposite party no.3 (AICTE).

13. Opposite parties No. 1 and 2 have filed a counter affidavit inter alia stating that the opposite party is well within its power under Article 309 of the Constitution of India to prescribe the procedure for recruitment to Public Services and posts in connection with the affairs of the State Government and the decisions to amend the impugned Rules has been taken after prolonged discussion with the expert bodies and with the objective to bring more objectivity and transparency to the recruitment process in order to get best candidates for the post of Assistant Executive Engineer and the deliberations/meetings held in this regard have been described in paragraph-4 (i) of the counter affidavit . In order to change the process of direct recruitment by amendment, the steps which were decided to be taken in the meeting dated 12.07.2018 for filling up the vacancy in the AEE posts till 2018, have been mentioned. A revised plan in two stages-Stage I-preliminary examination with MCQ and negative marking ; and Stage II main examination with two papers (descriptive type) had been suggested by the Opposite Party. But to ensure timely completion and to ensure transparency, it was decided to adopt the maximum of valid GATE scores for the preceding three years in lieu of the main examination for selection of posts of AEE. It was decided to amend Rule 7 of the OES Rules 2012 alongwith restricting of the OES cadre. A detailed syllabus for the Preliminary and Main examination was prepared as per suggestion of the OPSC and the file was processed for obtaining approval of the Government and for vetting by the GA and PG Department and the Law Department. After threadbare discussion with the Chief secretary, it was decided to adapt the “GATE scpre” in lieu of “written test”

and "vive voce test" in the selection". The OPSC had been intimated vide DoWR letter No 22175 dated 2.10.2019 about the decision of the Government to change the method of selection and its views had been requested .Vide letter No 7225 dated 11.11.2019, the OPSC sought for clarification / justification for adopting GATE scores and furnish orders of the GA&PG and Law department. It also recommended the provision for conducting Vive voce test as it is applicable to Group – A posts. (Annexure B/1) to the counter affidavit. The clarification was issued to the OPSC vide DoWR letter No 28746 dated 1.12.2019 (Annexure C/1) and the grounds have been described in paragraph 4 (v) of the counter affidavit. Vide letter No.1232 dated 19.02.2020, OPSC concurred with the proposal of amendment except the provision under para 4 which relates to the method of recruitment of assistant engineers in the feeder cadre and gave its suggestions for the method of a three stage selection-preliminary Examination, Written Test and Vive Voce Test. This suggestion was examined and discussed thoroughly in the Department and was not accepted as the OPSC had earlier pointed out in its letter No.1316 dated 04.03.2016 (Annexure D/I) that the existing recruitment method was defective and the problems faced by the Government during recruitment would persist if the suggestion of the OPSC to conduct a three tier test was accepted. The problems faced on account of the prevailing examination method due to lack of transparency could be avoided. The problem of delay in conducting examination, cases challenging the process of recruitment and selection (73 had been filed in respect of the recruitment in 2016) and necessity of giving conditional appointment vide DoWR notification No 4694 dated 25.02.2016 (Annexure E/I) could be avoided. The GA department opined that due care and caution may be taken while obtaining Government orders in those cases when recommendation of the Commission is proposed to be overruled .With a view to ensure utmost transparency in the process of selection and entry of talented engineers to the OES cadre from a wider pool of resources in a timely manner and to streamline the process, it was decided to deviate from the advice of the OPSC as a policy decision to that effect has already been taken by the Government and a letter dated 17.02.2020 was issued to OPSC informing that there was an inordinate delay on the part of OPSC to give its views on the proposed amendment nut OPSC failed to give any opinion in reply to this letter. After approval of the Hon'ble Chief Minister, the draft cadre rules were placed before the Cabinet and the Cabinet in its 21st meeting held on 09.12.2020 which has approved the draft Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Amendment Rules, 2012. With the assent of his Excellency, the Governor of Odisha, the Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Amendment Rules, 2012, were published in Odisha Gazette vide DoWR Notification No.2819 dtd.28.01.2021.So it is obvious that the impugned amendments have been introduced after detailed deliberation with the objective to ensure that the selection process is transparent, more efficient and ensure more efficient candidates for the Post of Asst. Executive Engineer (in short 'AEE').

14. As the grievances in these three writ applications and W.P.(C) No.9435 of 2023, W.P.(C) No.9440 of 2023, W.P.(C) No.9443 of 2023, W.P.(C) No.9445 of 2023 and W.P.(C) No. 9447 of 2023, are more or less are same, all the writ applications were heard together and a common judgment is passed without waiting for filing of separate counter affidavits in all the writ petitions, as the last date of filing of applications in the impugned Advertisement is fixed to 28.04.2023.

15. We have heard Mr. Ashok Mohanty, learned Senior Counsel assisted by Ms. S. Jena, learned counsel appearing for the petitioners, Mr. I. Mohanty, learned Additional Standing Counsel appearing for the opposite parties No.1 and 2 in W.P.(C) No.15738 of 2022, Mr. Budhadev Routray, learned Senior Counsel assisted by Ms. S. Sekhar, learned counsel appearing for the petitioners, Mr. I. Mohanty, learned Additional Standing Counsel appearing for the opposite parties No.1 and 2 in W.P.(C) No.10936 of 2023. Mr. S. Tibrewal, learned counsel has appeared for the petitioners and Mr. I. Mohanty, learned Additional Standing Counsel has appeared for the opposite parties No.1 and 2 in W.P.(C) No.10955 of 2023.

We have gone through the note of submissions filed on behalf of the petitioners and the Opposite parties No. 1 and 2 the decisions relied upon by them in W.P.(C) No. 15738 of 2022.

RELEVANT ARTICLES OF THE CONSTITUTION & RULES OF BUSINESS

16. Article 309 and 320 are relevant for deciding theses writ petitions and are reproduced below :

> *"**309. Recruitment and conditions of service of persons serving the Union or a State** Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State: Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act"*
>
> *"**Article-320. Functions of Public Service Commissions**.*
>
> *1. It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.*
>
> *2. It shall also be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.*
>
> *3. The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted—*

a.) on all matters relating to methods of recruitment to civil services and for civil posts;

b.) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;

c.) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;

d.) on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State;

e.) on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award, and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor of the State, may refer to them:

Provided that the President as respects the all- India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor, as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.

4. Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of article 16 may be made or as respects the manner in which effect may be given to the provisions of article 335.

5. All regulations made under the proviso to clause (3) by the President or the Governor of a State shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, as the case may be, as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid."

*"**323. Reports of Public Service Commissions***

(1) It shall be the duty of the Union Commission to present annually to the President a report as to the work done by the Commission and on receipt of such report the President shall cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the Commission was not accepted, the reason for such non acceptance to be laid before each House of Parliament

(2) It shall be the duty of a State Commission to present annually to the Governor of the State a report as to the work done by the Commission, and it shall be the duty of a Joint Commission to present annually to the Governor of each of the States the needs of which are served by the Joint Commission a report as to the work done by the Commission in relation to that State, and in either case the Governor shall, on receipt of such report, cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non acceptance to be laid before the Legislature of the State"

In the Rules of Business, Rule 4 A provides that all matters in the Second Schedule shall ordinarily be considered at a meeting of the Cabinet. Rule 4 A is extracted below

> ***" 4-A.*** *There shall be a Committee of the Council of Ministers to be called the Cabinet which shall consist of the Ministers. Except when the Council of Ministers meets on any occasion, all matters referred to the Second Schedule shall ordinarily be considered at a meeting of the Cabinet:*
>
> *Provided that a Minister of State or a Deputy Minister may attend the meeting of the Cabinet when requested to do so, either when a subject with which he is concerned is under discussion or otherwise:*
>
> *Provided further that a Minister of State-in-charge of a department where there is no Minister-in-charge of that department, shall attend the meeting of a Cabinet where at a subject with which he is concerned is fixed or taken up for consideration*
>
> Rule 8 is extracted below:
>
> *"**8. (1)** All cases referred to in the Second Schedule shall be brought before Cabinet by the direction of*
>
> *i. the Chief Minster , or*
>
> *ii. the Minister-in-charge or the Minister of State in-charge of the case with the consent of the Chief Minister*
>
> *2) Cases shall also be brought before the Cabinet by the Chief Minister by the direction of the Governor under clause (c) of Article 167:*
>
> *Provided that no case in regard to which the Finance Department is required to be consulted under rule 10 shall, save in exceptional circumstances under the direction of the Chief Minister, be discussed by the Cabinet unless the Finance Minister has had opportunity for its consideration.*
>
> **Provided further that the Chief Minister may anticipate approval of the Cabinet in cases of emergency, if the meeting of the Cabinet is likely to be delayed. Such cases shall have to be placed before the next meeting of the Cabinet as and when held"*

In the Second Schedule to the Rules of Business, in Sl No 13 (c), proposals for the making or amending of rules regulating the recruitment and the conditions of service of persons appointed to the public services and posts in connection with the affairs of the State has been included

In the instructions regarding the Business of the Government issued under Rule 14 of the Rules made under Article 166 of the constitution of India., at Sl. No 14 xxxiii and Sl.21 (1) are the following entries:

> *"**14 (1)** The following classes of cases shall be submitted to the Chief Minister before the issue of orders , namely :*
>
> ***(xxxiii)** All cases in which it is proposed to deviate from the advice tendered by the State Public Service Commission ."*
>
> ***"21.** (1) When it has been decided to bring a case before the Cabinet, the department to which the case belongs shall, unless the Chief Minister otherwise directs, prepare a memorandum indicating with sufficient precision the salient facts of the case and the points for decision. Such memorandum and such other papers as are necessary to*

enable the case to be disposed of shall be circulated to the Chief Minister, Minister, Minister of State-in-charge of a Department and the Secretary to the Cabinet.

(2) A memorandum prepared by any department for consideration of the Cabinet shall be drafted after due examination and consultation with all departments concerned including the Finance Department, wherever necessary. The memorandum shall be submitted in draft by the Secretary of the Department together with the papers of the related cases for consideration of the Minister-in-charge or the Minister of State-in-charge as the case may be through the Chief Secretary and thereafter for approval of the Chief Minister:

Provided that in special circumstances of the case, the Minister or the Minister of State as the case may be may call for the papers without such examination of the Chief Secretary and place them before Chief Minister."

RELEVANT RULES

17. The *"Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Rules, 2012"* (in short "the OES Rules") was enacted by the State Government in 2012 by exercising power under Article 309 of the Constitution of India to regulate the recruitment and service conditions of the Assistant Executive Engineers in the State. Rules 6 and 7 of the OES Rules are relevant for deciding this writ application.

Rule 6 contains the eligibility criteria for direct recruitment of AEEs and is extracted below:

6. Eligibility Criteria for Direct Recruitment- *In order to be eligible for direct recruitment to the posts of Assistant Executive Engineer in the service, a candidate must satisfy the following conditions, namely :-*

(a) Nationality : He must be a citizen of India

(b) Minimum Educational Qualification : He must have possessed a Degree in Engineering or an equivalent qualification from any University or Institution recognized by the Government or he must be an Associated Member of the Institution of Engineers of India.

(c) Age Limits : He must have attained the age of 21 years and must not be above the age of 32 years on the 1st day of January of the year of recruitment :

Provided that the upper age limit in respect of reserved categories of candidates referred to in Rule 5 shall be relaxed in accordance with the provisions of the Act, Rules, Orders or Instructions, for the time being in force, for the respective categories.

(d) Knowledge in Odia : He must be able to read, write and speak Odia and have—

(i) passed Middle School Examination with Odia as a Language subject ; or

(ii) passed Matriculation or equivalent Examination with Odia as medium of examination in non-language subject ; or

(iii) passed in Odia as language subject in the final examination of Class VII from a School or Educational Institution recognized by the Government of Odisha or the Central Government ; or

(iv) passed a test in Odia in Middle English School Standard conducted by the School and Mass Education Department/Board of Secondary Education, Odisha.

(e) Marital Status : A candidate if married must not have more than one spouse living :

Provided that the State Government may, if satisfied that such marriage is permissible under the personal law applicable to such person or there are other grounds for doing so, exempt any person from the operation of this rule.

(f) Physical Fitness : A candidate must be of good mental condition and bodily health and free from any physical defect likely to interfere with the discharge of his duties in the service.

Rule 7 contains the method of selection. The original Rule 7 of the OES Rules 2012 is extracted below:

*7. **Selection by the Commission** —(1) When the Government decides to fill up the vacancies in the post of Assistant Executive Engineers by direct recruitment, Government will communicate the number of vacancies in the posts along with reserved vacancies thereof proposed to be filled up.*

(2) The Commission on receipt of the requisition, shall in such manner as it thinks fit, shall invite applications from eligible candidates.

(3) The Commission after receiving all the applications shall take steps to select candidates in the manner given below :

(a) Selection shall be based on Career Evaluation and objective type written test and viva voce test.

(b) Weightage on Career Evaluation shall be 50% (fifty per cent) and objective type written test 40% (forty per cent).

(c) The Career Evaluation shall be made in the following manner :—

(i) High School Certificate : 12.5% (Twelve & half per cent)

(ii) Higher Secondary School Certificate or Diploma in Engineering.:12.5% (Twelve & half per cent)

(iii) Degree in Engineering : 25% (Twenty-five per cent)

(d) Weightage on the Viva Voce Test will be 10% (Ten per cent)

(4) The Commission shall prepare a list of selected candidates arranged in order of merit equal to the number of advertised vacancy on the basis of the marks secured in Career Evaluation, Objective Type Written Test and Viva Voce Test.

Explanation—The Commission shall prepare a common merit list taking into account all categories along with separate merit list categorywise.

This Rule was amended in the year 2014.Vide Rule 2 of the Amendment Rules, Rule 7 was amended and out of 100 marks, 90% mark was meant for written test and 10% mark for vivo-voce. The said amendment is extracted below :

*…." **2.** In the Odisha Engineering Service (Methods of Recruitment & Conditions of Service) Rules, 2012, for sub-rules (3) and (4) of rule 7, the following sub rule shall be substituted namely:–*

"(3) The Commission on receipt of the requisition shall take steps to select the candidates in the manner given below:–

(a) Selection shall be based on objective type written test and viva voce test.

(b) Weightage on objective type written test shall be 90% (ninety per cent).

(c) Weightage on the Viva Voce test shall be 10% (ten per cent).

"(4) The Commission shall prepare a list of selected candidates arranged in order of merit equal to the number of advertised vacancy on the basis of marks secured in objective type written test and Viva Voce test.

Explanation– The Commission shall prepare a common merit list taking into account all categories along with separate merit list category wise."

On 28.01.2021 in exercise of power under Article 309 of the Constitution of India, the Department of Water Resource issued a notification containing the Odisha Engineering Service (Methods of Recruitment & Conditions of Service) Amendment Rules, 2021 (in short "Amendment Rules 2021"). Various provisions of the OES Rules have been amended by the Amendment Rules 2021. But for the purpose of the present writ petitions we are concerned with Rule 4 of the Amendment rules 2021 which has amended Sub Rule 3 and Sub Rule 4 of Rule 7 by changing the method of selection and making the GATE Score to be the only sole basis of selection of candidates who fulfil the legibility criteria laid down in Rule 6.

Rule 4 of the Amendment Rule 2021 is extracted below:

"4. In the said Rules, in rule 7",

(i) for sub-rule (3), the following sub-rule shall be substituted, namely:

"(3) The commission after receipt of the application shall take steps to select the candidates on the basis of the highest of the valid GATE score of preceding 03 years of the date of advertisement (including the year of advertisement).

(ii) In sub-rule (4) the words and expression.

"marks secured in Career Evaluation, Objective type written test and Viva-voce test" the words and expressions "valid GATE" score shall be substituted".

By Rule 4 of the Amendment Rules 2021, Rule 7 (3) and Rule 7 (4) which provided for awarding marks for career evaluation, objective type written test and viva voce test have been done away with and GATE scores have been made the sole method of selection by providing that the selection of candidates shall be made on the basis of the highest of the valid GATE score of the preceding three years from the date of advertisement (including the year of the advertisement).

ADVERTISEMENT

18. Advertisement No 20 of 2022-23 dated 18.03.2023 has been published by the OPSC inviting applications for recruitment to the posts of Asst. Executive Engineer (Civil) and Asst. Executive Engineer (Mechanical) in Group A of Orissa Engineering Service under water resources Department. Clause 5 which indicates the method of selection, is the exact repetition of the impugned portion of the amended Rule and provides as follows :

"5. Method of Selection: –

a) The Commission after receipt of the applications shall take steps to select the candidates on the basis of the highest of the valid GATE score of preceding 03 years of the date of advertisement (including the year of advertisement.

b) The Commission, after verification of original certificates and documents, valid GATE scores, shall select the name of suitable candidates in order of merit , as per availability of vacancies in different categories and recommend for appointment to the post of AEEs to the Government."

This Advertisement has been challenged in WP (C) 10366 of 2023 and WP(C) 109355 of 2023.

SUBMISSIONS ON BEHALF OF THE PETITIONERS

19. Mr. A. Mohanty, learned Senior Counsel, assisted by Ms. S. Jena, learned counsel for the petitioner has submitted that the petitioners who are aspirants for the post of Asst. Executive Engineers under the State Government, confine their challenge to Rule 4 of the impugned Amendment Rules 2021 which amends Rule 7(3) and Rule 7(4) of the OES Rules 2012. On coming to learn about this amendment they alongwith other aggrieved aspirants had approached the Principal Secretary of Water Resources Department by filing a representation dated 23.05.2022. But when this was not considered, they filed the writ application. Notice had been issued to the opposite parties and they have filed counter affidavits and rejoinder affidavit has been filed by the petitioners in reply to the counter affidavit of opposite parties No.1 and 2. But before the matter could be finally adjudicated, the Odisha Public Service Commission, Cuttack (in short "OPSC") has published advertisement No. 20 of 20022-23 for recruitment to the post of Assistant Executive Engineer (Civil) and Assistant Executive Engineer (Mechanical) in Group-A of the Orissa Engineering Service under the Water Resources Department on 18.03.2023 prescribing GATE Scores to be the basis of selection and 28.04.2023 has been indicated to be the last date of application.

Challenging the substitution of the method of Selection through GATE scores, Mr. Mohanty, learned Senior Counsel has submitted that the syllabus of GATE is designed for higher study and entry into the higher education institution and has nothing to do with selection of engineers for services. Candidates who have never applied for GATE will be deprived of applying for the posts as generally as after completion of the engineering course, candidates prepare for appointment under the State Government and most of them do not prepare or appear in the GATE Examinations. Fresh engineering graduates opt for appearing in the GATE Examination for the purpose of higher education and for joining the public sector undertakings, while many engineering graduates join Private Companies and prepare for Government service by appearing in the examination held by the OPSC. GATE is an examination for admission into the master programme and doctorate programme and recruitment of some public sector undertaking and it is not required for the engineers who will serve the State Govt. The amendment has completed changed the examination / selection method depriving the aspiring engineers who have not appeared in the GATE examinations from applying for post under the Odisha Government which is violative of Article 14 and 21 of the Constitution of India and therefore liable to be set aside. He has also submitted that Article 320 (3)

of the Constitution of India specifically provides that at the time of recruitment to the Civil Post, the State shall consult the Public Service Commission but the impugned notification amending the rule has been made without considering the opinion of the OPSC as the OPSC had specifically questioned the substitution of the method of selection by written test and vive voce by GATE score .This is apparent from the statement made by the opposite party No.1 and 2 in paragraph-4 (vii) of their counter affidavit. Vide letter dated 4.3.2016 (Annexure-B/1 to the counter affidavit) suggestion had been given by the OPSC to make amendment as per suggestion No.2 so as to get better candidate to the post, but in complete disregard to the said suggestion, Rule 7 has been amending confining it to the GATE score which appears to be arbitrary and irrational. He has submitted that no doubt the opposite parties have the power to prescribe the qualification of the candidates for appointment but prescribing the GATE score as the only basis for recruitment bypassing objective written test and viva voce test and thereby depriving the more meritorious candidates who have never appeared in GATE is arbitrary and discriminatory. GATE scores have not been made the sole basis of recruitment by all PSU s and like companies as "BHEL' and HAL are still recruiting Engineers on the basis of computer based examination and interview and 2 and 1/2 duration test consisting of MCQ on General Awareness and 100% MCQ in concerned discipline.

20. Mr. B. Routray, learned Senior Counsel has submitted that the introduction of evaluation by considering the highest on the valid GATE score of preceding three years from the date of advertisement is illegal and arbitrary as it has given the procedure of objective type, written test and viva voce test a go by. He has submitted that the very purpose of GATE examination is for seeking examination and Financial Assistance to Master Degrees and Doctoral programmes and the same is used by different PSUs for getting their candidate shortlisted but introduction of such qualification for getting a job in Group A service of the State is arbitrary and irrational. On account of the impugned amendment, the petitioners will not get any opportunity to be considered for the post as they have not passed the GATE examination and the said amendment will discriminate between the candidates who have valid GATE score and those who have not appeared in the GATE and this requirement is violative of Article 14 of the Constitution of India as it has no nexus with the object of selecting the best candidate for the post of Assistant Engineer. His further contention is that this amendment has been enacted with the objective of giving preference to a particular class of persons thereby depriving the petitioner and other candidates from consideration and is therefore discriminatory and fails the test of reasonableness, for which it should be struck down. This amendment has no rationale with the object of selection of candidates for recruitment for the post of Asst. Executive Engineer as meritorious student having brilliant academic career will be kept out of the zone of consideration by confining the selection only to the group of person who have appeared in the GATE Examination and therefore, discriminatory and is hit by Article 14 of the Constitution of India by creating a class

within a class. Rule 7(3) and 7(4) are therefore liable to be declared ultra virus and struck down. He has also contended that the amended Rule also suffers from colourable exercise of power under delegated legislation. He has also contended that under Article 320(3) of the Constitution of India, the State is required to consult the State Public Commission in the matter of method of recruitment to Civil Services and for all Civil Post. In this case the OPSC had given its opinion not to proceed with the amendment which relates to requirement of appearing in GATE Examination, but the opinion has been ignored and has not been brought to the notice of the Cabinet before going ahead with the amendment. The OPSC in its letter dated 04.03.2016 has recommended a two stage written examination along with viva vice to ensure meritocracy of candidates in the dual field of theory and practical knowledge and there was no recommendation to conduct examination on the basis of GATE. In its letter No 1232 dated 19.02.2020 addressed to the Special Secretary to Government Water Resources Department (Annexure 8 to the writ application) , the OPSC has specifically objected to the amendment of rule 7 of the OES Rules 2012. The recommendations of the OPSC are mandatory in nature as regards to amendment to recruitment rules but the Water Resources Department has chosen to ignore its recommendation which vitiates the amendment. There should be one uniform selection procedure so far as appointments of Assistant Executive Engineers in different departments of the State is concerned, and other Departments (PanchayatiRaj and Drinking Water and Agriculture Department) have not given GATE score as the sole criteria but the department of Water Resource has given a go bye to maintaining the uniformity by introducing GATE as the sole eligibility criteria for being appointed as Assistant Executive Engineers. The copies of the advertisement have been annexed as Annexure-9 Series to the writ petition. He has ultimately submitted that assuming for a moment that the impugned amendment is not interfered with, even then the advertisement is liable to be quashed as being premature and for not providing a level playing field to candidates who have not appeared for the GATE examinations as the time gap between the coming into force of the Amendment Rules 2021 and the impugned Advertisement only provides candidates the opportunity to appear in two GATE examination for a particular years starts in the previous year and the examination itself is held in February of that year.

21. Mr. A. Mohanty, learned Senior counsel and Mr. B. Routray, learned Senior Counsel have relied on the decisions of the High Court of Patna in the case of ***Ram Monohar Pandey & Others Vs. State of Bihar & Others*** : CWJ Case No. 8760 of 2019 decided on 05.08.2019, where the amendment introducing the qualification of GATE for recruitment to the post of Lecturers in Polytechnic Colleges and Engineering Colleges has been struck down. They have also stated that this decision had been challenged before the Supreme Court in SLP (Civil) Diary No. 30880 of 2019 (***Smita Kumari & Others Vs. Ram Mohan Panday***), but the Supreme Court vide order dated 22.11.2019, dismissed the special leave petition and the application for impleadment. They have also relied on the decision of the High Court of Kerala

in the case of ***Aishwarya Mohan vs. Union of India and Others (W.P.(C) No. 30638 of 2021*** decided on 06.06.2022) : **2022 SCC Online Kerala 3090** and in the case of ***Asha Kaul & Others Vs. State of Jammu and Kashmir & Others reported in (1993) 2 SCC 573 (para-6)***. In the case of ***Duddilla Srinivasa Sharma & Others Vs. V. Chrysolite reported in (2013) 16 SCC 702***.

SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTIES:

22. Mr. I. Mohanty, learned Additional Standing Counsel has submitted that :

i) The State government is competent to promulgate the 2021 amendment rules under Article 309 of the Constitution of India. Relying on the decision of the Supreme Court in ***Maharastra Public Service Commission v. Sandip Sriram Warade and others (2019) 6 SCC 362*** he has submitted that the essential qualification for appointment to a post are for employer to decide and the employer is best suited to decide the requirements a candidate must possess according to the needs of the employer and the nature of the work. He also relies on the decision of Madhya Pradeash High Court in the case of ***Vikas Malik v. Union of India and others reported in (2019) ILR MP 558*** where it has been held that the prescription of minimum qualifications and the mode of appointment in the sphere of public employment is within the domain of the appointing authority and the Courts and tribunals can neither prescribe the qualifications nor entrench upon the power provided the same are reasonable.

ii) The amended Rule 7(3) is not arbitrary and has not deprived the petitioners from applying to the post of Asst. Executive Engineer. The minimum qualification for appearing in GATE examination is "A candidate who is currently studying in the 3rd or higher years of any undergraduate degree program OR has already completed any government approved degree program in Engineering/Technology/ Architecture / Science / Commerce / Arts" and the minimum eligibility for applying to the post of AEE as per Rule 6 of the 2012 Rules is Degree in Engineering or equivalent qualification from any University. As the minimum qualification for applying to the post of AEE and the minimum qualification for appearing in the GATE examination is identical, the petitioners who are Degree Engineers are eligible to appear in GATE examination and the change of the method of selection has not excluded any of the petitioners from participating in the recruitment process. The selection examination which was being conducted by OPSC would now be conducted by the Indian Institute of Technology (in short "IIT"). There is no bar for appearing in GATE examination for number of times. So, a candidate who has appeared in GATE examination about 4 years ago can again appear in the examination to be considered for the post of AEE. The impugned amendment was published in the Odisha Gazette on 28.01.2021 while the information brochure for GATE 2022 was published on 01.08.2021 and the last date of application was 24.08.2021 and the examination was scheduled on various dates in February, 2022.

Similarly, the last date for application for GATE-2023 was 30.8.2022 and the examination was scheduled on various dates in February, 2023. The last recruitment to the post of AEE was held in the year 2019 vide advertisement dated 29.6.2019 under the old un-amended Rules.After about more than two years, the advertisement dated 18.3.2023 has been published and in the meantime, the GATE examination has been conducted two times as the petitioners had two opportunities to appear in the GATE examination and thereafter to apply to the post of AEE. As the petitioners have chosen not to appear in GATE examination, their contention that they have been deprived for applying for the post is liable to be rejected. The petitioners have approached this Court by filing the writ petition in June, 2022 which is more than one and half years after the impugned rules came into force and the rules had not been stayed by this Court. There was no reason for the petitioners not to appear in GATE examinations which were conducted in February, 2022 and February, 2023. He has placed reliance on

a) the judgment dated 18.10.2022 of the Madras High Court in the case of W.P. (C) Nos.11026 and 9491 of 2022 (***Elambarathy S v. NLC India Limited and others***) where selection on the basis of GATE score was upheld ,

b) the decision of the Supreme Court in the case of ***Mohd Rashid v. The Director, Local Bodies, New Secretariat and others (Civil Appeal No.136 of 2020)*** delivered on 15.01.2020 where the challenge to method of recruitment was dismissed by the Court.

c) He has also submitted that the decision in the case of ***Ram Manohar Pandey (supra)*** is not applicable to the present case and is clearly distinguishable as in that case the amendment with regard to the eligibility and educational qualifications for recruitment to the post of Lecturers in Polytechnic Colleges and Engineering Colleges were under challenge. The Rules had been amended to remove the written test and had replaced it with the GATE score which would be given weightage of 30 marks as the AICTE has framed the minimum qualification for appointment of teachers to technical institutions. The High Court held that since the GATE examination is not made an eligibility condition, the State cannot make it a basis of evaluation of work knowledge and teaching skill and allot some weightage marks to it. In the present case, the State Government has completely replaced the previous model of written and viva voce test and replaced it with one single criteria which is the score in GATE examination. Therefore, it does not create any separate class is not arbitrary or discriminatory.

iii) Article 320 (3) of the Constitution of India has not been violated while promulgating the Amendment Rules 2021 as the decision to amend the impugned rules was taken after thorough and prolonged discussions with the State Public Service Commission and with the objective to bring to more objectivity and transparency in order to get best candidates for the position of Assistant Executive Engineer. On 11.11.2019, the OPSC had requested for certain clarifications inter alia

the advantages for switching on to GATE as the method of selection to which the opposite party had duly replied to the said letter dated 12.12.2019 wherein several advantages for switching to GATE was indicated. In response to letter dated 17.02.2020 of the Department of Water Resources, the OPSC in its reply dated 19.2.2020 had concurred with all the amendments except the method of selection to be GATE examination. This view was deliberated upon by the Departments and a committee under the Chairmanship of Chief Secretary was constituted. Thereafter after obtaining the views of the GA & PG Department and the Law Department, the matter was sent to the Hon'ble Chief Minister who approved it. After the approval of the Chief Minister, the proposal for amendment of 2012 Rules were placed before the Cabinet in its 21st meeting held on 09.12.2022 wherein the Cabinet approved the draft amendment rules and the Rules received the assent by the Hon'ble Governor of Odisha and the rules were published in the Odisha Gazette vide DoWR Notification No.2819 dated 28.01.2021. As the State Government has duly consulted with the OPSC on the said matter before taking a decision to amend the rules and the process of consultation with the Public Service Commission not always mandatory as per the decision of the Constitution Bench of the Supreme Court in the case of ***State of U.P. v. Manbodhan Lal Srivastava reported in 1958 SCR 533***.

CITATIONS / CASE LAW

23. In ***Ram Monohar Pandey*** (supra), where the amendment introducing the qualification of GATE for recruitment to the post of Lecturers in Polytechnic Colleges and Engineering Colleges was challenged, the Patna High Court has held as follows :

> *…."There is absolutely no issues on rearrangement of weightage marks amongst the different categories, the problem which arises by virtue of this amendment is, that in the process of amending the scheme of evaluation on work knowledge and teaching skill, the State has done away with the scheme of written test and in so far as the candidates seeking appointment in the Engineering/ Technology Branch is concerned, they are now to be assessed on the basis of percentile obtained by them in the GATE examination subject to a maximum of 30 marks.*
>
> *It is the contention of the petitioners that qualifying in GATE is a mandatory requirement for seeking admission in Masters/ Doctoral programme in Engineering/ Technology/ Architecture and since the petitioners are already having Post Graduate qualification they are not required to appear at such examination. According to Mr. Singh, while the petitioners are not required to pass GATE examination because they are already Post Graduates, this situation deprives them of the valuable 30 marks for being evaluated on their work knowledge/ teaching skill.*
>
> *We do agree with the issue canvassed and are completely at loss to appreciate this change in the procedure of evaluation of candidates on their work knowledge/ teaching skill because while the weightage scheme as it was originally framed, allowed equal opportunity to all the candidates for being tested on their work knowledge/ teaching skill through a written test to be held on the pattern of GATE, the State by waiving of such requirement has deprived the candidates who are not even required to pass GATE*

examination for being evaluated on their work knowledge and teaching skill even if they do possess such experience. Even if the State under Article 309 has a right to frame rules in matters of public employment, every such rule has to withstand the test of arbitrariness and rationality besides being transparent on the procedure but the amendment substituting Table-2 of Appendix-I through Memo No. 889 dated 10.4.2017 whereby it is decided to waive of the transparent evaluation of candidates on their work knowledge/ teaching skill by way of a written test and to simply mark candidates on the basis of marks obtained in the GATE examination, not only hits transparency but also discriminates against such of the candidates who are already Post Graduates and are not required to pass such GATE examination."….

…..

….."As we have observed there can be a preferential category within a particular category but a weightage scheme which deprives a candidate from consideration against a particular attribute in its entirety suffers from vice of arbitrariness besides being discriminatory and lacking on reasonableness. In fact this change in weightage scheme has created a class within a class of candidates in so far as evaluation on work knowledge/ teaching skill is concerned and the object is entirely missing. The basic eligibility as present in Table-1, Appendix-I for an applicant to apply against such post, does not prescribe passing of a GATE examination as a condition of eligibility. In our opinion, until passing of a GATE examination is made a condition of eligibility, the State cannot make it a basis for evaluation of a candidate on the issue of work knowledge and teaching skill. Such is the arbitrary consequences of such form of evaluation that despite candidates possessing work experience and teaching skill, they are yet deprived of such consideration simply because they have not passed the GATE examination. The case of the petitioners is even worse because being Post Graduate they are not even required to pass such examination and yet the substituted rule deprives them of such consideration."…

In the case of ***Aishwarya Mohan (supra)***, the Kerala High Court has held as follows :

*… **"10**. No doubt, the precedents cited by the learned Solicitor General lays down the position that, fixing the eligibility of a particular post is within the domain of the employer and cannot be the subject matter of judicial review, unless found to be arbitrary, unreasonable or having no rational nexus to the objective sought to be achieved. The essential difference between the facts involved in the cited precedents and the case at hand is that, here the challenge is not against qualification or eligibility, but focused on the selection process. The challenge is mainly on the ground that, incorporation of the restrictive selection criteria is nothing but indirect discrimination."…*

***……."16**. The above discussion leads me to the only conclusion that Ext.P3 notification insofar as it confines the selection process to only candidates who had participated in the CLAT-2021 PG programme, violates Article 16 of the Constitution of India. Having held so, rather than upsetting the whole selection process, I deem it more appropriate to direct the second respondent to accept the petitioner's application and conduct a selection test or interview for testing her eligibility for appointment to the notified post. Further action with respect to the appointment shall be taken depending on the outcome of such selection test/interview. The above direction shall be given effect to within one month of receipt of a copy of this judgment. The writ petition is disposed of accordingly."*

The case of ***Asha Kaul*** (supra) pertained to approval and publication of the select list of District Munsifs prepared by the Jammu and Kashmir Public Service Commission. The Supreme Court interalia held as follows:

> *…. "It is true that the government is the appointing authority for the munsifs but it is misleading to assert that in the matter of selection and appointment the government has an absolute power. Such an argument does violence to the constitutional scheme. The Constitution has created a public service commission and assigned it the function of Conducting examinations for appointments to the services of the Union or to the services of the State, as the case may be. According to Article 320 clause (1) this is the primary function of the commission. The Government is directed to consult the public service commission on all matters relating to methods of recruitment to civil services and to civil posts and on the principles to be followed in making. appointment to civil services and posts and on the suitability of candidates for such appointment, among other matters. An examination of Articles 317 to 320 makes it evident that the constitution contemplates the commission to be an independent and effective body outside the governmental control. This is an instance of application of the basic tenet of democratic form of government viz., diffusion of governing power, The idea is not to allow the concentration of governing power in the hands of one person, authority or organ."….*
>
> *….." Indeed, clause (2) of Article 323 obliges the Governor of a State to lay a copy of the annual report received from the commission before the Legislature "together with a memorandum explaining, as respect the cases, if any, where the advice of the commission was not accepted (and) the reasons for such non-acceptance." Evidently, this is meant as a check upon the power of the government. This provision too militates against the theory of absolute power in the government to disapprove or reject the recommendations of the commission."*

In the case of ***Duddilla Srinivasa Sharma*** (supra), the Supreme Court has held :

> *…."We fail to understand how a person who fulfils the eligibility conditions as per the recruitment rules can be excluded even from appearing in the qualifying written examination by fixing higher educational qualification bench mark. That would be permissible where the post is to be filled by main written examination (with marks obtained therein to be included in the total marks) followed by viva- voice test OR where the post is to be filled by interview mode alone. Thus, having regard to the specific provision of shortlisting, we are of the opinion that the impugned judgment of the High Court has taken the correct view."….*

In ***Sandip Sriram Warade*** (supra), the Supreme Court has held as follows :

> *"9. The essential qualifications for appointment to a post are for the employer to decide. The employer may prescribe additional or desirable qualifications, including any grant of preference. It is the employer who is best suited to decide the requirements a candidate must possess according to the needs of the employer and the nature of work. The court cannot lay down the conditions of eligibility, much less can it delve into the issue with regard to desirable qualifications being at par with the essential eligibility by an interpretive rewriting of the advertisement. Questions of equivalence will also fall outside the domain of judicial review. If the language of the advertisement and the rules are clear, the Court cannot sit in judgment over the same. If there is an ambiguity in the*

advertisement or it is contrary to any rules or law the matter has to go back to the appointing authority after appropriate orders, to proceed in accordance with law. In no case can the Court, in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer and interpret the conditions of the advertisement contrary to the plain language of the same."

In the case of ***Elambarathy S*** (supra), the High Court of Madras while dealing with a challenge to the advertisement which had prescribed GATE score as the criteria for selection to the post of Graduation Executive Trainee held as follows:-

"8.The aspirants for the post of Graduate Executive Trainee in the first respondent/public sector Company, do not have a vested right on the mode of recruitment and/or qualification prescribed by the recruiting agency/employer. The second respondent under the impugned Advertisement, has prescribed GATE score as mandatory requirement for applying to the subject post. GATE is an examination conducted by the agency established by the Central Government. GATE is an examination that primarily tests the comprehensive understanding for various under-graduate subjects in Engineering and Science for admission in the Master's programme for recruitment by some public sector undertaking Companies like that of the first respondent. The purpose for GATE examination is to test the students' knowledge and undertaking of under-graduate level subjects in Engineering and Science. GATE is utilised to measure and tehst the calibre of the Engineering students. The requirement of GATE score under the impugned Advertisement/Notification therefore cannot be held to be unreasonable…….

10. …..This Court is of the considered view that the petitioners' contention will have to be rejected for the following reasons:

(a) The prescription of educational and other required qualifications for a post, is within the domain of the recruiting agency/employer, unless and until they will have to follow any statutory law/Rules prescribing a particular educational qualification criteria for a particular post. No statutory provision/Rule prohibits the first respondent-Company from prescribing GATE score as a mandatory qualification for applying to the post of Graduate Executive Trainee. The first respondent has a discretion to prescribe the required and relevant educational and other necessary qualifications for the required post in consonance with the nature of the post. The petitioners have no legally recognised/protected and judicial enforceable right to compel and/or dictate the respondents to follow the same yardstick for all times in the recruitment for the post required by the respondents. This legal position had also been confirmed by the Honourable Supreme Court in the decision dated 03.05.2019 in Civil Appeal No.4597 of 2019 (cited supra) as well as in the judgment, dated 03.11.2020 in Civil Appeal No.3602 of 2020 (cited supra), relied upon by the learned Additional Solicitor General appearing for the respondents."

The High Court of Madhya Pradesh (Indore Bench) in **Vikas Malik** (supra) has interalia held : :

…" 7. The prescription of minimum qualifications and the mode of appointment in the sphere of public employment is within the domain of the appointing authority or the selection body. The Courts and tribunals can neither prescribe the qualifications nor

entrench upon the power of the authority concerned so long as the qualification so prescribed reasonably relevant and do not obliterate the equality clause (J.Ranga Swamy v. Govt., of A.R.[MANU/SC/0229/1989 : (1990) 1 SCC 288 and Chandigarh Administration Through the Director Public Instructions (Colleges), Chandigarh [(2011) 9 SCC (645)]…"

In the case of **Mohd Rashid v.The Director, Local Bodies, New Secretariat and others (Civil Appeal No.136 of 2020)** delivered on 15.01.2020, the recruitment rules had been amended on 7th June, 2013 and the advertisement was issued on 12th September, 2013. The Supreme Court *inter-alia* held :

…"11. From the above information placed on record, we find that the Recruitment Rules providing 50% quota to be filled up by promotion failing which by direct recruitment and another 50% by deputation quota failing which by direct recruitment are being followed by the Municipal Bodies.

12. The appellants who are aspirants for direct recruitment have no right for appointment merely because at one point of time the vacancies were advertised. The candidates such as the appellants cannot claim any right of appointment merely for the reason that they responded to an advertisement published on 12th September, 2013. Even after completion of the selection process, the candidates even on the merit list do not have any vested right to seek appointment only for the reason that their names appear on the merit list. In ***Shankarsan Dash v. Union of India****, a Constitution Bench of this Court held that a candidate seeking appointment to a civil post cannot be regarded to have acquired an indefeasible right to appointment in such post merely because of the appearance of his name in the merit list. This Court held as under:-*

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in the ***State of Haryana v. Subhash Chander Marwaha [(1974) 3 SCC 220 : 1973 SCC (L&S) 488 : (1974) 1 SCR 165] ; Neelima Shangla (Miss) v. State of Haryana [(1986) 4 SCC 268 : 1986 SCC (L&S) 759] or Jitender Kumar v. State of Punjab [(1985) 1 SCC 122 : 1985 SCC (L&S) 174 : (1985) 1 SCR 899]."***

13. Since the selection process has not been completed and keeping in view the mandate of the Statutory Rules, we find that the appellants have no right to dispute the action of the Municipal Bodies to fill up the posts either by way of promotion or by deputation as such posts are being filled up in terms of mandate of the Rules. It is always open to the Municipal Bodies to fill up the vacant posts by way of direct recruitment after the posts by way of promotion and/or deputation quota are not filled up either on the basis of recruitment process already initiated or to be initiated afresh."

In the case of ***State of U.P. v. Manbodhan Lal Srivastava*** reported in ***1958 SCR 533***, where the Hon'ble Supreme Court has held as follows:

> *…"7. Article 320 does not come under Chapter I headed "Services" of Part XIV. It occurs in Chapter II of that part headed "Public Service Commissions." Articles 320 and 323 lay down the several duties of a Public Service Commission. Article 321 envisages such "additional functions" as may be provided for by Parliament or a State Legislature. Articles 320 and 323 begin with the words "It shall be the duty.....", and then proceed to prescribe the various duties and functions of the Union or a State Public Service Commission, such as to conduct examinations for appointments; to assist in framing and operating schemes of joint recruitment; and of being consulted on all matters relating to methods of recruitment or principles in making appointments to Civil Services and on all disciplinary matters affecting a civil servant. Perhaps, because of the use of word "shall" in several parts of Art. 320, the High Court was led to assume that the provisions of Art. 320(3)(c) were mandatory, but in our opinion, there are several cogent reasons for holding to the contrary. In the first place, the proviso to Art. 320, itself, contemplates that the President or the Governor, as the case may be, "may make regulations specifying the matters in which either generally, or in any particular class of case or in particular circumstances, it shall not be necessary for a Public Service Commission to be consulted." The words quoted above give a clear indication of the intention of the Constitution makers that they did envisage certain cases or classes of cases in which the Commission need not be consulted. If the provisions of Art. 320 were of a mandatory character, the Constitution would not have left it to the discretion of the Head of the Executive Government to undo those provisions by making regulations to the contrary. If it had been intended by the makers of the Constitution that consultation with the Commission should be mandatory, the proviso would not have been there, or, at any rate, in the terms in which it stands. That does not amount to saying that it is open to the Executive Government completely to ignore the existence of the Commission or to pick and choose cases in which it may or may not be consulted. Once, relevant regulations have been made, they are meant to be followed in letter and in spirit and it goes without saying that consultation with the Commission on all disciplinary matters affecting a public servant has been specifically provided for, in order, first, to give an assurance to the Services that a wholly independent body, not directly concerned with the making of orders adversely affecting public servants, has considered the action proposed to be taken against a particular public servant, with an open mind; and, secondly, to afford the Government unbiassed advice and opinion on matters vitally affecting the morale of public services. It is, therefore, incumbent upon the Executive Government, where it proposes to take any disciplinary action against a public servant, to consult the Commission as to whether the action proposed to be taken was justified and was not in excess of the requirements of the situation.*
>
> *8. Secondly, it is clear that the requirement of the consultation with the Commission does not extend to making the advice of the Commission on those matters, binding on the Government. Of course, the Government, when it consults the Commission on matters like these, does it, not by way of a mere formality, but, with a view to getting proper assistance in assessing the guilt or otherwise of the person proceeded against and of the suitability and adequacy of the penalty proposed to be imposed. If the opinion of the Commission were binding on the Government, it may have been argued with greater force that non-compliance with the rule for consultation would have been fatal to the validity of the order proposed to be passed against a public a servant. In the absence of*

such a binding character, it is difficult to see how non-compliance with the provisions of Art. 320(3)(c) could have the effect of nullifying the final order passed by the Government."…

…"11. The principle laid down in this case was adopted by the Federal Court in the case of Biswanath Khemka v. The King Emperor [[1945] F.C.R. 99]. In that case, the Federal Court had to consider the effect of non-compliance with the provision of s. 256 of the Government of India Act, 1935, requiring consultation between public authorities before the conferment of magisterial powers or of enhanced magisterial powers, etc. The Court repelled the contention that the provisions of s.256, aforesaid, were mandatory. It was further held that non-compliance with that section would not render the appointment otherwise regularly and validly made, invalid or inoperative. That decision is particularly important as the words of the section then before their Lordships the Federal Court were very emphatic and of a prohibitory character."…

…"13. We have already indicated that Art. 320(3)(c) of the Constitution does not confer any rights on a public servant so that the absence of consultation or any irregularity in consultation, should not afford him a cause of action in a court of law, or entitle him to relief under the special powers of a High Court under Art. 226 of the Constitution or of this Court under Art. 32. It is not a right which could be recognized and enforced by a writ. On the other hand, Art. 311 of the Constitution has been construed as conferring a right on a civil servant of the Union or a State, which he can enforce in court of law. Hence, if the provisions of Art. 311, have been complied with in this case - and it has hot been contended at any stage that they had not been complied with - he has no remedy against any irregularity that the State Government may have committed. Unless, it can be held, and we are not prepared to hold, that Art. 320(3)(c) is in the nature of a rider or proviso to Art. 311, it is not possible to construe Art. 320(3)(c) in the sense of affording a cause of action to a public servant against whom some action has been taken by his employer.

24. As we wanted to verify if the views of the OPSC had been placed before the Chief Minister and the cabinet before the Amendment Rules 2021 were sent to the Governor for his signature, we had directed the learned Additional Standing Counsel to produce the original file for our perusal. File No FE – II – AEE (C) – 10/2019 of the WR Department has been produced by him and we have perused the same carefully.

At **page 46** of the Note sheet, noting No 103 to 108 are available .Noting No 105 to 108 are extracted below :

"Noting No 105

This was discussed with Chief Secretary.

This is regarding amendment of Cadre Rule (Methods of Recruitment and Conditions of Service) Rules, 2019 for Odisha Engineering Service.

2. The cadre *restricting* of IES took place following Cabinet decision of Jan 2019.

3. In order to implement the restructuring of OES Cadre it was required to finalize the new Cadre Rule.

4. The draft cadre rule, inter-alia provided for the selection of candidates to the service on the basis of "**highest of the valid GATE score of preceding three years of the date**

of advertisement (including the year of advertisement)" in lieu of **objective written test and viva-voce test** for selection of candidates by OPSC in the feeder grade of OES.

5. This had been suggested since GATE system of examination is a national level standardized and recognized engineering entrance examination not only for selection of students in PG program in seven IITs, NITs, IITs & IISC but also selection of employees in high level public sector jobs; in Group-A level posts in Central Government i.e. Senior Field Officer (Tele), Senior Research Officer (Crypto) and Senior Research Officer (S & T) in Cabinet Secretariat Government of India. Several public sector undertakings (PSUs) like BHEL, GAIL, HAL, IOCL, NTPC, NPCIL, ONGC & PGCI have used GATE score to short list the candidates for employment.

6. Government approval was taken to the draft Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Rules, 2019 duly vetted by the General Administration Department (32206/WR/2019 GA View'Page1) and Law Department (32204/WR/2019 Law View'Page 1)

7. The matter was then referred to the Odisha Public Service Commission (OPSC) for their concurrence. The OPSC has concurred all the above amendments except Para-4, relating to selection process of direct recruitment of Assistant Executive Engineer (AEE) and **the Commission has not agreed to the proposed recruitment system through GATE score**.

8. Views of GAD of Law Department were sought again. GA & PG Deparment views that *"In this respect, it may be indicated that the recommendation of the Commission is not obligatory to be accepted unless there is sufficient justification of non-acceptance of their advice/suggestions/ recommendations…."* and Law Department has opined that *"…. this Department has noting further to say in the matter except for reiterating the same since it is basically of policy decision, the A/D, if so advised, may seek kind orders of the Hon'ble Chief Minister under Instruction 1(14)(1) (xxx(iii)) of Instructions issued under Government Rules of Business in case it proposes to deviate from the advice tendered by the OPSC"*

9. In view of the above opinion of GA & PG Deptt. and Law Deptt. and with a view to ensuring utmost transparency in the process of selection; ensuring entry of talented engineers to the OES from a wider pool of resources, timely completion of the process of selection and to streamline the process, **we may deviate from the advice of the OPSC** as a policy decision to that effect has already been taken by the Government.

10. Kind approval of the Hon'ble Chief Minister is solicited to place the matter, the draft rules, before the Cabinet for their approval.

Smt. Anu Garg (Principal Secretary,Water Resources), 07-Nov-2020 12:48:06.

Noting 106

As Proposed.

Asit Kumar Tripathy (Chief Secretary, Office of Chief Secretary), 09-Nov-2020 15:40:37

Noting 107

ସଦୟ ଅନୁମୋଦନ ନିମନ୍ତେ

Shri Raghunandan Das (Minister of State (Independent), Water Resources), 12-Nov-2020 11:30:07

Noting 108

ଅନୁମୋଦନ କରାଗଲା।

Shri Naveen Patnaik (Chief Minister, Office of Chief Minister) 20-Nov-2020 13:13:00"

At Page 50 and 51 of the Note sheet, Noting No 112 to 120 are available . They are extracted below :

*"**Noting No 112***

PUC at (6092 Cabinet Approval Page1) may please be seen.

This is regarding approval of the cabinet to the proposed amendment to the Odisha Engineering Service Cadre (Methods of Recruitment and Conditions of Service) Rules, 2012.

The draft Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Amendment Rules, 2020 has been framed and sent to the GA & PG Deptt. for vetting. The vetting of GA & PG Deptt. is at (32206/WR/2019 GA View'Page1) Simultaneously Law Deptt. vide at (32204/WR/2019 GA View'Page1) has given their approval. Then the draft rule was sent to Government for approval. After obtaining Government approval at (32207/WR/2019 Governemnt Approval'Page1), the Draft Amendment Rule was sent to OPSC for concurrence. The OPSC submitted its views / concurrence at (20392/WR/2020 opsc reply with clarification'Page1) Accordingly the corrected Draft of Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Amendment Rules, 2020 was placed before the Hon'ble Chief Minister, Odisha for kind approval for placing the same before the Cabinet. The approval of Hon'ble Chief Minister for placing the same before the Cabinet is at Noting 108 (Notings : 108).

The Parliamentary Affairs Department vide their Letter No.6092 dtd. 09.12.2020 at (6092 Cabinet Approval'Page1) has intimated that, the Cabinet in its 21st meeting held on 09.12.2020 has approved the draft Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Amendment Rules, 2012.

Now, if approved, the draft Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Amendment Rules, 2012 may be placed before the Hon'ble Chief Minister, Odisha for obtaining the kind approval of his Excellency Governor of Odisha.

Submitted for kind orders.
Enclosures
Draft 6092 Date 18-Dec-2020 16:50:19 has been added

Dipak Kumar Baral (Section Officer, Water Resources), 18-Dec-2020 20:18:54

Noting 113

Notes above.

This is regarding approval of the cabinet to the proposed amendment to the Odisha Engineering Service Cadre (Methods of Recruitment and Conditions of Service) Rules, 2012 (6092 Cabinet Approval;Page1).

The draft Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Amendment Rules, 2020 has been framed and sent to the GA & PG Deptt. for vetting. The vetting of GA & PG Deptt. is at (32206/WR/2019 GA View'Page1) Simultaneously Law Deptt. vide at (32204/WR/2019 GA View'Page1) has given their approval. Then the draft rule was sent to Government for approval. After obtaining Government approval at (32207/WR/2019 Government Approval'Page1), the Draft Amendment Rule was sent to OPSC for concurrence. The OPSC submitted its views/concurrence at (20392/WR/2020 opsc reply with clarification'Page1) Accordingly the corrected Draft of Odisha Engineering

Service (Methods of Recruitment and Conditions of Service) Amendment Rules, 2020 was placed before the Hon'ble Chief Minister, Odisha for kind approval for placing the same before the Cabinet. The approval of Hon'ble Chief Minister for placing the same before the Cabinet is at Noting 108 (Notings : 108).The Parliamentary Affairs Department vide their Letter No.6092 dtd. 09.12.2020 at (6092 Cabinet Approval'Page1) has intimated that, the Cabinet in its 21st meeting held on 09.12.2020 has approved the draft Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Amendment Rules, 2012.Now, if approved, the draft Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Amendment Rules, 2012 may be placed before the Hon'ble Chief Minister, Odisha for obtaining the kind approval of his Excellency Governor of Odisha.

Submitted for kind orders.

Dhaneswar Panda (Under Secretary, Water Resources), 30-Dec-2020 17:02:27.
Noting 114

Notes above.

This is regarding approval of the cabinet to the proposed amendment to the Odisha Engineering Service Cadre (Methods of Recruitment and Conditions of Service) Rules, 2012 (6092 Cabinet Approval;Page1).

The draft Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Amendment Rules, 2020 has been framed and sent to the GA & PG Deptt. for vetting. The vetting of GA & PG Deptt. is at (32206/WR/2019 GA View'Page1) Simultaneously Law Deptt. vide at (32204/WR/2019 GA View'Page1) has given their approval. Then the draft rule was sent to Government for approval. After obtaining Government approval at (32207/WR/2019 Government Approval'Page1), the Draft Amendment Rule was sent to OPSC for concurrence. The OPSC submitted its views/concurrence at (20392/WR/2020 opsc reply with clarification'Page1) Accordingly the corrected Draft of Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Amendment Rules, 2020 was placed before the Hon'ble Chief Minister, Odisha for kind approval for placing the same before the Cabinet. The approval of Hon'ble Chief Minister for placing the same before the Cabinet is at Noting 108 (Notings : 108).

The Parliamentary Affairs Department vide their Letter No.6092 dtd. 09.12.2020 at (6092 Cabinet Approval'Page1) has intimated that, the Cabinet in its 21st meeting held on 09.12.2020 has approved the draft Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Amendment Rules, 2012.

The draft Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Amendment Rules, 2012 may be placed before the Hon'ble Chief Minister, Odisha for obtaining the kind approval of his Excellency Governor of Odisha.

Submitted.

Prabhat Kumar Bhoi (Additional Secretary, Water Resources), 30-Dec-2020 18:10:40.

Noting 115

As Proposed

Smt. Anu Garg (Principal Secretary, Water Resources), 31-Dec-2020 16:06:09

Noting 116

Submitted for kind approval.

Shri Raghunandan Das (Minister of State (Independent), Water Resources), 31-Dec-2020 17:32:28.
Noting 117

ଅନୁମୋଦନ କରାଗଲା।

Shri Naveen Patnaik (Chief Minister, Office of Chief Minister) 04-Jan-2021 16:51:22"

Noting 118

Smt. Anu Garg (Principal Secretary, Water Resources), 05-Jan-2021 10:03:17

Noting 119

Prabhat Kumar Bhoi (Additional Secretary, Water Resources), 05-Jan-2021 10:12:26.

Noting 120

Dhaneswar Panda (Under Secretary,Water Resources), 05-Jan-2021 12:45:41."

The Draft Memorandum for the Cabinet is at page 364 to 367 of the file. After the proposed amendment, it has been stated at paragraphs 4.0 to 8.0 as follows

"4.0…The proposal has been concurred in by G.A. & P.G Department on 29th September 2020 in OSWAS File No. PTI-WR-FE-II-Policy-0002-2019 and by Law Department vide their UOR No.5131/PSL dtd 25th September 2020 in File No. FE-II-AEE(C)-10/2019.

5.0 The Odisha Public Service Commission has given their concurrence to the proposal vide their Letter No. 1232/PSC, dtd 19.02.2020.

6.0 The synopsis in respect of the above proposal has been given in the appendix to the Memorandum as ***Annexure-A****.*

7.0 The Financial Memorandum is annexed as ***Annexure-B*** *as laid down in P.A. Department Circular No. CAB-3/2013-2047/PAD dtd. 11.04.2013.*

8.0 The approval of Hon'ble Chief Minister has been obtained on 20th November 2020 in OSWAS File No.

PTI-WR-FE-II-Policy-0002-2019 to place this memorandum before the Cabinet.

The memorandum for amendment to Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Rules, 2012 is placed before the cabinet for its kind approval.

Sd/-

Name: Anu Garg
Designation: Principal Secretary to Govt.
Department of Water Resources."

Annexure A at page 363 which is the synopsis and Annexure B at page 362 the Financial Memorandum are extracted below:

"Annexure A

SYNOPSIS

File No. FE-II-AEE(C) – 10/2019/WR/22561 Dt-27/11/2020

Subject:-AMENDMENT TO ODISHA ENGINEERING SERVICE (METHODS OF RECRUITMENT AND CONDITIONS OF SERVICE RULES 2012)

Sl. No	Gist of decision required	Backgrounds	Benefits/Executed outcome	Remarks
1	Amendments to the Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Rules, 2012 – to abolish the post of Deputy Executive Engineer, merger of the posts of Superintending Engineer,Level-A & Superintending Engineer, Level-II and to be re-designated as Superintending Engineer in the Pay Level-14 creation of the post of Additional Chief Engineer in the pay level 16.	As per the decisions taken in the 70th meeting of the Cabinet held on 26th February 2019 to restructure the Odisha Engineering Service Cadre To address the issue of increasing workload in various engineering departments To remove stagnation in promotion and resultant erosion in productivity in the cadre and. To resolve the pay anomaly of this cadre vis a vis other provincial premium cadres of the State such as OMS, OAS and OFS etc.	To streamline the Odisha Engineering Service Cadre by making it six tier cadre to enhance proficiency. To remove the asymmetry in the promotional pyramid at the interface between AEE and DEE, Superintending Engineer, level –I & level-II. Better supervision and control of field Divisions with higher responsibility and administrative power	The amendments to the Odisha Engineering Service (Methods of Recruitment and Conditions of Service) Rules, 2019 is hereby introduced..
2	To increase the number of posts of Assistant Executive Engineer (AEE) to be filled up by way of promotion from the posts of Assistant Engineer (AE) in the Odisha Diploma Engineering Service from 33% to 40%	As per the decisions taken in the 70th meeting of the Cabinet held on 26th February, 2019 to provide better promotional avenue to the engineers of Odisha Diploma Engineering Services	To provide better promotional avenue to the engineers of Odisha Diploma Engineering Services and to remove stagnation	
3	To amend the constitution of the Departmental Promotion Committees	As per requirement in accordance with instruction of G.A. Department O.M. No. 31897 dtd. 11.11.2013	To streamline the promotion cases of Engineering personnel	
4	To bring in meritorious engineering students to the Odisha Engineering Service (OES) through a fair and standard test procedure within minimum time frame, the score in Graduate Aptitude Test in Engineering (GATE) is being considered to replace the present process of selection of Engineering Graduates to fill up the direct recruitment quota in OES	The Odisha Public Service Commission (OPSC) requested the Government to review the selection process of direct recruitment to the post of Assistant Executive Engineers during March, 2016 with a suggestion that the system of selection to be based more on merit than elimination	GATE, being a standardized examination on comprehensive understanding of the candidates in various undergraduate subject in Engineering / Technology will provide a pool of meritorious students in a timely manner	

Sd/-
Name Anu Garg
Designation :Principal Secretary to
Govt. Department of Water Resources

Annexure – **"B"**

Financial Memorandum

	Yes	No
1. Does the proposal involves revenue loss? (Put a √ mark in the appropriate box)		√

2.In case the proposal involves revenue loss what is the estimated quantum of loss ? (Indicate the amount in the appropriate box)

- Non-recurring — Not applicable
- Recurring (per annum) — Not applicable

	Yes	No
3. Does the proposal involve a additional budgetary expenditure ? (Put a √ mark in the appropriate box)		√

4. In case the proposal involves additional budgetary expenditure what is the estimated quantum ? (Indicate the amount in the appropriate box)

- Non-Recurring
  - Capital — Not Aapplicable
  - Revenue — Not applicable
- Recurring (per annum) — Not applicable

	Yes	No
5. Does the proposal envisage creation of new posts ? (Put a √ mark in the appropriate box)		√

If Yes, what is the estimated annual salary expenditure ? (indicate the amount in the appropriate box) — Not applicable

	Yes	No
6. Does the proposal involve imposition of any new tax or any change in the method of assessment or the pitch of any existing tax, land revenue or irrigation rates ? (Put a √ mark in the appropriate box)		√

It Yes, what is the estimated annual revenue yield ? (Indicate the amount in the appropriate box) — Not applicable

Sd/-
(Anu Garg)
Principal Secretary to Government. DoWR

From this it is crystal clear that the cabinet has not been intimated about the objection / reservations of the OPSC The decision of the Department to deviate from opinion of the OPSC has not been specifically brought to the knowledge of the cabinet. On the other hand at Paragraph 5.0 it has been stated that "the Odisha Public Service Commission has given their concurrence to the proposal vide their Letter

No. 1232 /PSC dtd 19.0.2.2020' which is a palpably incorrect statement as the OPSC has specifically stated in the letter that

> *" In inviting a reference to the letters on the subject cited above , the draft notification (Amendment Rules) forwarded vide yr letter No 22175 dt 04.10.2019 is hereby concurred except Para 4" ….*

Thereafter the OPSC has specifically stated in the letter that :

> *…"The Commission vide its letter No.1316 dt. 04-03-2016 had recommended a two stage written examination alongwith viva-voce test to ensure meritocracy of candidates in the dual field of theory and practical knowledge. There was no recommendation to conduct the examination on the basis of GATE. Notwithstanding above, the proposal was extensively deliberated by the Commission and the representative of the Deptt. on 31-01-2020. The Commission is of the opinion that the syllabus or GATE designed for entry to higher education Institutions is not suitable for selection of officers to the Group A category of the Govt. with the laid down terms and conditions under Art. 311 of the Constitution of India.*
>
> *However, if the Deptt. of Water Resources considers to ignore the recommendations of the Commission which are mandatory in nature as regards to amendment to the Recruitment Rules, the Supreme Court has opined and directed that such decisions of the executive are subject to judicial review. In addition, the proposed draft notification also needs to suppress amendments vide Notification No.24848-FE-II-AEE(C) - 83/2014/WR dt 31 Oct. 2014 and also examine Notification No.11194-WR-FEII-POLICY-0001/2014/WR dt 19 May 2015 prior to issue of suitable instructions.*

But this letter No 1232 dated 19.02.2020 of the OPSC has not been made an Annexure to the Draft Memorandum put up before the cabinet. This letter has been annexed as ANNEXURE 8 in W.P.(C) No. 10936 of 2023.

ANALYSIS

25. On a conspectus of the statutory provisions, the advice of the OPSC, the manner in which the Department has placed information before the Cabinet, we find that

A. There is no gainsaying the State Government is within its power under Article 309 of the Constitution of India to prescribe the procedure for recruitment to the post of Assistant Executive Engineer and consequently amend the OES Rules 2012 which have been framed for this purpose. But the Rules so framed have to withstand the test of arbitrariness and rationality besides being transparent on the procedure. In this case the OPSC, which was consulted by the Government in accordance with Article – 320 (3) of the Constitution had expressed its reservation regarding the advantage and purpose of the proposed amendment to Rule 7 of the OES 2012 Rules.

B. While amending the OES Rules 2012, the provisions of Article 320 (3) of the Constitution and the Rules of Business have been given a go by. It has not been brought to our notice that the Government has framed any Rule under Proviso to

Article 320 (3) (e) of the Constitution that it would not be necessary to consult the OPSC in the matter of recruitment of members of the Orissa Engineering Service. On the other hand, it is the admitted case that the OPSC has been consulted and it did not agree to the part of the proposed amendment relating to Rule 7 i.e the method of selection of the Assistant Executive Engineers on the basis of GATE scores. But this consultation with OPSC has been made an empty formality and short shrift has been made of its advice. Although the OPSC has consistently expressed its reservation to amendment of Section – 7 of the OES Rules 2012 by substituting Rule 7 (2) and 7 (3) i.e. the method of selection by replacing the marks awarded for career, written examination and vive voce with GATE scores, and this had been brought to the notice of the Law Department and GA & PG Department and the Chief Minister, but it has not been brought to the notice of the Cabinet. The view / advice of the OPSC vide its letter dated 19.02.2020 with regard to the proposed amendment of Rule 7 has not been placed before Cabinet by making it an Annexure to the memorandum. The Department has not even mentioned in the synopsis which was placed before the Cabinet about its disagreement with the proposed amendment to Rule 7 of OES Rules 2012. The Cabinet has been completely kept in the dark about the advice/opinion of the OPSC and has in fact been misled as it has been stated in paragraph 5.0 of the memorandum that the OPSC has given its concurrence to such amendment. This is also in contravention to the procedure laid down in the Rules of Business and Instructions for carrying out the Rules of Business which have been referred to earlier.This contravention amounting to suppression has vitiated the process of consultation adopted for carrying out the proposed amendment of Rule 7. Rule 4 (i) and Rule 4 (ii) of the Amendment Rules 2021, amending Rule 7 (3) and 7 (4) of the OES Rules 2012 is therefore illegal and the liable to be struck down.

C. The averment in paragraph 4 (ix) of the counter affidavit of opposite parties No 1 and 2 that OPSC failed to give any opinion in response to the Department Letter dated 17.02.2020 , is factually incorrect as in response to such letter, the OPSC vide its letter dated 19.02.2020 has replied not agreeing to substitution of the method of written test and interview with highest valid GATE scores for the preceding three years.

D. From a perusal of the notesheet of the file as extracted above, it is apparent that the advice /disagreement of the OPSC to a part of the Amendment Rules 2021 has not been brought to the notice of the cabinet . Serial No 21 of the Instructions to Rules of Business specifies that unless the Chief Minister otherwise directs the concerned Department has to prepare a memorandum with sufficient precision containing the salient facts and the points to be decided instruction and this memorandum has to be drafted after consulting all departments. In this case, the memorandum appears to have been drafted after consulting the other departments but unfortunately does not contain the salient facts regarding advice of the OPSC

and has suppressed the advice of the OPSC so far as its disagreement with the proposed amendment of Rule 7 of the OES Rules 2012 is concerned. At paragraph 5.0 of the draft memorandum it has been specifically stated that - "*The Odisha Public Service Commission has given their concurrence to the proposal vide their Letter No. 1232/PSC, dtd 19.02.2020*" which is a palpably incorrect statement. It is shocking as to how such a wrong memorandum could be prepared and put up for consideration of the Cabinet.

CONCLUSION

26. In view of the fact that the advice /opinion of the OPSC has not been placed correctly before the Cabinet and a wrong statement has been made before it that the OPSC has given its concurrence to the proposed amendments, Rule 4 of the Amendment Rules which amends Rule 3 and 4 of the OES Rule 2012 is liable to be struck down. Consequently, the impugned advertisement having prescribed the highest valid GATE scores of the preceding three years to be the basis of selection is also liable to be quashed.

27. An additional ground for quashing the impugned advertisement is that candidates have not been provided enough time / opportunity to appear in the GATE Examinations thrice before publication of the Advertisement dated 18.03.2023. The highest valid GATE Score for the preceding three years (from the date of advertisement) has been provided in the method of selection in the Advertisement , thereby depriving candidates who had not appeared for the GATE Examination in the year 2021 (the process for which admittedly began in 2020) before the publication of the Amendment Rules 2021, which were published on 28.01.2021 while the Advertisement has been published on 18.03.2023, of a level playing field placing them at a disadvantageous position as compared to candidates who were able to appear in the GATE examinations thrice, before publication of the impugned advertisement and thereby discriminating against them.

28. Rule 4 (i) and Rule 4 (ii) of the Orissa Engineering Service (Recruitment and Conditions of Service) Amendment Rules 2021, amending Rule 7 (2) and 7(3) of the Orissa Engineering Service (Recruitment and Conditions of Service) Rules OES Rules 2012 are hereby struck down and consequently Advertisement No. 20 – 2022-23 dated 18.03.2023 published by the OPSC is quashed.

29. All the writ applications are allowed to the extent indicated above. There shall be no order as to costs.

S. TALAPATRA, J. (Concurring)

30. While concurring with the well-reasoned opinion of Hon'ble Ratho, J., it is felt necessary to emphasize on certain aspects which are in-alienable to the controversy.

31. Rule-7 of the OES Rule, 2007 provided that when the Government would decide to fill up the vacancies in the posts of Assistant Executive Engineer by direct recruitment, the Government will communicate the number of vacancies in the posts along with reserved vacancies thereof proposed to be filled up and the Commission (Odisha Public Service Commission) on receipt of the requisition should invite application in the manner chosen by it from the eligible candidates. After receipt of the application, the candidates will be selected in the manner provided under sub-Rule (3) of Rule-7 of the OES Rule, 2012. The said Rule-7 has been thoroughly amended by the OES (Methods of Recruitment and Conditions of Service) Amendment Rules, 2021. The said sub-rule (3) of Rule-7 has been substituted by the following clause:

> *"(3) The Commission after receipt of the application shall take steps to select the candidates on the basis of the highest of the varied GATE score of proceeding of the date of the advertisement including the year of the advertisement."*
>
> *Sub-Rule (4) of Rule-7 of the OES Rules has been amended by deleting "marks secured in Career Evaluation, Objective type written and vivo-voce Test".*
>
> *In that place, the words and expression valid GATE score has been substituted. Consistent with the said amended rules, the advertisement No.20 of 2022-23 issued by the Odisha Public Service Commission carried the following clause:*
>
> "**5. METHOD OF SELECTION** :
>
> *a) The Commission after receipt of the application shall take steps to select the candidates on the basis of the highest of the valid GATE score of preceding three years of the date of the advertisement (including the year of advertisement)*
>
> *b) The Commission, after verification of the original certificate and documents, valid GATE score shall select the names of the suitable candidates in order of merit as per availability of the vacancies in different categories and recommends for appointment to the post of AEEs to the Government."*

32. Hon'ble Ratho,J. has elaborately dwelled upon the fall out of the said change, but where I want to lay the emphasis is whether by incorporating the above change, as reproduced, the Constitutional role of the Public Service Commission has been slighted or completely excluded. For this purpose, let us revisit Article-320. The text of Article-320 has been reproduced by Hon'ble Ratho, J.

33. In unequivocal terms, Article-320 has laid down the functions of Public Service Commissions. The Public Service Commission for the Union or for the States has a distinct status under the Constitution apart from the Government of the Union or of the State and cannot be identified with such Government.

34. The fundamental purpose of constituting the Public Service Commission has been discerned in Article-320 of the Constitution. The Public Service Commission is to conduct examination to the services of the Union and the services of the State. The Public Service Commission shall as well be consulted on all matters relating to

methods of recruitment to civil services and for civil posts. In view of that provision, the opposite parties No.1 & 2 had commenced the consultation in respect of the OES Amendment Rules, 2021. But as it has been revealed from the records, relevant part of which has been extensively reproduced in the opinion of Hon'ble Ratho, J., that in the draft minutes of the Cabinet, the opinion of the OPSC has been wrongly reflected and on that basis, the amendment to the Rule-7(3) & Rule-7(4) of the OES Rule have been adopted by the Cabinet. As such, the said decision is totally uninformed and contrary to the Constitutional process as provided by Article-320(3)(a) of the Constitution.

35. The said amendment has been adopted in an arbitrary manner. By such amendment, function of the Public Service Commission has been reduced to that of a ministerial job. The Odisha Public Service Commission had given their opinion by not accepting the proposed amendment in toto.

36. In my considered opinion, the said amendment has completely excluded the function of the Public Service Commission as enshrined in Article-320 of the Constitution.

37. In this regard, it is pertinent to refer that proviso below sub-Article- (3) (e) of Article-20 postulates that the President as respect of public services and also as respects other services and posts in connection with affairs of the Union, and the Governor as respect of other services and forces in connection with affairs of the States may make regulation specifying the matters in which either generally, or any particular class of case of or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.

38. Rule-7 of the OES Rule [un-amended part] still provides that selection be made by the Public Service Commission. But no role has been assigned to the Public Service Commission by the amendment that has been implanted by deleting the original sub-rule (3) and sub-rule (4) of Rule-7 of OES Rules. It is a complete exclusion of consultation with the Public Service Commission.

39. This is a unique example of applying the power of subordinate legislation against the Constitutional ethos.The opposite parties No.1 & 2 were under obligation to give due consideration to the opinion of the Public Service Commission while adopting the amendment. As shown from the records that the Cabinet was "misinformed" about the opinion of the Public Service Commission and as such, there was no consultation in the eye of law. Merely sending for opinion is not enough to draw an inference that the consultation is done. Such inference can only be drawn when the opinion of the Public Service Commission is duly considered either by way of accepting or by way of discarding with adequate reasons. Even the opposite parties No.1 & 2 themselves have stated, as reproduced in the opinion of Hon'ble Ratho, J., that any opinion of the Public Service Commission should not be ignored or discarded casually.

40. In the case in hand, there has been no consultation at all. The consultation with the Public Service Commission in the recruitment of the civil posts is made mandatory unless exempted by the appropriate Rules framed under proviso to Sub-Article 3(e) of Article-320 of the Constitution. No exemption as regards the posts under reference has been adopted by the opposite parties No.1 & 2.

41. The State Government, the opposite parties No.1 & 2, has faulted in observing the Constitutional imperatives while framing the impugned amendment Rules.

42. In **Ram Manohar Pandey vs. State of Bihar (the Judgment dated 05.08.2019 delivered in Civil Writ Jurisdiction Case No.8760 of 2019**, the Patna High Court was examining vires of the amendment of Bihar Polytechnic Education Service Rules, 2014 by which the requirement of written test and evaluation in the teaching skill was deleted and it was provided that by evaluation of the percentile secured by the candidate in the Graduate Aptitude Test in Engineering Examination (the GATE, in short) selection will be made. The said amendment was challenged in a few writ petitions. While deciding the controversy, the Patna High Court has observed that though there is no apparent breach of Article-14 of the Constitution but for introduction of the GATE selection method, the candidates having higher qualification or experience will not get due weightage during the viva-voce test. It has been observed, thereafter, that there can be a preferential category within a particular category but a scheme which deprives the candidates from consideration against a particular attribute in its entirety, suffers from vice of arbitrariness besides being discriminatory and lacking reasonableness. In fact the change that has been brought about has created a class within a class of candidates. In so far as evaluation of the work knowledge is concerned, the object is entirely missing.

43. It has been observed in **Ram Manohar Pandey (supra)** as under:

> *"Even if the State under Article-309 has a right to frame rules in matters of public employment, every such rule has to withstand the test of arbitrariness and rationality besides being transparent on the procedure but the amendment substituting Table-2 of Appendix-I trough Memo No.889 dated 10.04.2017 whereby it is decided to waive of the transparent evaluation of candidates on their work knowledge/teaching skill by way of a written test and to simply mark candidates on the basis of marks obtained in the GATE examination, not only hits transparency but also discriminates against such of the candidates who are already Post Graduates and are not required to pass such GATE examination."*

We are also confronted with the similar circumstances. Finally, the Patna High Court held the said amendment as discriminatory and hence, the same was set-aside in its entirety.

44. In the said Judgment of the Patna High Court, some additional features were considered for interference. Those are not very material in the present context. But what the Patna High Court has significantly observed is thus:

"Since we have struck down the amendment to Table-II Appendix-I of the Rule" in its entirety, the evaluation obviously is to be carried out as per the scheme originally framed as present in Table-II of Appendix-I which accompanies the Service Rules, 2014".

45. The Service Rules, 2014 as referred in the Patna High Court judgment, is the un-amended rules. When the amendment is struck down and the earlier rules are not interfered with, the earlier rules swing back to its operation. I would further like to put on records that the said decision of the Patna High Court was challenged in Special Leave Petition (Civil) Diary No.(s) 30880/2019, but the said Special Leave Petition (SLP) was dismissed by the apex court by their order dated 21.11.2019.

4**6**. A responsible Executive cannot slight the status of a Constitutional Institution like the Public Service Commission. The State may frame the rules observing the procedure as prescribed by the law, not in defiance thereof.

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2023 (II) ILR - CUT- 728

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

W.P(C) NO. 5291 OF 2019

RABINDRA KUMAR NAYAK .....Petitioner

.V.

REGIONAL CHIEF CONSERVATOR OF FORESTS, BHUBANESWAR & ANR. .....Opp.Parties

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 and 227 – Disciplinary proceeding – Principle with regard to scope of Judicial Interference – Explained. (Para -15)

(B) INTERPRETATION OF STATUTE – The rules made under the proviso to Article 309 of the constitution are legislative in character – The clear and unambiguous expressions used in the constitution must be given their full and unrestricted meaning unless hedged-in, by any limitations – The rules which have to be subject to the provisions of the constitution shall have effect subject to the provisions of any such Act. (Para -7)

Case Laws Relied on and Referred to :

1. AIR 2000 SC 725 : Maharashtra Vs. Nanded-Parbhani Z.L.B.M Operator Sangh.
2. (2008) 8 SCC 236 : State of Uttaranchal Vs. Kharak Singh.
3. (2010) 10 SCC 539 : Mohd. Yunus Khan Vs. State of Uttar Pradesh.
4. 2015(II) ILR-CUT- 494 : Ejaz Alam Siddique Vs. Presiding Officer, Industrial Tribunal.
5. (2015) 2 SCC 610 : Union of India Vs. P. Gunasekaran.

6. AIR 1969 SC 118 : B.S. Vadera Vs.Union of India.
7. AIR 1997 SC 1038 : Bhakta Rame Gowda Vs. State of Karnataka.
8. AIR 1969 SC 118 : B.S. Vadera Vs. Union of India.
9. AIR 1992 SC 1981 : Nelson Motis Vs. Union of India.
10. AIR 2000 SC 725 : Maharashtra Vs. Nanded-Parbhani Z.L.B.M Operator Sangh.

For Petitioner : M/s. R.K. Patnaik, T.K.Dwibedy, B.Jalli, B.B. Acharya U.K. Patnaik.

For Opp.Parties : Mr. A.K. Mishra, AGA

JUDGMENT Date of Hearing : 25.04.2023 : Date of Judgment: 02.05.2023

Dr. B.R.SARANGI, J.

1. The petitioner, by means of this writ petition, seeks to quash the order dated 03.10.2018 passed in O.A. No.534(C) of 2011, by which the State Administrative Tribunal, Cuttack Bench, Cuttack, while dismissing the Original Application, has confirmed the order of punishment imposed by the disciplinary authority and upheld by the appellate authority; and further seeks direction to the opposite parties to extend three annual increments without cumulative effect and treat the suspension period from 27.06.2007 to 02.01.2008 as on duty with payment of duty pay and all other financial benefits.

2. The factual matrix of the case, in brief, is that the petitioner, while serving as Forester, Kusanga Section of Kusanga Wildlife Range under Divisional Forest Officer (DFO), Mahanadi Wildlife Division,Nayagarh,was placed under suspension, vide office order dated 27.06.2007 issued by the Divisional Forest Officer, Mahanadi Wildlife Division contemplating disciplinary proceeding. He was served with statement of article of charges and statement of imputation in support of the article of charges together with the list of documents, by which the article of charges are proposed to be sustained. The statement of imputation in support of the article of charges framed against the petitioner runs as follows:-

"CHARGE NO-I : Suppression of facts and connivance with smugglers.
CHARGE NO-II : Causing pecuniary loss to State Exchequer.
CHARGE NO-III : Involvement in smuggling of minor Forest produces from the Sanctuary.
CHARGE NO-IV : Disobedience of instructions of higher authorities and non-cooperation with Divisional Mobile Unit.
CHARGE NO-V : Commission of criminal offence and giving false information."

He was called upon to file written statement of defence within ten days and, accordingly, he submitted the same on 28.11.2007. Thereafter, vide office order dated 01.01.2008, he was reinstated in service and was posted as Forester, Special in Banigochha East Wildlife Range with headquarters at Kuanaria with immediate effect. Vide office order dated 05.01.2008, the DFO, Mahanadi Wildlife Division himself made an inquiry under Rule-15 of OCS (CCA) Rules, 1962 and in exercise of powers conferred by Sub-rule (5) of Rule-15 of the said Rules, appointed Sribatsa

Dash, Junior Clerk as the Presenting Officer. The DFO, Mahanadi Wildlife Division, Nayagarh issued a show-cause notice on the departmental proceeding drawn up against the petitioner, vide office order dated 23.10.2007. The Inquiry Officer submitted his report with the following findings:-

> "1. Charge No.1 i.e. connivance with smugglers was not proved but the suppression of facts is provide beyond doubt.
>
> 2. Causing pecuniary loss to Govt. is provided beyond doubt.
>
> 3. Involvement in smuggling of minor Forest produces from the Sanctuary is not proved.
>
> 4.Disobedience of instructions of higher authorities and non-cooperation with Divisional Mobile Unit is partially proved.
>
> 5.Commission of criminal offence and giving false information is proved beyond doubt."

Accordingly, he recommended the following punishments:-

> "1. His three annual increments may be stopped with cumulative effect.
>
> 2. His suspension period may be treated as such.
>
> 3. The loss sustained by the Govt. i.e. Rs.4,400/- may be recovered from Sri Rabindra Kumar Nayak, Forester.
>
> 4. He may be warned for the future."

Consequentially, agreeing with the findings and recommendation of the Inquiry Officer, the Divisional Forest Officer, Mahanadi Wildlife Division, Nayagarh proposed to award the following punishment on the petitioner:-

> "1. His three annual increments are to be stopped with cumulative effect.
>
> 2. His suspension period i.e. from 27.06.2007 to 02.01.2008 treated as such.
>
> 3. The loss sustained by the Govt. ie. Rs.4,400/- is to be recovered from Sri Rabindra Kumar Nayak, Forester.
>
> 4. He is to be warned for the future."

2.1 Against the said order of imposition of penalty, the petitioner preferred appeal before the Conservator of Forests-cum-Appellate Authority, who, vide order dated 17.01.2011, confirmed the order of punishment imposed by the disciplinary authority.Against the said order,the petitioner approached the Odisha Administrative Tribunal,Cuttack Bench, Cuttack by filing O.A. No.534(C) of 2011 and the Tribunal, vide order dated 03.10.2018, confirmed the order of punishment imposed by the disciplinary authority as well as the appellate authority. Hence, this writ petition.

3. Mr. R.K. Patnaik, learned counsel appearing for the petitioner vehemently contended that the DFO, Mahanadi Wildlife Division, Nayagarh, being the disciplinary authority, himself conducted enquiry and appointed one Sribatsa Dash, Junior Clerk, as the Presenting Officer. Thereby, he is the prosecutor as well as the Inquiring Officer and has become the Judge of his own cause. As such, the enquiry

conducted by the DFO, Mahanadi Wildlife Division, Nayagarh is illegal. It is further contended that after enquiry, the enquiry report was given to the petitioner and he was asked to file show-cause. Accordingly, he filed his reply to the show-cause on 08.04.2009 and, thereafter, the punishment was imposed by the disciplinary authority, i.e., DFO, Mahanadi Wildlife Division, Nayagarh, vide order dated 01.05.2009. It is contended that the DFO, Mahanadi Wildlife Division, Nayagarh, being the disciplinary authority, conducted enquiry and imposed penalty. Thereby, any action taken by the DFO, Mahanadi Wildlife Division, Nayagarh is hit by the principle of the Judge of his own cause. As a result, the order so passed by the disciplinary authority cannot be sustained in the eye of law and the same is liable to be quashed. To substantiate his contentions, he has relied upon the judgments of the apex Court in the cases of ***State of Uttaranchal v. Kharak Singh,*** *(2008) 8 SCC 236;* ***Mohd. Yunus Khan v. State of Uttar Pradesh,*** *(2010) 10 SCC 539****; and Ejaz Alam Siddique v. Presiding Officer, Industrial Tribunal,*** *2015(II) ILR-CUT-494*.

4. Mr. A.K. Mishra, learned Addl. Government Advocate appearing for the opposite parties vehemently disputed the contentions raised by learned counsel appearing for the petitioner and contended that the emphasis laid by the learned counsel for the petitioner, that the disciplinary authority at no point of time can become an Inquiry Officer-cum-Punishing Authority in a particular departmental proceeding for the ends of law and fair play of justice, as because no person shall become Judge of his own cause, is completely unfounded and incorrect. He, thus, contended that the entire process including the action taken by the disciplinary authority is well within the ambit of law and in consonance with Rule-15 of the OCS (CCA) Rules, 1962 as well as the principles of natural justice and fair play. It is further contended that, vide order dated 05.01.2008 under Annexure-6, a Presenting Officer was appointed by the DFO, Mahanadi Wildlife Division, Nayagarh in exercise of powers conferred under Rule-15(5) of the OCS (CCA) Rules, 1962 in order to present the case/charges on behalf of the Mahanadi Wildlife Division Nayagarh. In view of such provision, the disciplinary authority may nominate any person to present the case in support of the charges before the authority inquiring into the charges and after considering such documentary and oral evidence, as is relevant or material in regard to the charges, as per Rule-15(6) prepared a report of inquiry, recording its findings on each of the charges together with reasons thereof upon conclusion of the enquiry under Rule 15(7) of the Rules. Opposite party no.2-DFO, Mahanadi Wildlife Division, Nayagarh, being the disciplinary authority, is thus competent and empowered to enquire into the charges framed against the petitioner and there is no infirmity or violation of the provisions of law as such. He laid emphasis that DFO, Mahanadi Wildlife Division, Nayagarh, the disciplinary authority, had framed the charges against the petitioner on the basis of the reports of the ACF, Mahanadi Wildlife Division, Nayagarh dated 27.07.2007, the Range Officer, Kusanga Wildlife Range dated 25.06.2007 and the Range Officer Mobile Unit, Mahanadi Wildlife Division dated 12.06.2007. Therefore, on the basis of the

report of ACF,Mahanadi Wildlife Division dated 27.07.2007,the proceeding/enquiry was conducted by the DFO, Mahanadi Wildlife Division, Nayagarh by recording the statements of some of the witnesses, along with the petitioner, and the petitioner was granted sufficient opportunity to cross-examine the witnesses. The allegations having been established against the petitioner, punishment was imposed against him, which is within the domain of the disciplinary authority. Consequentially, no illegality or irregularity has been committed by the disciplinary authority by imposing such penalty. Thereby, dismissal of the writ petition is sought for. To substantiate his contentions, he has relied upon ***Union of India v. P. Gunasekaran, (2015) 2 SCC 610.***

5. This Court heard Mr. R.K. Patnaik, learned counsel appearing for the petitioner and Mr. A.K. Mishra, learned Addl. Government Advocate appearing for the opposite parties in hybrid mode. 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.

6. Before delving into the merits of the case, it is of relevance to refer to the rules governing the field for just and proper adjudication of the case. In exercise of powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Odisha framed the Odisha Civil Services (Classification, Control & Appeal) Rules, 1962 (hereinafter referred to as "OCS (CCA) Rules, 1962"). Rules 2(c), 15(4) and 15(5), being relevant for the purpose of the case, are extracted hereunder:-

> *"Rule-2(c). Disciplinary authority", in relation to the imposition of a penalty on a Government servant means the authority competent under these rules to impose on him that penalty."*
>
> *xxx xxx xxx*
>
> *"15(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.*
>
> *15(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."*

The OCS (CCA) Rules, 1962, having been framed by the proviso to Article 309 of the Constitution of India, is legislative in character. The powers of the Governor under the proviso to Article 309 are the constitutional powers and legislative in character subject to act of legislation.

7. In ***B.S. Vadera v. Union of India,*** *AIR 1969 SC 118*, the apex Court in paragraph-24 of the said judgment held that it is also significant to note that the proviso to Article 309, clearly lays down that 'any rules so made shall have effect, subject to the provisions of any such Act'. The clear and unambiguous expressions, used in the Constitution must be given their full and unrestricted meaning unless hedged-in, by any limitations. The rules, which have to be 'subject to the provisions of the Constitution', shall have effect, subject to the provisions of any such Act'.

8. In ***Bhakta Rame Gowda v. State of Karnataka*****,** *AIR 1997 SC 1038*, the apex Court, referring to its earlier Constitution Bench judgment in ***B.S. Vadera v. Union of India,*** *AIR 1969 SC 118,* held that rules made under the proviso to Article 309 of the Constitution are legislative in character. The same principle has been reiterated in several judgments of the apex Court.

9. In view of the law laid down by the apex Court, as mentioned above, the OCS (CCA) Rules, 1962, having been framed under the proviso to Article 309 of the Constitution of India, is legislative in character subject to limitation, as mentioned above. On perusal of the provision contained in Rule-15(4) of the OCS (CCA) Rules, 1962, it is made clear that 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 Inquiring Officer for the purpose. In view of such power provided under Rule-15(4) of the OCS (CCA) Rules, 1962, the disciplinary authority can conduct the enquiry itself or may appoint a board of inquiry or an Inquiring Officer, if he considers it necessary to do so.

10. It is well settled law in ***Nelson Motis v. Union of India, AIR 1992 SC 1981*** that if the words of a statute are clear and free from any vagueness and are, therefore, reasonably susceptible to only one meaning, it must be construed by giving effect to that meaning, irrespective of consequences.

Similar view has also been taken by the apex Court in State of ***Maharashtra v. Nanded-Parbhani Z.L.B.M Operator Sangh, AIR 2000 SC 725.***

11. On the face of the above settled position of law, there is no ambiguity in the provisions contained under Rule-15(4) of the OCS (CCA) Rules, 1962. Therefore, the disciplinary authority may himself enquire into such of the charges being an Inquiring Officer and being disciplinary authority can also impose punishment and to assist the Inquiry Officer under Sub-rule (5) of Rule-15 of the OCS (CCA) Rules, 1962, the disciplinary authority may nominate any person to present the case in support of the charges before the authority inquiring into the charges. Therefore, it is well within the domain of the DFO, Mahanadi Wildlife Division, Nayagarh, who

can himself conduct the inquiry and also can impose punishment as a disciplinary authority.

12. Much reliance has been placed on ***Kharak Singh*** (supra) by the learned counsel for the petitioner, wherein the Divisional Forest Officer acting as Inquiry Officer himself inspected the area where there was illicit felling, put certain questions to the respondent and after securing answers, submitted a report of enquiry. Neither was any presenting officer nor any prosecution witness examined. In that context, the apex Court in the said case held that the Inquiry Officer acted as investigator, prosecutor and also judge. Such a procedure is opposed to the principles of natural justice and the same was frowned upon by the Supreme Court.

Factually, the case in hand is absolutely distinguishable from the cited case, in view of the fact that on the basis of the report of the Assistant Conservator of Forests, Mahanadi Wildlife Division, Nayagarh, the DFO, being the disciplinary authority, pending contemplation of disciplinary proceeding, placed the petitioner on suspension and served with memorandum of charges calling upon the petitioner to file written statement and on consideration of the same examined the witnesses and documents available on record by appointing presenting officer under Rule-15(5) of the OCS (CCA) Rules, 1962, caused enquiry and, thereafter, imposed penalty being disciplinary authority and, as such, there is no bar under Rule-15(4) for the DFO, Mahanadi Wildlife Division, Nayagarh to continue as Inquiry Officer and also the disciplinary authority. Thereby, the ratio decided in ***Kharak Singh*** (supra) has no application to the present case and the same is distinguishable.

13. In ***Md. Yunus Khan*** (supra), the apex Court held that the authority initiating disciplinary proceedings, becoming a witness thereto, accepting enquiry report and imposing punishment is impermissible and no person can be a judge in his own cause and no witness can certify that his own testimony is true. Thereby, the procedure adopted there, was in flagrant violation of natural justice and consequentially stood vitiated.

Factually, the present case is absolutely distinguishable from Md***. Yunus Khan*** (supra). At no point of time, in the case at hand, the disciplinary authority has acted as a witness accepting enquiry report and imposing punishment on the delinquent-petitioner, rather the DFO, Mahanadi Wildlife Division, Nayagarh has acted in conformity with the provisions contained under the OCS (CCA) Rules, 1962 and, consequentially, the plea advanced by the learned counsel for the petitioner to that effect is not acceptable.

14. In ***Ejaz Alam Siddique*** (supra), learned Single Judge of this Court held that disciplinary authority himself was a witness in the proceeding and he has no competence to appoint the Inquiry Officer and acted as disciplinary authority. The ratio decided in that case is not applicable to the present case and it is akin to ***Md. Yunus Khan*** (supra). Thereby, the judgments of the apex Court and this Court relied upon by the learned counsel appearing for the petitioner are of no assistance to him.

15. In ***P. Gunasekaran*** (supra), the apex Court in paragraphs-12 and 13 laid down the principle with regard to scope of interference in a service matter and when interference with disciplinary proceedings is permissible. The said paragraphs-12 and 13 are extracted hereunder:-

> *"12. Despite the well–settled position, it is painfully disturbing to note that the High Court acted as an appellate authority in the disciplinary proceedings, reappreciating even the evidence before the enquiry officer. The finding on Charge I was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Articles 226/227 of the Constitution of India, shall not venture into reappreciation of the evidence.*
>
> *The High Court can only see whether:*
>
> *(a) the enquiry is held by a competent authority;*
>
> *(b) the enquiry is held according to the procedure prescribed in that behalf;*
>
> *(c) there is violation of the principles of natural justice in conducting the proceedings;*
>
> *(d) the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;*
>
> *(e) the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;*
>
> *(f) the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;*
>
> *(g) the disciplinary authority has erroneously failed to admit the admissible and material evidence;*
>
> *(h) the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;*
>
> *(i) the finding of fact is based on no evidence.*
>
> *13. Under Articles 226/227 of the Constitution of India, the High Court shall not:*
>
> *(i) reappreciate the evidence;*
>
> *(ii) interfere with the conclusion in the enquiry, in case the same has been conducted in accordance with law;*
>
> *(iii) go into the adequacy of the evidence:*
>
> *(iv) go into the reliability of the evidence;*
>
> *(v) interfere, if there be some legal evidence on which findings can be based.*
>
> *(vi) correct the error of fact however grave it may appear to be*
>
> *(vii) go into the proportionality of punishment unless it shocks its conscience."*

16. Taking into consideration the aforementioned principles laid down by the apex Court and applying the same to the present case, since the DFO, Mahanadi Wildlife Division, Nayagarh, being the disciplinary authority, has acted as an Enquiry Officer as per Rule-15(4) of OCS (CCA) Rules, 1962 and imposed punishment, thereby, he has acted within the parameters of the provisions of law by

affording opportunity of hearing to the petitioner. As a consequence thereof, this Court does not find any error in the order impugned so as to cause interference of this Court.

17. In the result, therefore, the writ petition merits no consideration and the same is hereby dismissed, but, however, there shall be no order as to costs.

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2023 (II) ILR- CUT - 736

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

W.P.(C) NOS. 651, 652 ,653, 654 OF 2012
AND
W.P.(C) NO. 3854 OF 2012

M/s. BATA INDIA LTD. .....Petitioner

-V-

PRESIDING OFFICER,INDUSTRIAL TRIBUNAL, BHUBANESWAR & ANR. .....Opp. Parties

(A) CONSTITUTION OF INDIA,1950 – Articles 226, 227 – Whether interfering with the concurrent findings of fact held by the labour court is permissible – Held, No. (Para 13-14)

(B) BACK WAGES – When permissible – Held, the workman is only entitled to get back wages when the laches has been done by the management, if the reinstatement is not done in compliance to the direction of the Tribunal. (Para-15)

Case Laws Relied on and Referred to :-

1. AIR 1984 SC 500 : Gammon India Limited Vs. Niranjan Dass.
2. AIR 2006 SC 355 : R.M. Yellatti Vs. Assistant Executive Engineer.

For Petitioner : M/s. P. Varma, B.Pasayat, P. Priyotosh, T. Verma & L Mishra
M/s. S.K.Mishra, J. Pradhan, P.S. Mohanty & P.K. Mishra

For Opp. Parties : Mr. P.K. Muduli, AGA
Mr. D.K. Pani, (Amicus Curiae)
M/s. S.K.Mishra, J. Pradhan, P.S. Mohanty & P.K. Mishra

M/s. P. Verma, B. Pasayat, P. Priyotosh, T. Verma & L. Mishra

JUDGMENT Date of Hearing: 04.05.2023 : Date of Judgment: 09.05.2023

Dr. B.R. SARANGI, J.

M/s. Bata India Limited, a company registered under the Companies Registration Act, 1956, has filed W.P.(C) No. 651 of 2012, W.P.(C) No. 652 of 2012, W.P.(C) No. 653 of 2012 and W.P.(C) No. 654 of 2012, in which challenge has been made respectively to the award dated 09.11.2011 passed in I.D. Case No. 10 of 2010, the award dated 19.11.2011 passed in I.D. Case No.5 of 2010, the award dated 14.11.2011 passed in I.D. Case No.11 of 2010 and the award dated 22.11.2011 passed in I.D. Case No.37 of 2010 by the Presiding Officer, Industrial Tribunal, Bhubaneswar for reinstatement of the workmen without any back wages and directed to pay the back wages w.e.f. the date of award till the reinstatement. The workman-Nirmal Kumar Nayak, who is opposite party no.2 in W.P.(C) No.652 of 2012, has filed W.P.(C) No. 3854 of 2012 challenging the award dated 19.11.2011 passed in I.D. Case No. 5 of 2010 by the Presiding Officer, Industrial Tribunal, Bhubaneswar, so far as rejection of the claim of the petitioner for grant of back wages is concerned.

2. At the outset, this Court deems it proper to make a mention that opposite party no.2-workman in W.P.(C) No. 654 of 2012 expired during pendency of the said writ petition, but the petitioner-Management deliberately and willfully did not bring the said fact to the notice of the Court nor took steps for substitution of legal representatives of opposite party no.2. However, this Court directed the petitioner-Management to take steps in terms of Section 17-B of the Industrial Disputes Act, 1947 for disbursement of the dues in favour of the legal representatives of opposite party no.2. Even though opposite party no.2 in W.P.(C) No. 654 of 2012 has not been substituted, since this writ petition is connected to other batch of writ petitions, it is also taken up along with the connected writ petitions and is disposed of by this common judgment.

3. In addition to what has been stated above, it is further relevant to note that the facts and law involved in all these writ petitions are by and large similar. Not only that, in the awards, against which these writ petitions are directed, the Tribunal has issued a common direction, that the Management shall reinstate the workmen without any back wages and if there will be delay in the implementation of the award for any reason whatsoever the Management shall be liable to pay the back wages from the date the award becomes enforceable till the date of its implementation. Therefore, these writ petitions were heard together and are disposed of by this common judgment, which shall govern all the cases.

4. For the sake of convenience and proper adjudication of all these writ petitions, the facts of W.P.(C) No. 651 of 2012 are taken note of.

4.1 As is borne out from the records, opposite party no.2 in W.P.(C) No. 651 of 2012 was appointed as a Salesman by the Shop Manager of M/s. Bata Shoe Store situated at Plot No.5, Khurda Road (Railway Market), Jatni, Bhubaneswar to work

on daily wage basis. Accordingly, he joined in his duty on 10.12.2002 and continued as such till 21.04.2009. During the period from 10.12.2002 to 21.04.2009, he had worked in the shop continuously. On 21.04.2009, he was refused employment without any reason, which amounts to retrenchment from service. As a consequence thereof, he raised an industrial dispute. The conciliation having been failed, a reference was made under Section 10 of the Industrial Disputes Act, 1947 by the Government of Odisha in the Labour and Employment Department, vide order dated 17.03.2010. The schedule of reference reads as follows:-

> "*Whether the action of the Management of M/s. Bata India Ltd., Kalpana Square, Bhubaneswar represented through M/s. Bata Shoe Store, Railway Market, Jatni, a Sales Unit in terminating the services of Sri Dhruba Ranjan Pattnaik, Salesman with effect from 21.4.2009 is legal and/or justified ? If not, to what relief Sri Pattnaik is entitled?*

4.2 Accordingly, Industrial Dispute Case No.10 of 2010 was registered before the Industrial Tribunal, Bhubaneswar. Consequentially, opposite party no.2 filed his statement of claim, basing upon which notice was issued to the Management. In response thereto, the Management filed its written statement on 17.01.2011 denying and disputing the stand taken by opposite party no.2. It was specifically contended that opposite party no.2-workman was not appointed by the Management, but by the Shop Manager as a temporary hand as per the daily requirement. The work assigned to opposite party no.2-workman by the Shop Manager was intermittent and sporadic and it was never regular or perennial in nature. The opposite party no.2-workman used to be engaged as per the requirement of the shop which arises mostly during the festival season. Since his job was temporary in nature, he was liable to be released from employment by the Shop Manager as and when work was not available for him. Since the work was temporary and seasonal and throughout the period of different engagements with the Management, the workman had never completed 240 days in a calendar year, therefore, he is not liable for regularization nor required to be terminated in terms of the provisions of Industrial Disputes Act, 1947. As such, there is no requirement for compliance of the provisions of the Industrial Disputes Act, 1947 and disputed the fact that the workman had rendered continuous and uninterrupted service from 10.12.2002 to 21.04.2009.

4.3. In support of his claim, the workman examined himself as W.W. No.1 and a co-workman as W.W.No. 2. On behalf of the Management the District Manager was examined as M.W. No.1. Similarly, to establish the case, the workman exhibited the documents marked as Exts.1to 8, but on behalf of the Management, no document was exhibited.

4.4. Basing on the contentions raised by both the parties, the Tribunal framed three issues to the follwing effect:-

> *1) Whether there is workman-employer relationship between the parties?*
>
> *2) Whether the action of the Management of M/s.-Bata India Ltd., Kalpana Square, Bhubaneswar represented through M/s. Bata Shoe Store, Railway Market Jatni, a sales*

unit in terminating the services of Sri Dhruba Ranjan Pattnaik, Salesman with effect from 21.4.2009 is legal and/or justified ?

3) If not, to what relief Sri Pattnaik is entitled?

4.5. The Tribunal, in the impugned award, answered issue no.1 holding that there exists workman-employer relationship between the parties. So far as issue no.2 is concerned, the Tribunal held that the termination of the service of the workman on 21.04.2009 is neither legal nor justified. Therefore, while answering issue no.3 the Tribunal directed for reinstatement of the workman in service, without any back wages, but observed that if there will be delay in the implementation of the award for any reason whatsoever, the Management shall be liable to pay the back wages from the date the award becomes enforceable till the date of its implementation.

4.6 Hence, the Management has filed this writ petition [W.P.(C) No.651 of 2012] challenging the award dated 09.11.2011 passed in I.D. Case No.10 of 2010. Since similar awards were passed in respect of the workmen in the connected I.D. cases, the Management has filed the connected writ petitions, i.e., W.P.(C) Nos.652, 653 and 654 of 2012. But, so far as W.P.(C) No. 3854 of 2012 is concerned, as already stated, the said writ petition has been preferred by the workman challenging the refusal of back wages by the Tribunal.

5. Mr. Pradipta Varma, learned counsel appearing for the Management contended that the Tribunal has committed grave error, which is apparent on the face of the record, by holding that the workman being appointed on temporary basis, there was no need to keep any detail or proof thereof, rather, the burden of proof lies on the workman to prove whether he was employed on regular basis and had completed stipulated period of time for being considered for reinstatement as a temporary hand. He further contended that since the workman had not completed 240 days in a year, on the basis of absence of clear averment made by the workman and on the basis of non-filing of any supporting documents regarding the same, the direction given by the Tribunal, for the workman's reinstatement in service, cannot be sustained in the eye of law. His further contention is that since the workman was engaged on temporary basis, as per the rules and regulations he could not have been directed to be reinstated. He emphatically submitted that since the workman was engaged on temporary basis, there is no requirement for compliance of any provision of Industrial Disputes Act, 1947 by the Management. Therefore, he seeks for quashing of the impugned awards passed by the Tribunal.

6. Mr. D.K. Pani, learned counsel, who has been engaged as *Amicus Curiae* to assist the Court on behalf of the workman in all the writ petitions filed by the Management, while justifying the order passed by the Industrial Tribunal, emphatically contended that the workmen had established their case and as their termination was made without following the procedure envisaged under Section 25F of the Industrial Disputes Act, 1947, the same was void ab *initio* and, therefore, the Tribunal is well justified in passing the impugned awards, which does not require

interference by this Court at this stage. To substantiate his contention, he placed reliance on ***Gammon India Limited v. Niranjan Dass,*** *AIR 1984 SC 500* and ***R.M. Yellatti v. Assistant Executive Engineer****, AIR 2006 SC 355*

7. Mr. S.K. Mishra, learned counsel appearing for the workman-petitioner in W.P.(C) No. 3854 of 2012 has heavily relied upon the additional affidavit filed by the petitioner enclosing therewith the Standing Orders & Rules for Shop Employees formulated by Bata India Limited, Clause-5 whereof prescribes the conditions of service and Sub-clause-A thereof deals with the recruitment & appointment and Sub-clause-B thereof deals with classification of service. As per the said Standing Orders, on completion of the probationary period, the probationer will be made permanent employee and a letter to that effect will be issued to him. The Company may also at its discretion extend the period of probation of an employee who fails to attain the required standard during the said term, by any period as may be determined by the Company. If no letter is issued to this effect, probationary period will be deemed to have been automatically extended for a further period of six months. In such view of matter, it is contended that since the workmen were engaged and allowed to continue for years together, termination of their services without complying the provisions contained under Section 25F cannot be sustained. Accordingly, the Tribunal is well justified in issuing direction for their reinstatement in service, but committed an error by not granting back wages to the workmen, as no fault can be attributable to such workmen for not discharging their duties. Thereby, he claims for grant of back wages to the workmen.

8. This Court heard Mr. Pradipta Varma, learned counsel appearing for the petitioner-Management in W.P.(C) Nos. 651, 652, 653 and 654 of 2012, Mr. S.K. Mishra, learned counsel appearing for the petitioner-workman in W.P.(C) No. 3854 of 2012 and Mr. D.K. Pani, learned Amicus Curiae appearing for the workmen-opposite parties 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 petitions are being disposed of finally at the stage of admission.

9. The undisputed facts, as narrated above, clearly indicate that the workman-opposite party in W.P.(C) No. 651 of 2012 though was engaged on temporary basis, but there was no such document like appointment order showing the terms and conditions of employment. As such, there is no dispute from the side of the Management that the workman had worked during the period from 10.12.2002 to 21.04.2009. Even during cross-examination of the workman, it was elucidated that the shop in question was running by franchise. But that plea is not made available in the written statement filed by the Management. The District Manager, during his cross-examination, has admitted that the Shop Manager of Bata Shoe Shop is a permanent employee of M/s. Bata India Ltd. He has also stated in his evidence that in case of any need, the Shop Manager appoints temporary Salesman for a limited period and pays remuneration to the temporary hand from out of the sale proceeds of

the shop. Therefore, the Tribunal, taking into consideration such statement of the District Manager (M.W.1), came to a definite conclusion that the workman was employed by the Shop Manager as a temporary hand but such employment was made on behalf of M/s. Bata India Ltd. The workman had relied on the documents exhibited by him as Exts.1 to 5 to prove that he was an employee of M/s. Bata India Ltd. But, those documents did not reflect that the workman was employed by the District Manager of Bata India Ltd, as averred in the claim statement. Therefore, he was employed as a temporary hand, which has also been admitted by the workman that he was employed on daily wage basis. As he was engaged on behalf of M/s. Bata India Ltd., therefore, there exists a relationship of workman-employer between them. Consequentially, if at all the employer wants to retrench the service of the workman, he has to follow the procedure as envisaged under the Industrial Disputes Act, 1947.

10. The materials on record, including Ext.1, i.e., copy of the pay slip for the period from 09.01.2006 to 29.01.2006, clearly reveal that the workman was initially engaged on 10.12.2002 and it was admitted by the workman that on and from 21.04.2009 he was denied employment. Therefore, the workman was under continuous employment in the Bata Shoe Shop from 10.12.2002 to 21.04.2009. But, the same was refuted by the Management contending that he had not rendered continuous and uninterrupted service starting from 10.12.2002 till 21.04.2009. Nothing has been placed on record, either by written or oral evidence, to substantiate the same. More so, the Management had never taken a specific plea that the workman had not completed 240 days of work in each calendar year during his employment. On the prayer of the workman to produce documents, such as, salary sheets and provident fund card, the Management in their objection took the stand that such documents are not available with them. If the documents pertaining to the salary sheets and provident fund card are available with the Management, merely by showing ignorance that such documents are not available, the Management cannot absolve their liability to reinstate the workman in service. Therefore, the explanation, which had been given by the Management, being not convincing, the Tribunal is well justified in drawing an adverse inference against the Management.

11. The plea of the Management that the workman was not working continuously or uninterruptedly, that was not established by producing any material before the Tribunal. As such, the Management failed to produce any material to substantiate such contention. The workman having been engaged in each of the calendar months covered by the period from 10.12.2002 to 21.04.2009, the presumption was drawn that the workman was engaged for more than 240 days in each of the calendar year as mentioned above. Therefore, termination of service of such employee was in gross violation of the provisions contained under Section 25F of the Industrial Disputes Act, 1947 and, as such, the same is illegal. More so, the Management has failed to show the reason for termination of the service of the

workman. Thereby, the Tribunal is well justified in coming to a conclusion that retrenchment/ termination of service of the workman from 21.04.2009 is neither legal nor justified, as the provisions of Section 25F of the Industrial Disputes Act, 1947 have not been complied with.

12. In ***Gammon India Limited*** (supra), the apex Court observed that the pre-requisite for a valid retrenchment as laid down in Section 25F has not been complied with and, therefore, the retrenchment bringing about termination of service is void ab initio. Therefore, held that the award of the Industrial Tribunal is correct and unassailable and, thereby, the learned Single Judge fell into error in interfering with the same and the Division Bench of the High Court has rightly set aside the order of the learned Single Judge and restored the award for reasons of its own. It was further held that if the workman has been unlawfully kept out of service, therefore, it is but just that the Management shall pay all the arrears as calculated according to the directions given with 12% interest from the date the amount became due and payable till realization.

13. In ***R.M. Yellatti*** (supra), the apex Court held that mere affidavits or self-serving statements made by the claimant/workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked 240 days in a given year. The judgments which have been referred to further lay down that mere non-production of muster rolls per se without any plea of suppression by the workman will not be a ground for the Tribunal to draw an adverse inference against the Management. However, the judgments lay down the basic principle, namely, that the High Court under Article 226 of Constitution will not interfere with the concurrent findings of the fact recorded by the Labour Court unless they are perverse and that this exercise will depend upon facts of each case. It has also been held that the Management was duty bound to produce before the Labour Court the nominal muster rolls for the relevant period, particularly when it was summoned to do so. But the workman had stepped in the witness box and his case that he had worked for 240 days in a given year was supported by certificate. Thereby the Division Bench of the High Court had erred in interfering with the concurrent findings of fact.

14. Applying the above principle to the present case, it is made clear that the Management has not filed any document or adduced any evidence, either written or oral, to substantiate the fact that the workman had not worked for 240 days. On the contrary, the workman had examined himself as a witness and produced the material to establish that he had rendered service for more than 240 days in a calendar year. In view of such position, if the petitioner was continuing in service for more than 240 days, then for any termination or retrenchment, the Management had to follow the provisions contained under Section 25F of the Industrial Disputes Act, 1947. For non-compliance thereof, the termination/ retrenchment cannot be sustained in the eye of law. Thereby, this Court does not find any error apparent on the face of the

award impugned passed by the Industrial Tribunal so as to cause any interference at this Stage.

15. In view of the analysis made above, this Court is of the considered view that the Tribunal is well justified in directing reinstatement of the workman in service. So far as grant of back wages is concerned, for the period the workman has not rendered the work, he is not entitled to get the back wages. But the Tribunal has directed that the workman is to be reinstated in service without any back wages, but, however, if there will be delay in the implementation of the award for any reason whatsoever, the Management shall be liable to pay the back wages from the date the award becomes enforceable till the date of its implementation. Therefore, it is well justified that the workman is only entitled to get back wages because of the laches on the part of the Management, if the reinstatement is not done in compliance to the direction of the Tribunal.

16. In view of such position, this Court does not find any illegality or irregularity in the impugned awards passed by the Tribunal so as to cause interference by this Court. Accordingly, the same are confirmed and the Management is directed to comply with the awards passed by the Tribunal forthwith and extend the benefit of back wages from the dates of the awards till reinstatement of the workmen in their service.

17. In the result, the writ petitions filed by the Management cannot be sustained and accordingly the same are hereby dismissed. So far as W.P.(C) No. 3584 of 2012 is concerned, in view of the discussion made in the foregoing paragraphs, the said writ petition filed by the workman is disposed of accordingly. However, there shall be no order as to costs.

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2023 (II) ILR – CUT - 743

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

STREV NO. 74 OF 2017

M/s.CORPORATE ENGINEERS & ASSOCIATES, BHUBANESWAR .....Petitioner

-V-

STATE OF ODISHA, COMMNR. OF SALES TAX .....Opp. Party

ODISHA VALUE ADDED TAX ACT, 2004 – Section 42(5) – Whether the Sales Tax Tribunal was right in law in holding that 150HP fully automotive ATS control panel, motor starter control panel and other panel are unspecified goods and liable to tax at 13.5% and not falling under Entry Serial no 29, Part-II of schedule-B of the OVAT Act – Held,

No. – The above commodities are comprehended in the term "accessories" as per entry in serial no 29 of part-II of schedule-B appended to the OVAT Act, which attracts rate of tax @ 4% for the tax periods prior to 01.04.2012 and @ 5% for the tax periods commencing from 01.04.2012. (Para 144)

Case Laws Relied on and Referred to :-

1. (1991) 80 STC 233 (SC) = AIR 1991 SC 1017 = 1990 SCR Supl. (3) 61: Mehra Bros. Vs. Joint Commercial Tax Officer.
2. ILR 1974 CUT 1367 : State of Odisha Vs. Rajkumar Agarwalla.
3. (1985) 60 STC 213 (SC) : State of Orissa Vs. Titaghur Paper Mills Co. Ltd.
4. 2022 (I) ILR-CUT 796 : Purna Chandra Mohapatra Vs. State of Odisha.
5. (1972) 30 STC 372 (All) : Sales Tax Commissioner Vs. Lachman Singh.
6. 1987 (31) ELT 344 (Mad) : TI Miller Limited Vs. Union of India.
7. (1989) 73 STC 120 (AP) : Universal Radiators Vs. State of Andhra Pradesh.
8. (1999) 116 STC 261 (Guj) : Jay Industries Vs. State of Gujarat.
9. 2002 (141) ELT 352 (Raj): Union of India Vs. Rishabydev Textiles .
10. (1991) 1 SCC 514 : Mehra Bros. Vs. Jt. CTO.
11. (2007) 8 VST 705 (SC) : Pragati Silicons Pvt. Ltd. Vs. CCE.
12. (1976) 2 SCC 273 : Annapurna Carbon Industries Co. Vs. State of AP.
13. 2022 (I) ILR-CUT 796 : Purna Chandra Mohapatra Vs. State of Odisha.
14. 2008 (224) ELT 512 (SC) : Commissioner of Central Excise, Delhi Vs. Insulation Electrical (P) Ltd.
15. (1971) 27 STC 178 (AP):K.V. Narasimulu Vs. State of Andhra Pradesh.
16. (2014) 11 SCR 331: State of Punjab Vs. Nokia India Pvt. Ltd.
17. 1988 (37) ELT 480 (SC) : Collector of Central Excise, Kanpur Vs. Krishna Carbon Paper Co.
18. (1973) 3 SCC 496 : CST Vs. S.N. Brothers, Kanpur.
19. (1994) 72 ELT 513 (SC) : CCE Vs. Fenoplast Pvt. Ltd.
20. (1987) 64 STC 180 (SC) : Indian Aluminium Cables Ltd. Vs. Union of India.
21. (2011) 13 SCC 275:Agarwal Oil Refinery Corporation Vs. Commissioner of Trade Tax.
22. ILR 1974 CUT 1367 : State of Odisha Vs. Rajkumar Agarwalla.
23. (2008) 16 VST 181 (SC) : Steel Authority of India Limited Vs. Sales Tax Officer.
24. (2023) 4 SCR 430 : SAP Labs India Private Limited Vs. Income Tax Officer.
25. (1959) 37 ITR 151 (SC) : Omar Salay Mohamed Sait Vs. CIT.
26. AIR 1990 SC 616 : Bharat Forge & Press Industries P. Ltd. Vs. CCE.
27. (1991) Supp. 1 SCC 125 : Indian Metals & Ferro Alloys Ltd. Vs. CCE.

For Petitioner : M/s. Chitta Ranjan Das & Padmalaya Mohapatra

For Opp. Party : Mr. Sunil Mishra, Standing Counsel (CT & GST Organisation)

JUDGMENT Date of Hearing: 04.07.2023 : Date of Judgment: 11.07.2023

MURAHARI SRI RAMAN, J.

1. M/s. Corporate Engineers and Associates, a partnership firm, has approached this Court invoking provisions of Section 80 of the Odisha Value Added Tax Act, 2004, assailing the Order dated 20.06.2017 passed by the Odisha Sales Tax

Tribunal in Second Appeal bearing No. 188 (VAT) of 2015-16 partly allowing the appeal filed by the State of Odisha-opposite party against the Order dated 17.04.2015 passed by the Deputy Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar in the first appeal bearing No. AA 106221422000213 arising out of Assessment framed vide Order dated 10.09.2014 under Section 42 of said Act, 2004 read with Rule 49 of the Odisha Value Added Tax Rules, 2005 by the Sales Tax Officer, Bhubaneswar-I Circle, Bhubaneswar pertaining to the tax periods from 01.04.2011 to 31.03.2013.

FACTS OF THE CASE:

2. The assessee-petitioner being a registered dealer under the Odisha Value Added Tax Act, 2004 (for short referred to as "OVAT Act"), carries on its business in manufacturing and trading of electrical goods and equipments for industrial use, electric generator, pump sets and its spares and accessories etc. This apart, it is engaged in supply, erection, installation and commissioning of contract work.

2.1. Being selected under Section 41 of the OVAT Act, tax audit was conducted and Audit Visit Report was submitted to the Assessing Authority-Sales Tax Officer, Bhubaneswar-I Circle, Bhubaneswar, consequent upon which Assessment under Section 42 was framed taking into account observation/objection contained in the Audit Visit Report inter alia that the petitioner-dealer had misclassified the item, namely 150 HP Fully Automatic ATS (Auto-Transformer Starter) Control Panel, Motor Starter Panel Board and other Control Panel (hereinafter referred to as "ATS"), as a result of which there was a short levy of value added tax. The Assessing Authority has raised a demand of tax to the tune of Rs.52,517/-. Besides demand of tax, the Assessing Authority imposed penalty twice the amount of tax so assessed invoking provisions of sub-section (5) of Section 42.

2.2. Aggrieved, the petitioner-firm availed the remedy under Section 77 of the OVAT Act by way of filing first appeal bearing No.AA 106221422000213. The Deputy Commissioner of Sales Tax (Appeal), Bhubaneswar Range, Bhubaneswar ("Appellate Authority", in short) acceded to the explanation proffered by the petitioner and allowed the appeal partly by observing thus:

> *"*** In course of their visit, the Audit team verified the books of accounts and observed that the dealer had been selling purely electrical goods like 150HP Fully Automatic ATS Control Panel, motor starter panel board and other control panel levying VAT 5% instead of 13.5% under Part-III of Schedule B of the OVAT Act. Basic price of such sales were calculated to be Rs.5,57,534.00. On being confronted by the STO (Audit), the dealer argued that these goods are not the electrical goods in strict sense, rather those are accessories of pump sets exigible to VAT @5% under the OVAT Act. Interpreting the items in question as unspecified ones, the STO (Audit) recommended for realization of differential taxes. The same contention was raised in assessment also and the learned Advocate also submitted that these goods were purchased from registered dealers on payment of VAT @4%. The contention of the learned Advocate having been found to be unsatisfactory, the learned Assessing Authority rejected the averment and, thereby,*

accepted the allegation levelled in the AVR. Thus the dispute relates to taxability of the 'Control Panel, Motor Start Panel Board and other Control Panel'.

The learned Advocate, in the grounds of Appeal, has submitted that in the instant case, the dealer basically deals in 'Pump sets, Accessories and Spare parts' thereof under agriculture and PHD Sector. The appellant-dealer is also used to purchase the accessories and spare parts of pumps from registered dealer of inside the State by paying the tax as the rate applicable for pump sets as @4% or @5%. The copy purchase bills issued by M/s. S.L. Associates, TIN-21885600440, Bhubaneswar was furnished in this forum for confirmation and consideration. Entry No.29 of Part-II of Schedule B of the Act says that 'Centrifugal, Monoblock and Submersible pumps and pump sets for handling water operated electrically or otherwise and parts and accessories thereof' are exigible to VAT @4% / 5% as the case may be."

2.3. Alleging that the Appellate Authority having blindly accepted the explanation of the petitioner, the first appellate order being perverse, the State of Odisha represented by the Commissioner of Sales Tax, Odisha carried the matter before the Odisha Sales Tax Tribunal under Section 78 of the OVAT Act which was registered as S.A. No.188 (VAT) of 2015-16 on the ground amongst others that the ATS attracts levy of value added tax @13.5% as it falls within ken of Part-III of Schedule-B appended to said Act.

2.4. Accepting the plea, the learned Sales Tax Tribunal allowed the second appeal preferred at the behest of the State of Odisha by stating thus:

"After going through all the aspects of the case, it is my considered opinion that, in the instant case the demand has been raised on two grounds: (i) Tax was levied @13.5% towards sale of 150HP fully automotive ATS control panel, Motor starter panel pump and other control panel as unspecified goods. Whereas the First Appellate Authority has allowed the said items to be taxed @5% as a spare parts/accessories of pump sets on the ground that the fora below has not inquired into the veracity of the items dealt by the dealer-respondent. It is pertinent to mention here that, the First Appellate Authority himself has not made any inquiry before arriving such a conclusion of taxing of aforesaid items at a lower rate. Therefore the findings given by Assessing Authority is now sustained.

Secondly, with regard to the reversal of ITC on the peruse the order of learned DCST and found the transaction relating to inverter battery is interpreted as a case of sale suppression. So an amount of Rs.14,826.00 is added to the gross turnover disclosed. Further, he has included 10% towards profit margin. Accordingly, the dealer has disclosed the purchase in the purchase register. In the above facts and circumstances the action of the learned DCST cannot be said to be wrong."

Accordingly, the learned Odisha Sales Tax Tribunal setting aside the order of the Appellate Authority, remanded the matter to the Assessing Authority for fresh assessment by applying rate of tax @13.5% on sale of ATS as per entry specified in Part-III, Schedule-B.

3. Dissatisfied, the petitioner-dealer, with a prayer to quash the Order-in-Second Appeal dated 20.06.2017 (Annexure-4) moved this Court by way of instant

revision under Section 80 of the OVAT Act, and posited the following questions of law:

> *I. Whether, on the facts and circumstances of the case, the Single Bench, Judicial Member-II, Odisha Sales Tax Tribunal was right in law in holding that 150HP fully automotive ATS control panel, motor starter control panel and other panel are unspecified goods liable to tax at 13.5% and not falling under Entry Sl. No. 29 of Part II of Schedule B of the OVAT Act.*
>
> *II. Whether, on the facts and circumstances of the case the Single Bench, Judicial Member-II, Odisha Sales Tax Tribunal is right in law, in remanding the matter to the Sales Tax Officer for fresh assessment by directing to demand tax @13.5% on the goods 150HP fully automotive ATS control panel, motor starter control panel and other panel, which also gives scope for imposition of penalty under Section 42(5) of the OVAT Act, when the issue involved is classification and interpretation of goods, whether the above goods are falling under Entry Sl. No. 29 of Part II of Schedule B or are unspecified goods.*
>
> *III. Any other question of law as the Honourable Court deems fit and proper out of the said order of the Division Bench, Odisha Sales Tax, Tribunal, Cuttack?*

QUESTION OF LAW FRAMED FOR ADJUDICATION:

4. This Court while entertaining revision petition, passed the following Order on 12.03.2018:

> *"Heard Mr. C.R. Das, learned counsel for the petitioner.*
>
> *This Sales Tax Revision is admitted on the following substantial question of law:*
>
> *I. Whether in the facts and circumstances of the case, the Single Bench, Judicial Member-II, Odisha Sales Tax Tribunal was right in law in holding that 150 HP fully automotive ATS control panel, motor starter control panel and other panel are unspecified goods liable to tax at 13.5% and not falling under Entry Serial No.29, Part-II of Schedule-B of the OVAT Act.*
>
> *Issue notice. ***"*

4.1. At the stage of hearing of the matter, Sri Chitta Ranjan Das, learned counsel confined his arguments to the aforesaid question of law as framed by this Court.

4.2. Therefore, this Court is called upon to consider whether on the facts and in the circumstances of the case, the tax periods involved in the assessment being 01.04.2011 to 31.03.2013, ATS falls within the scope of Entry Serial No.29 of Part-II of Schedule-B so as to attract levy of value added tax @4% [prior to 01.04.2012] and @5% [with effect from 01.04.2012] or subject to tax @13.5% as per entry in Part-III of Schedule-B appended to the Odisha Value Added Tax Act, 2004?

4.3. Accordingly, this Court proceeded to hear the matter on the consent of the counsel for the respective parties.

ARGUMENTS ADVANCED BY THE RESPECTIVE PARTIES:

5. Sri Chitta Ranjan Das, learned counsel for the petitioner submitted that the explanation of the petitioner that the commodities in question (ATS), being

"accessories" used exclusively for "Centrifugal, Monoblock, Submersible pump and pump sets for handling water" do comprehend within the description in Entry at Serial No.29 of Part-II of Schedule-B appended to the OVAT Act, but the same was treated under misconception by the Assessing Authority to be "electrical goods" so as to attract levy of tax @13.5% under residuary entry contained in Part-III, Schedule-B.

5.1. Sri Chitta Ranjan Das, learned counsel urged that it is erroneous approach of the learned Odisha Sales Tax Tribunal that the Appellate Authority instead of investigating the matter for himself, observing that the Assessing Authority did not conduct any enquiry with regard to issue as to whether ATS would fall within the meaning of the term "accessories" could not have nullified the demand. He, thus, went on to submit that fishing and roving enquiry is anathema to the assessment. When the petitioner-dealer had made rightful claim with respect to classification, without any material on record and justifiable reason the Assessing Authority ought not to have turned down the explanation of the dealer.

5.2. The learned counsel for the petitioner further submitted that ATS falls within ambit of Entry in Serial No.29 of Part-II of Schedule-B subject to levy of tax @4% [up to 31.03.2012] and @5% [with effect from 01.04.2012], and therefore, other registered dealers including manufacturers and sellers charge said commodities accordingly. The instant petitioner-dealer could not have been saddled with huge burden of tax @13.5% by treating the same to have fallen within scope of residuary entry as per Part-III, Schedule-B. The Appellate Authority was correct in observing that "neither the STO (Audit) nor the learned Assessing Authority enquired into, at any point of time, the business activities of the selling dealer, M/s. S.L. Associates, TIN 21885600440, Bhubaneswar and other dealers dealing in these goods".

5.3. It is vehemently contended that the Assessing Authority should not have mechanically accepted the version of the STO (Audit) and discarded the explanation of the Assessee-petitioner. It has consistently been the stand of the petitioner-firm that ATS sold by the dealer is nothing but accessories to pump and pump sets. As the term "accessory" is not defined in the statute, reference has been made to the meaning given in *Black's Law Dictrionary, Fifth Edition*. Sri Chitta Ranjan Das, learned Advocate advancing argument further would submit that though ATS is not indispensable to the main article, for convenient functioning of it, the same is used. Motor Starter and Control Panel consist of electrical goods, like power contactor, thermal overload relays, AMPs, volt meters, etc. Hence ATS is "accessory" for Centrifugal, Monoblock and Submersible pumps and pump sets for handling water. For this purpose, the learned counsel for the petitioner has placed reliance on the ratio of *Mehra Bros. Vrs. Joint Commercial Tax Officer, (1991) 80 STC 233 (SC) = AIR 1991 SC 1017 = 1990 SCR Supl. (3) 61.* Sri Chitta Ranjan Das, therefore, opposed the finding and conclusion of the learned Tribunal and submitted that it is inapt to hold that ATS would fall within scope of Part-III of Schedule-B.

6. Sri Sunil Mishra, learned Standing Counsel for the Commercial Tax & Goods and Services Tax Organisation supporting the Order-in-Second Appeal, submitted that no infirmity can be imputed against the Order so passed by the learned Odisha Sales Tax Tribunal. Since there was no enquiry conducted by the Appellate Authority, the objection raised in the Audit Visit Report has been confirmed in the Assessment, as such the impugned Order warrants no interference. The petitioner was rightly fastened with liability @13.5% as per Part-III of Schedule-B.

7. Sri Chitta Ranjan Das, learned counsel for the petitioner at this juncture brought to the notice of this Court that in obedience to the Order dated 10.01.2023, he filed Certificate issued by the manufacturer/supplier-M/s. BCH Electric Limited forming part of an Affidavit dated 26.06.2023 sworn to by Sri Arbinda Patra, Managing Partner of M/s. Corporate Engineers and Associates, Authorised dealer of said Company. The learned counsel submitted that said Company having expertise in Switchgear and Low Voltage Panel manufacturing, certified that the commodities in question are made exclusively for Centrifugal, Monoblock and Submersible pump and pump sets for handling water. The veracity of such certificate having not been questioned by Sri Sunil Mishra, learned Standing Counsel for the Commercial Tax & Goods and Services Tax Organisation, the dispute set up by the Assessing Authority is to be resolved in favour of the Assessee-dealer.

7.1. Though this Court granted opportunity to Sri Sunil Mishra, learned Standing Counsel, for filing of objection, he did not wish to furnish objection to the aforesaid Affidavit dated 26.06.2023, but insisted for proceeding with the hearing of the matter basing on the material available on the record. Sri Sunil Mishra,learned Standing Counsel appearing for the opposite party fervently prayed for remitting the matter to the Assessing Authority for fresh adjudication on the issue raised in the present case inasmuch as none of the authorities below has examined the issue in its proper perspective. To a specific query, Sri Sunil Mishra submitted that no (further) material was placed before the learned Odisha Sales Tax Tribunal to substantiate the issue raised by the Revenue in the second appeal.

8. Having heard counsel for both the sides, this Court proceeds to dispose of the matter on merit basing on the material available on record.

ENTRIES IN THE SCHEDULE AND TAX RATES:

9. Entries in the Schedule appended to the OVAT Act, so far as relevant, runs thus:

Schedule-B		
Part-II		
Serial No.	Description of goods	Rate of tax
29.	Centrifugal, monoblock and submersible pumps and pump sets for handling water operated electrically or otherwise and parts and accessories thereof.	*5% * Substituted for "4%" with effect from 01.04.2012 *vide* Finance Department Notification No.12277-FIN-CT1-TAX-0025/2012 [SRO No.126/2012], dated 30.03.2012.
Part-III		
…	All other goods except those specified in Schedule C	13.5%

KNOWING ABOUT THE ITEM IN QUESTION, i.e., ATS:

10. As the learned Appellate Authority proceeded on the basis of the fact that neither the Sales Tax Officer (Audit) nor the Assessing Authority conducted enquiry with respect to the nature of business activities/commodities in question and the learned Odisha Sales Tax Tribunal also observed that the Appellate Authority could have made enquiries about the items dealt in, i.e., ATS, this Court vide Order dated 10.01.2023 directed for placing on record expert opinion. In obedience thereto, the petitioner has furnished the following Certificate of the expert by way of Affidavit, which is quoted herein below:

"BCH ELECTRIC LIMITED

Date:23.05.2023
Ref No: CEA\ATS-232343

To

M/s CORPORATE ENGINEERS & Associates
(Authorized Dealer of BCH Electric Limited)
S-01, Swarnalata Apartment, NS Road,
Bomikhal, Bhubaneswar, Odisha.

Sub.: Your request for Clarification for Usages of BCH Make ATS Control panel.

Ref.: Invoice No 11-12/TI/29, Dated 02.04.2011

Dear Sir,

Introduction & Expertise

As we are ISO 9001:2015 & ISO 14001:2015 Company & well recognized, expertise on Switchgear & Low Voltage Panel manufacturer of low voltage electrical and electronic controls for Pumping applications in India. The Company was established in 1965 as a joint venture between Cutler-Hammer, USA, and Indian partners. Since 1977, it is a wholly owned Indian company with global business connections.

Our proven range of Industrial Contactors, Overload Relays, Motor starters, ATS Control Panels & MCC has, over the years, become well accepted. All our products conform to the latest national and international standards, including labelling for most of them.

Content Clarification:

1. The certain category of Control Panels (ATS) 150HP Pump Motor Starter & other specified control panel are made exclusive for Centrifugal, Monoblock, Submersible pump & pump sets for handling water operated electrically.

2. As these are specific purpose it can't be use in other electrical goods.

This is for your information.

On and Behalf of,

BCH ELECTRIC LIMITED

Sd/-

(Authorised Signatories)

The above 150HP Control Panel (ATS) shall be used in Centrifugal/ Monoblock/Submercible pump sets.

Sd/-
K.G. Choudhury
M-109062/8
Chartered Engineer (India)"

10.1. In a case of determination of classification of commodity, this Court has laid down modality in *State of Odisha Vrs. Rajkumar Agarwalla, ILR 1974 CUT 1367* as follows:

> *"Thus both the aforesaid categories come within the meaning of chuni as used in common parlance. It was the duty of the assessing authorities including the Tribunal to have called upon the dealer to give evidence as to the nature of the goods sold before holding that he was liable to sales tax. The assessing officer and the appellate authorities have merely indicated their subjective view without reference to objective factors which was absolutely necessary to determine the true character of the goods sold. Without materials on record it is not possible to say as to in which category the impugned goods sold would fall."*

10.2. Since it is borne on orders of the authorities including that of the learned Tribunal that no enquiry was conducted as regards nature of commodities, i.e., ATS, this Court is inclined to take into consideration the expert opinion as submitted by the petitioner. As the learned Standing Counsel has not placed any other material to controvert the opinion of the expert furnished by way of Affidavit sworn to by the Managing Partner of petitioner-firm, the suggestion of Sri Sunil Mishra, learned Standing Counsel during the course of hearing for relegating the matter back for adjudication afresh is not accepted as doing so would serve no purpose at this distance of time and tantamount to giving scope for fishing and roving enquiry. It is fairly conceded by the learned Standing Counsel that before the learned Tribunal no evidence was placed to substantiate the stand of the Revenue. Therefore, this Court, in absence of any material being placed by the State of Odisha to contradict the version of the petitioner that ATS is used as accessories for Centrifugal/Monoblock/Submersible pump sets, while in seisin of the matter under Section 80 of the OVAT Act to answer the question of law, does not deem it proper to remit the matter for fresh determination of nature of commodities.

10.3. Visiting webportal of Expert Engineers, manufacturers of Electrical Control Panel [www.expertengineers.co.in/ blog/what-is-auto-transformer-starter] reveals that ATS is:

> *"Auto Transformer Starter (ATS) are starting devices, for large induction motors, using reduced voltage initially, where availability of current is limited and minimum starting torque is required.*
>
> *The reduced voltage applied results in lower starting current and higher torque.*
>
> *Auto-transformer Starter— How it Works:*
>
> *The reduced voltage is applied to the star contactor while starting the motor. The motor accelerates for a preset time of 8 to 12 seconds, limiting input current the star contactor is opened and even lower current is applied momentarily by the auto transformer using the winding as inductors connected in series with motor. The time is short just enough to disconnect star contractor and engage main contactor to supply full voltage in order to achieve full speed simultaneously opening the run contactor and disengage the auto transformer.*
>
> *Application:*
>
> - *Pumps Submersible pumps*
> - *Mixers*
> - *HVAC*
> - *Blowers/Fans*
> - *Extruders & grinders*
> - *Crushers*
> - *Conveyors"*

10.4. It remained undisputed as adumbrated by the petitioner in the revision petition [paragraph 7.2] that the goods in question, i.e., Motor Starters, Control Panels and ATS Control Panel are used as accessories to motor pumps to protect the lifespan and for effective use of the motor. During fluctuation of power supply, said ATS protects pump from being damaged. Therefore, ATS is accessory to pumps.

10.5. Thus, taking into account the expert opinion and description of ATS in the webportal, it can be construed that it is understood in common sense and trade parlance as Auto-Transformer Starter Control Panel which is used for effective functioning of pump and in connection with it.

ABSENCE OF DEFINITION OF "ACCESSORY" IN THE STATUTE:

11. It transpires from bare reading of Entry Serial No.29 of Part-II, Schedule-B that "accessories" of Centrifugal, Monoblock and Submersible pumps and pump sets for handling water operated electrically or otherwise are subject to levy of tax @ 4% [prior to 01.04.2012] and @5% [with effect from 01.04.2012].

11.1. In absence of meaning ascribed to "accessories" in the OVAT Act, dictionary meaning can be resorted to in order to understand the true scope of said term. In *State of Orissa Vrs. Titaghur Paper Mills Co. Ltd., (1985) 60 STC 213 (SC) = AIR 1985 SC 1293 = 1985 SCR (3) 26 = 1985 SCC Supl. 280 = 1985 SCALE (2)*

410 = (1985) TaxLR 2948 (SC) it has been laid down that the dictionary meaning of a word cannot be looked at where the word has been statutorily defined or judicially interpreted. But where there is no such definition or interpretation, the Courts may take aid of dictionaries to ascertain the meaning of a word in common parlance. In doing so the Court must bear in mind that a word is used in different senses according to its context and a dictionary gives all the meanings of a word and the Court has, therefore, to select the particular meaning which is relevant to the context in which it has to interpret that word. Regard may also be had to *Purna Chandra Mohapatra Vrs. State of Odisha, 2022 (I) ILR-CUT 796*.

11.2. Concise Oxford Dictionary, Ninth Edition, defines "accessory" as a noun as 'an additional or extra thing, a small attachment or fitting, a small item of dress', and as an adjective as 'additional, contributing in a minor way, dispensable'.

11.3. *Webster's Dictionary defines* it as a noun as 'a wing of secondary subordinate importance, an object or device not essential in itself but adding to the beauty, convenience or effectiveness of something else' and as adjective it has been defined as 'assisting as a subordinate, adding or contributing in consequential way, present in a minor amount and not essential as a constituent'.

11.4. "Accessory" is not a word of art. The word 'accessory' carries a wide meaning. It is the popular commercial view which has to be adopted. An accessory must be specially adopted for use in principal article, and not of general use. Where the term 'accessory' is not defined in the statute, the same being not a technical or a scientific term, the expression has to be construed as it is ordinarily understood. The expression 'accessory' can be assigned to the equipment which is used as addenda or adjunct, not essential but which adds to its efficiency. Reference may be made to *Sales Tax Commissioner Vrs. Lachman Singh, (1972) 30 STC 372 (All); TI Miller Limited Vrs. Union of India, 1987 (31) ELT 344 (Mad); Universal Radiators Vrs. State of Andhra Pradesh, (1989) 73 STC 120 (AP); Jay Industries Vrs. State of Gujarat, (1999) 116 STC 261 (Guj); Union of India Vrs. Rishabydev Textiles, 2002 (141) ELT 352 (Raj).*

11.5. Conspectus of Mehra Bros. Vrs. Jt. CTO, (1991) 1 SCC 514 = (1991) 80 STC 233 (SC); Pragati Silicons Pvt. Ltd. Vrs. CCE, (2007) 8 VST 705 (SC); Annapurna Carbon Industries Co. Vrs. State of AP, (1976) 2 SCC 273 = (1976) 37 STC 378 (SC); and Commissioner of Central Excise, Delhi Vrs. Insulation Electrical (P) Ltd., 2008 (224) ELT 512 (SC) points out that the term 'accessories' is used in the Schedule to describe goods which may have been manufactured for use as an aid or addition.

11.6. Vide *K.V. Narasimulu Vrs. State of Andhra Pradesh, (1971) 27 STC 178* (AP), the meaning of "accessory" in Chamber's Twentieth Century Dictionary by Davidson that "anything additional, secondary, or non-essential item of equipment" and Murray's Dictionary that "something contributing in a subordinate degree to a general result or effect" has been referred to.

11.7. In Black's Law Dictionary, Fifth Edition, 'accessory' has been defined as "anything which is joined to another thing as an ornament, or to render it more perfect, or which accompanies it, or is connected with it as an incident, or as subordinate to it, or which belongs to or with it … Adjunct or accompaniment … A thing of subordinate importance. Aiding or contributing in secondary way or assisting in or contributing to as a subordinate."

11.8. The correct test would be whether the article or articles in question would be an adjunct or an accompaniment or an addition for the convenient use of another part of the vehicle or adds to the beauty, elegance or comfort for the use of the motor vehicle or a supplementary or secondary to the main or primary importance. Whether an article or part is an accessory cannot be decided with reference to its necessity to its effective use of the vehicle as a whole. General adaptability may be relevant but may not by itself be conclusive. Take for instance a stereo or air-conditioner designed or manufactured for fitment in a motor car. It would not be absolutely necessary or generally adapted. But when they are fitted to the vehicle, undoubtedly it would add comfort or enjoyment in the use of the vehicle. Another test may be whether a particular article or articles or parts, can be said to be available for sale in an automobile market or shops or places of manufacture; if the dealer says it to be available certainly such an article or part would be manufactured or kept for sale only as an accessory for the use in the motor vehicle. Of course, this may not also be a conclusive test but it is given only by way of illustration. Undoubtedly, some of the parts like axle, steering, tyres, battery, etc. are absolutely necessary accessories for the effective use of the motor vehicle. If the test that each accessory must add to the convenience or effectiveness of the use of the car as a whole is given acceptance many a part in the motor car by this process would fall outside the ambit of accessories to the motor car. It is laid down in ***Deputy Commissioner of Agricultural Income-tax and Sales Tax Vrs. Union Carbide India Ltd., (1976) 38 STC 198 (Ker)*** that a thing is a part of the other only if the other is incomplete without it. A thing is an accessory of the other only if the thing is not essential for the other but only adds to its convenience or effectiveness.

11.9. *In* ***Annapurna Carbon Industries Co. Vrs. State of Andhra Pradesh,*** *(1976) 2 SCC 273 = (1976) 37 STC 378 (SC)*, the Court while examining the question whether "Arc Carbon" is an accessory to cinema projectors or whether comes under "other cinematography equipments" under tariff Schedule to the Andhra Pradesh General Sales Tax Act, 1957, referred to following definition of "accessory" contained in *Webster's Third New International Dictionary*:

> *"an object or device that is not essential in itself but that adds to the beauty, convenience or effectiveness of something else". Other meanings given there are: 'supplementary or secondary to something of greater or primary importance'; 'additional', 'any of several mechanical devices' that assist in operating or controlling the tone resources of an organ'. 'Accessories' are not necessarily confined to particular machines for which they may serve as aids. The same item may be an accessory of more than one kind of instrument."*

11.10. Adaptability and importance are also relevant tests. An accompaniment or a thing which is connected with the principal thing can also be regarded as accessory, if it is made for the purpose of being used in that fashion and is adapted either specially or even generally for the principal article. If an article is important for the purpose of being used in or with the principal article and is specially adapted for that article and is of such a nature that it can be used for that purpose alone, then it can be said without any hesitation that it is an accessory of the principal article. But even if the article is such that it can be used as an accessory in more than one kind of principal articles, it can still be regarded as an accessory of each one of them depending upon its predominant or ordinary purpose That would be a case of general adaptability and, it would be very relevant though not conclusive by itself. It is necessary for a thing to be described as an accessory that it should really be accessory of a principal thing. It should not be of general use. If it is an article which can be used for various purposes, then it will be difficult to describe it as an accessory of a particular thing. [See, *Jay Industries Vrs. State of Gujarat, (1999) 116 STC 261 (Guj)*].

11.11. Though reference may be had to ***State of Punjab Vrs. Nokia India Pvt. Ltd., (2014) 11 SCR 331 = (2015) 77 VST 427 (SC)*** to understand the true import of the word "accessory", the *Hon'ble Supreme Court in Collector of Central Excise, Kanpur Vrs. Krishna Carbon Paper Co., 1988 (37) ELT 480 (SC) = AIR 1988 SC 2223 = 1988 SCR Supl. (3) 12 = (1989) 1 SCC 150* held as follows:

> *"9. It is well-settled, as mentioned before, that where no definition is provided in the statue itself, as in this case, for ascertaining the correct meaning of a fiscal entry reference to a dictionary is not always safe. The correct guide, it appears in such a case, is the context and the trade meaning. In this connection reference may be made to the observations of this Court in CST Vrs. S.N. Brothers, Kanpur, (1973) 3 SCC 496 = 1973 SCC (Tax) 254 = AIR 1973 SC 78.*
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> *10. The trade meaning is one which is prevalent in that particular trade where the goods is known or traded. If special type of goods is subject-matter of a fiscal entry then that entry must be understood in the context of that particular trade, bearing in mind that particular word. Where, however, there is no evidence either way then the definition given and the meaning following (sic flowing) from particular statute at particular time would be the decisive test.*
>
> *11. In the famous Canadian case in King Vrs. Planters Nut and Chocolate Co. Ltd. [1951 CLR Ex 122] Cameron, J. observed that it is not botanist's conception as to what constitutes a fruit or vegetable ... but rather what would ordinarily in matters of commerce in Canada be included that should be the guide. Similarly, this Court has held in Union of India Vrs. Delhi Cloth and General Mills Co. Ltd. [AIR 1963 SC 791] at p. 794 para 12 that the view of the Indian Standards Institute as regards what is refined oil as known to the market in India must be preferred in the absence of any other reliable evidence. It must be emphasised in view of the arguments advanced in this case that the meaning should be as understood in the particular trade. In this case, we are construing not paper as such but a particular brand of paper with a meaning attributed to it. Sub-item (2) of Item 17 as was the position in 1979 paper referred to all kinds of paper*

including paper or paper boards which have been subjected to various treatments such as coating, impregnating. So, therefore, if all kinds of paper including coated paper is the goods, we have to find out the meaning attributed to those goods in the trade of those kinds of paper where transactions of those goods take place.

*12. It is a well-settled principle of construction, as mentioned before, that where the word has a scientific or technical meaning and also an ordinary meaning according to common parlance, it is in the latter sense that in a taxing statute the word must be held to have been used, unless contrary intention is clearly expressed by the legislature. This principle is well settled by a long line of decisions of Canadian, American, Australian and Indian cases. Pollock, J. pointed out in Grenfell Vrs. IRC [(1876) 1 Ex D 242, 248 = 34 LT 426 = 24 WR 582] that if a statute contains language which is capable of being construed in a popular sense, such a statute is not to be construed according to the strict or technical meaning of the language contained in it, but is to be construed in its popular sense, meaning, of course, by the words "popular sense" that which people conversant with the subject-matter with which the statute is dealing would attribute to it. The ordinary words in everyday use are, therefore, to be construed according to their popular sense. The same view was reiterated by Story, J. in 200 Chests of Tea, (1824) 9 Wheaton US 435, 438 where he observed that the legislature does not suppose our merchants to be naturalists, or geologists, or botanists. See the observations of Bhagwati, J. as the learned Chief Justice then was, in Porritts & Spencer (Asia) Ltd. Vrs. State of Haryana, (1979) 1 SCC 82 = 1979 SCC (Tax) 38. But there is a word of caution that has to be borne in mind in this connection, the words must be understood in popular sense, that is to say, these must be confined to the words used in a particular statute and then if in respect of that particular items, as artificial definition is given in the sense that a special meaning is attached to particular words in the statute then the ordinary sense or dictionary meaning would not be applicable but the meaning of that type of goods dealt with by that type of goods in that type of market, should be searched. ***"*

11.12. It is trite that where no definition is provided in the statute for ascertaining the correct meaning of a fiscal entry, the entry should be construed as understood in common parlance or trade or commercial parlance. Such words must be understood in their popular sense. The nomenclature given by the parties to the words or expression is not determinative or conclusive of the nature of the goods. Strict or technical meaning or dictionary meaning of the entry is not to be resorted to. Common sense rule of interpretation and the user test may be applied but the application of the principles will depend on the facts and circumstances of each case. No test or tests can be said to be applicable to all cases. There may be cases where the interpretation may be tested by applying more than one rule of interpretation. See, *Chittaranjan Saha Vrs. State of Tripura, (1990) 79 STC 37 (Gau).*

11.13. Regard may be had to *CCE Vrs. Fenoplast Pvt. Ltd., (1994) 72 ELT 513 (SC); and CCE Vrs. Champdany Industries Ltd., (2010) 1 GSTR 52 (SC)*, wherein it has been observed that while interpreting statutes like the Excise Tax Acts or the Sales Tax Acts where the primary object is to raise revenue and for such purpose the various products and goods are classified, the common parlance test can be accepted, if any term or expression is not properly defined in the Act 'if any term or

expression has been defined in the enactment then it must be understood in the sense in which it is defined but in the absence of any definition being given in the enactment the meaning of the term in common parlance or commercial parlance has to be adopted.' It has also been stated in *Indian Aluminium Cables Ltd. Vrs. Union of India, (1987) 64 STC 180 (SC)* that commercial parlance assumes importance when goods are marketable. There is no gainsaying that the commercial meaning has to be given to the expressions in tariff items and that where definition of a word is not given it must be construed in its popular sense. Refer, *Asian Paints India Limited Vrs. CCE, (1988) 35 ELT 3 (SC).*

11.14. It is also pertinent to bear in mind another test for the purpose of classification of commodity. The test commonly applied to ascertain whether a marketable product falls within a specific entry is: how is the product identified by the class or section of people dealing with or using the product? It is generally by its functional character that the product is so identified. It is a matter of common experience that the identity of an article is associated with its primary function. It is only logical that it should be so. When a consumer buys an article, he buys it because it performs a specific function for him. There is a mental association in the mind of the consumer between the article and the need it supplies in his life. It is the functional character of the article which identifies it in his mind. See *Atul Glass Industries Pvt. Ltd. Vrs. CCE, (1986) 63 STC 322 (SC) = 1986 (25) ELT 473 (SC).*

11.15. It is well-recognized canon for identifying the commodity in taxation law to fall within the meaning of entry in Schedule of rates is trade parlance meaning or common sense approach attributed to such commodity. As has already been stated earlier, in order to identify the nature of the commodity in question, i.e., ATS, this Court has visited webportal of manufacturers of ATS from which it could be known that said commodity is adjunct to main goods, i.e., pumps and it aids in smooth functioning of Centrifugal, Monoblock and Submersible pump sets. Therefore, the test of understanding in trade parlance and/or popular parlance can safely be applied to the present context.

ANALYSIS AND DISCUSSIONS:

12. Considering the instant case etched on above tests and well-accepted tenets, ATS answers that it is accessory to 'Centrifugal, Monoblock and Submersible pumps and pump sets'. The document like expert opinion supported by Affidavit furnished by the petitioner remained undisputed by the opponent-State of Odisha. This Court is of the firm view that the contention of the petitioner deserves seal of approval.

12.1. In the present case, the authorities below never examined the pertinent issue as to the identity of the commodity— ATS with reference to Entry 29 of Part-II of Schedule-B. The Assessing Authority mechanically discarded the explanation rendered by the petitioner and shifted the onus on the dealer. In *Collector of*

Customs Vrs. Hindalco Industries Ltd., 2007 (217) ELT 343 (Cal) it has been stated thus:

> *"10. The subject consignment admittedly falls within the category 2708. While making further classification under different sub-heading subject consignment could come within sub-heading 11 or 19 or 20. The respondent on the basis of the information received from their overseas seller imported the consignment under sub-heading 11. If the Customs Authority was not satisfied with such classification they must atleast prima facie show the reason for such dissatisfaction. Law permits the statutory authorities to question the conduct of a party within the framework of the said statute. Such statutory authority is also under obligation to satisfy itself that there are reasons for questioning such conduct. Before issuance of show cause notice the authority should have investigated into the matter and after prima facie satisfaction the authority should have issued the show cause notice. We have perused the show cause notice. From the tenor of the show cause notice it appears that the Customs Authority put the burden on the respondent that they would have to show that the subject consignment was not manufactured by cut back method to come out of the mischief of sub-heading 19. This is not the right approach.*

12.2. For ascertaining the true nature of ATS, the petitioner has brought on record the expert opinion and this Court on visiting webportal of manufacturers of such commodities found that in trade parlance ATS is treated as accessories to 'Centrifugal, Monoblock and Submersible pumps and pump sets'. The explanation of the petitioner being in consonance with the well-settled tests and guidelines propounded by the Courts, the suggestion of Sri Sunil Mishra, learned Standing Counsel for the Commercial Tax & Goods and Service Tax Organisation for sending the matter back to the Assessing Authority for fresh adjudication by giving scope for enquiry/investigation is rejected. What is emanating from the Order-in-Second Appeal of the learned Sales Tax Tribunal is that no enquiry as to identity of commodity vis-à-vis entry in Serial No.29 of Part-II of Schedule-B was conducted by neither the Sales Tax Officer (Audit) nor the Assessing Authority. Legal position is well-established in *Hindustan Ferodo Ltd. Vrs. Collector of Central Excise, Bombay, 1997 (89) ELT 16 (SC)*, ratio of which is this, that the onus of establishing that a product falls within a particular item is on the Revenue. If the Revenue leads no evidence, then the onus is not discharged. It has been reiterated in *Hewlett-Packard India Sales Pvt. Ltd. (now HP India Sales Pvt. Ltd. Vrs. Commissioner of Customs (Import), Nhava Sheva, (2023) 1 SCR 1123* as follows:

> *"23. It goes without saying that since the customs authorities wanted to classify the goods differently, the burden of proof to showcase the same was on them, which they failed to discharge. [Dabur India Ltd. Vrs. CCE, Jamshedpur, (2005) 4 SCC 9]. Hence under the prevalent self-assessment procedure, the classification submitted by the Appellants must be accepted."*

12.3. As expert opinion is placed on record by Sri Chitta Ranjan Das, learned counsel for the petitioner-firm and the contents of such expert opinion has not been disputed by Sri Sunil Mishra, learned Standing Counsel for the Commercial Tax &

Goods and Services Tax Organisation, this Court is of the considered view that the ATS is accessory of "Centrifugal, Monoblock and Submersible pump and pump set" as the same satisfies the common parlance test. In this regard the following observation made by the Hon'ble Supreme Court in *Puma Ayurvedic Herbal P. Ltd. Vrs. CCE, (2006) 6 RC 328 (SC) = (2006) 145 STC 200 (SC) = (2006) 3 SCC 266* is relevant:

> *"This opinion coming from a competent and authorised source, is of great relevance so far as the case in hand is concerned. Besides this the evidence produced by the appellant before the authorities in the shape of letters from consumers, from doctors and from Ayurvedic physicians satisfies the common parlance test.*
>
> *On the other hand the revenue led no evidence of any sort to rebut the evidence led by the assessee. It is settled law that burden of showing correct classification lies on the revenue. The Revenue has done precious little in this case to discharge this burden."*

12.4. Such being the position borne on record, on due consideration of the material available and the contentions of the advocate for the petitioner, this Court does not find force in the argument of Sri Sunil Mishra, learned Standing Counsel for the Commercial Tax & Goods and Services Tax Organisation, more so when the Revenue has not chosen to file any objection to the Expert Opinion supported by Affidavit sworn to by Managing Partner of the petitioner-firm. This Court, hence, feels it expedient to show indulgence in the Order-in-Second Appeal of the learned Odisha Sales Tax Tribunal in exercise of power of revision under Section 80 of the OVAT Act.

13. This Court may have regard to principle as set out by the Hon'ble Supreme Court in *Agarwal Oil Refinery Corporation Vrs. Commissioner of Trade Tax, (2011) 13 SCC 275*, wherein it has been observed that normally the High Court under revision does not interfere with findings of fact by the lower authority, unless the case involves any question of law. Traditionally, in exercise of revisional jurisdiction, High Court does not interfere with finding of fact, unless the findings recorded by the lower authorities are perverse or based on an apparently erroneous principles which are contrary to law or where the finding of the lower authority was arrived at by a flagrant abuse of the judicial process or it brings about a gross failure of justice. In the instant case, the Odisha Sales Tax Tribunal candidly observed that the First Appellate Authority instead of conducting enquiry himself into "veracity of the items dealt" could not have proceeded to allow the appeal by recording that neither the Sales Tax Officer (Audit) nor did the Assessing Authority conduct enquiry in this regard. By observing thus, abruptly the Sales Tax Tribunal held "the findings given by Assessing Authority is sustained". Such a conclusion is not only perverse but also based on no evidence.

13.1. The learned Odisha Sales Tax Tribunal while upsetting the conclusion reached at by the Appellate Authority merely stated that said Authority could have conducted enquiry for himself even though it found that the Sales Tax Officer

(Audit) or the Assessing Authority did not discharge their respective function. Being final fact-finding authority it has failed to keep in mind the ratio settled by this Court in *State of Odisha Vrs. Rajkumar Agarwalla, ILR 1974 CUT 1367*. At the cost of repetition it is recorded that the learned Standing Counsel fairly conceded that no material was placed by the Revenue in its second appeal before the learned Odisha Sales Tax Tribunal in objection to what was observed by the Appellate Authority and it is also submitted that no contrary material is available neither on the Audit Record nor the Assessment Record to justify that ATS falls within the ambit of residuary entry as per Part-III of Schedule-B so as to levy value added tax @13.5%.

13.2. Though the learned Odisha Sales Tax Tribunal noticed that the Appellate Authority allowed the appeal of the petitioner-dealer on the ground that "the Fora below has not inquired into the veracity of the items dealt by the dealer", it has jumped to the following conclusion without assigning cogent reason:

> *"*** It is pertinent to mention here that, the First Appellate Authority himself has not made any inquiry before arriving such a conclusion of taxing of aforesaid items at a lower rate. Therefore, the findings given by Assessing Authority is now sustained."*

13.3. In view of the consistent stand of the petitioner-firm before the authorities below that ATS is nothing but accessory to pumps and non-availability of any contrary evidence on record nor did the Revenue bring forth material to contradict such claim of the petitioner, taking into consideration the clinching expert opinion furnished by the petitioner, this Court finds that no reason has been assigned by the learned Odisha Sales Tax Tribunal to restore the observation of the Assessing Authority by reversing the conclusion of the Appellate Authority, as such it committed error in allowing the second appeal preferred by the opposite party-Commissioner of Sales Tax. This Court refers to the following observation of the Hon'ble Supreme Court in the case of *Steel Authority of India Limited Vrs. Sales Tax Officer, (2008) 16 VST 181 (SC)* made in the context of failure of the Appellate Authority to ascribe reasons:

> *"12. A bare reading of the order shows complete non-application of mind. As rightly pointed out by learned counsel for the appellant, this is not the way a statutory appeal is to be disposed of. Various important questions of law were raised. Unfortunately, even they were not dealt by the first appellate authority.*
>
> *13. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same it becomes lifeless. [See Raj Kishore Jha Vrs. State of Bihar, (2003) 11 SCC 519].*
>
> *14. Even in respect of administrative orders Lord Denning, M.R. in Breen Vrs. Amalgamated Engg. Union, (1971) 1 All ER 1148, observed:*
>
> *"The giving of reasons is one of the fundamentals of good administration."*
>
> *In Alexander Machinery (Dudley) Ltd. Vrs. Crabtree 1974 ICR 120 (NIRC) it was observed:*

> *"Failure to give reasons amounts to denial of justice." "Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The "inscrutable face of the sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance."*

13.4. In *SAP Labs India Private Limited Vrs. Income Tax Officer, (2023) 4 SCR 430* it has been laid down that:

> *"Unless perversity in the findings of the Tribunal is pleaded and demonstrated, by placing material on record, no substantial question of law can arise and, therefore, there can be no interference by the High Court. To the extent there can be no dispute between the parties, in view of the settled legal proposition dealing with Sections 260A of the Act and Section 100 of the Code of Civil Procedure, 1908."*

13.5. Where the fact finding authority has acted without any evidence or upon a view of the facts which could not reasonably be entertained or the facts found were such that no person acting judicially and properly instructed as to the relevant law could have found, the Court is entitled to interfere. See, Lalchand Bhagat Ambica Ram Vrs. CIT, (1959) 37 ITR 288 (SC).

13.6. With reference to *Omar Salay Mohamed Sait Vrs. CIT, (1959) 37 ITR 151 (SC) the Hon'ble Andhra Pradesh High Court in Spectra Shares & Scrips Pvt. Ltd. Vrs. CIT, (2013) 354 ITR 35 (AP)*, has been pleased to make the observation that Income-tax Appellate Tribunal is a fact finding Tribunal and if it arrives at its own conclusions of fact after due consideration of the evidence before it, the Court will not interfere. It is necessary, however, that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was the evidence pro and contra in regard to each one of them and what were the findings reached on the evidence on record before it. The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort, its findings, even though on questions of fact, will be liable to be set aside by the Court.

13.7. View so expressed being subscribed by this Court, it is, thus, to be observed that question of law, in the present case, does arise for consideration.

DECISION AND CONCLUSION:

14. The learned Odisha Sales Tax Tribunal without assigning cogent reason restored the view of Assessing Authority taken in the Assessment Order which was passed in absence of due enquiry as to the nature of the commodities. The consistent stand of the petitioner-firm dealing in pump sets, accessories and spare parts thereof, that ATS (Auto-Transformer Starter) Control Panel, Motor Starter Panel Board and other Control Panel, being accessories of Centrifugal, Monoblock and Submersible pumps and pump sets, is supported by expert opinion, which remained uncontroverted by the opponent. Said expert opinion answers the common parlance test.

14.1. By reversing the conclusion arrived at by the Appellate Authority, the learned Odisha Sales Tax Tribunal essentially held that the commodity in question, i.e., ATS, falls within the scope of entry in Part-III of Schedule-B. Before holding the commodity to fall in residuary entry, the learned Tribunal as also the Assessing Authority failed to bear in mind the enunciation in the matters of *Bharat Forge & Press Industries P. Ltd. Vrs. CCE, AIR 1990 SC 616 = 1990 SCR (1) 60 = (1990) 1 SCC 532 = (1992) 84 STC 414 (SC); Indian Metals & Ferro Alloys Ltd. Vrs. CCE, (1991) Supp. 1 SCC 125; Speedway Rubber Co. Vrs. CCE, (2002) 5 SCC 527; Commissioner of Customs Vrs. Gujarat Perstorp Electronics Ltd., (2005) 5 RC 537 (SC); CCE Vrs. Maharshi Ayurveda Corporation, (2006) 6 RC 13 (SC); Hindustan Poles Corporation Vrs. CCE, (2006) 6 RC 403 (SC) = (2006) 145 STC 625 (SC)*, conspectus of which leads to show that only such goods as cannot be brought under the various specific entries in the tariff should be attempted to be brought under the residuary entry. In other words, unless the Department can establish that the goods in question can by no conceivable process of reasoning be brought under any of the tariff items, resort cannot be had to the residuary item. The entry which provides the most specific description shall be preferred to entry providing a more general description. Priority has to be given to the main entry and not the residual entry. The residuary entry is meant only for those categories of goods which clearly fall outside the ambit of specified entries. In *Mega Enterprises Vrs. State of Madhya Pradesh, (2012) 53 VST 422 (MP) referring to Mauri Yeast India Pvt. Ltd. Vrs. State of UP, (2008) 14 VST 259 (SC)*, it is observed that in interpreting different entries, attempts should be made to find out as to whether the same answers the description of the contents of the basic entry. Only in the event if it is not possible to do so, recourse to the residuary entry should be made as a last resort. If there is a conflict between two entries, one leading to an opinion that it comes within the purview of a specific entry and another the residuary entry, the former should be preferred.

14.2. It is significant to notice that the words “accessories thereof” are succeeded by the enumeration “Centrifugal, monoblock and submersible pumps and pump sets

for handling water operated electrically or otherwise" in Entry Serial No.29 of Part-II of Schedule-B of OVAT Act. Where specific word is found place in an entry, the same prevails over the generic entry. This principle has been succinctly laid down in *Santhosh Maize & Industries Limited Vrs. The State of Tamil Nadu, 2023 LiveLaw (SC) 499*. In the said case, it has been observed by the Hon'ble Supreme Court of India as follows:

> "*24. Law is well settled that if in any statutory rule or statutory notification two expressions are used— one in general words and the other in special terms— under the rules of interpretation, it has to be understood that the special terms were not meant to be included in the general expression; alternatively, it can be said that where a statute contains both a general provision as well as a specific provision, the latter must prevail.*
>
> *25. What emerges from the above discussion is that Taxation Entry No.61 is relatable to 'starch' of any kind whereas Exemption Entry No.8 relates to products of 'millet'.*
>
> *26. Looking at the specific (Taxation Entry No.61) in contradistinction with the general (Exemption Entry No.8), there can be no manner of doubt that maize starch would be covered by the taxation entry and not by the exemption entry."*

14.3. In view of the admitted position that the Revenue had no material on record to take a contrary view than what was claimed by the petitioner-assessee, the Order passed in Second Appeal by the learned Odisha Sales Tax Tribunal is against the principles propounded by the Supreme Court as well as High Court(s). The manner in which the learned Odisha Sales Tax Tribunal arrived at the conclusion as to classification of commodity is not in consonance with what was laid down in State of *Odisha Vrs. Rajkumar Agarwalla, ILR 1974 CUT 1367*.

14.4. Under the aforesaid premises, this Court has no hesitation to hold that the commodities, i.e., 150 HP Fully Automatic ATS (Auto-Transformer Starter) Control Panel, Motor Starter Panel Board and other Control Panel is comprehended in the term "accessories" as per entry in Serial No.29 of Part-II of Schedule-B appended to the OVAT Act, which attracts rate of tax @ 4% for the tax periods prior to 01.04.2012 and @5% for the tax periods commencing from 01.04.2012 pertaining to the periods of assessment.

15. For the discussions made above and the reasons stated supra, the question of law as framed by this Court vide Order dated 12.03.2018 which fell for consideration is answered in the negative, i.e., in favour of the petitioner-assessee and against the Revenue.

16. In the result, the Order dated 20.06.2017 passed by the Odisha Sales Tax Tribunal, Cuttack in S.A. No. 188 (VAT) of 2015-16 so far as it relates to issue of classification of ATS is set aside and the determination of tax liability by applying rate of tax @13.5% as specified in Part-III of Schedule-B is held to be erroneous. The Assessing Authority is, thus, requested to recompute the tax liability by applying rate of tax @4% for the tax periods from 01.04.2011 to 31.03.2012 and @5% for the tax periods from 01.04.2012 to 31.03.2013.

17. As a sequel to the above observation, the sales tax revision petition succeeds to the extent indicated above, but, in the circumstances, with no order as to costs.

2023 (II) ILR – CUT - 764

ARINDAM SINHA, J

W.P.(C) NO.15790 OF 2023

DIPENDRI NAG @ DEEPANDRI NAG .....Petitioner

-V-

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

THE ORISSA CASTE CERTIFICATE (For Scheduled Caste and Scheduled Tribe) Rules, 1980 – The petitioner was born into scheduled caste family – The petitioner married a Christian in the year 2019 – Whether the petitioner lose her identity as scheduled caste after marriage – Held, the Caste-Status of a person necessarily have to be determined in the light of the recognition received by one person from the member of the caste into which he/she seeks an entry, in the present case report of the Revenue Inspector suggest that, the petitioner is practising Christianism after her marriage – Therefore she is not entitled to scheduled caste certificate. (Para 9-10)

Case Laws Relied on and Referred to :-

1 (2018) 2 SCC 493 : Sunita Singh Vs. State of U.P.
2. AIR 1959 SC 1318 : V.V. Giri Vs. D. Suri Dora.

For Petitioner : Mr. A. K. Acharya
For Opp. Parties : Mr. A. K. Nanda, AGA

JUDGMENT Date of Hearing and Judgment: 18.05.2023

ARINDAM SINHA, J.

1. Mr. Acharya, learned advocate appears on behalf of petitioner and submits, impugned is order dated 23rd March, 2023 passed by the Collector, on appeal preferred against order dated 21st December, 2021 passed by the Tahsildar, refusing to issue caste certificate to his client.

2. He submits, there is no dispute his client was born into scheduled caste 'Gonda' family. On query from Court he submits, in year, 2019 she married a Christian. However that cannot cause her to lose her identity as belonging to the scheduled caste.

3. He relies on judgment of the Supreme Court in **Sunita Singh v. State of U.P.,** reported in **(2018) 2 SCC 493**, paragraph 5, reproduced below.

> ***"5. There cannot be any dispute that the caste is determined by birth and the caste cannot be changed by marriage with a person of scheduled caste.*** *Undoubtedly, the appellant was born in "Agarwal" family, which falls in general category and not in scheduled caste. Merely because her husband is belonging to a scheduled caste*

> *category, the appellant should not have been issued with a caste certificate showing her caste as Scheduled Caste. In that regard, the orders of the authorities as well as the judgment of the High Court cannot be faulted."* (emphasis supplied)

He also relies on majority view of said Court in **V.V. Giri Vs. D. Suri Dora**, reported in **AIR 1959 SC 1318**, paragraphs 23 and 24 (SCC online print).

4. Mr. Nanda, learned advocate, Additional Government Advocate appears on behalf of State and submits, there should not be interference.

5. The Supreme Court declared the law to be that a person is born into a caste. It cannot be changed by marriage. In other words, being born into an upper caste, one cannot become scheduled caste by marrying a person, who belongs to one. There cannot be any dispute with the proposition. Petitioner's case is to the contrary. The question is whether she renounced her caste by embracing Christianity, on having married a Christian.

6. In an otherwise situation contemplated in V.V. Giri (supra) the Supreme Court said as would appear from a passage extracted from paragraph 24, reproduced below.

> *"24. ... ... The High Court has held that even if the documentary and oral evidence adduced by the appellant is accepted at its face value, it falls far short of establishing his plea that respondent had become a kshatriya at the material time.* ***The caste-status of a person in the context would necessarily have to be determined in the light of the recognition received by him from the members of the caste into which he seeks an entry. "*** (emphasis supplied)

Above indicates it is possible for a person to seek entry into a caste. It follows that the converse, of renouncing a caste is, therefore, possible.

7. In impugned order it is recorded that petitioner had stated she is Hindu by birth and she is still practising Hindu rituals even after her marriage. The appellate authority, in considering rival submissions, went on to hold as will appear from two paragraphs, reproduced from impugned order.

> *"Sufficient time was given to the petitioner to produce any valid documents according to her claim. But the petitioner failed to produce any valid documents.*
>
> *After hearing the petitioner, Tahasildar, Loisingha & going through the available documents, I am led to the conclusion that, the petitioner failed to show any proof towards her claim that, she is practicing Hindu religion. Whereas,* ***as per the report of Tahasildar, Loisingha after her marriage to one Rahul Senapati, S/0- Santosh Senapati, Vill-Brahmanipali, PS-Loisingha, Dist.-Bolangir, the petitioner is now practicing*** *Christianity, hence the order dtd.24.12.2021 passed by the Tahasildar, Loisingha in Caste Certificate application No. E-SCO/2021/404379, dtd. 15.11.2021 of the petitioner is hereby upheld. Intimate the petitioner & Tahasildar, Loisingha accordingly."*

8. On query from Court Mr. Acharya submits, there has been omission to positively state in the petition that his client is still a practising Hindu. He prays for

leave to allow his client to put in additional affidavit containing the averment. This leave, Court is not inclined to grant.

9. As aforesaid, there was statement made by petitioner before the Tahsildar as well as the appellate authority that she is a practising Hindu. She was disbelieved by both the authorities on basis of report of the Revenue Inspector, relied upon by the Tahsildar. Petitioner in paragraphs 5 and 6 said so. The paragraphs are reproduced below.

> *"5. That under the aforesaid circumstances, the Petitioner filed her application for the Opposite Party No.3-Tahasildar, Luisinga with requisite documents for issuance of a caste certificate in her favour. The Opposite Party No.3 by order dated 21st December, 2021 was pleased to* ***reject her application for grant of caste certificate in her favour on the ground that the Petitioner after her marriage*** *with one Rahul Kumar Senapati, who belongs to Gonda Christian by caste and practicing Christianism and there for SC certificate cannot be issued in her favour. The copy of the order dated 21st December, 2021 passed by Opposite Party No.3 is annexed herewith as* ***ANNEXURE-2****.*
>
> *6. That the Petitioner being aggrieved by the order passed by the Opposite Party No.3 under Annexure-2 approached the Opposite Party No.2 in Misc. Certificate Appeal Case No.1 of 2022 and that the Opposite Party No.2, vide order dated 23rd March, 2023 under Annexure-1 basing upon the order of the Tahasildar-Opposite Party No.3* ***came to a conclusion that after the marriage, the Petitioner is practising Christianism****. Therefore, she is not entitled to a Schedule Caste Certificate"* (emphasis supplied)

10. In spite of above statements of the writ petition, petitioner omitted to state on oath therein, she is still a practising Hindu. In the circumstances, view taken by both the authorities appear to be a possible view.

11. The writ petition is dismissed.

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2023 (II) ILR – C UT- 766

ARINDAM SINHA, J & SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 18837 OF 2022

ODISHA JESUIT SOCIETY, BHUBANESWAR .....Petitioner

-V-

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

STATE FINANCIAL CORPORATION ACT, 1951 – Section 29 – The corporation took possession of the unit – The petitioner sought for settlement of the property in lieu of consideration amount – The administration allow the settlement – A Third Party Appealed against the settlement – Additional Sub-Collector allowed Appeal which was

confirmed by the revision authority – Whether the appeal at the instance of a third party is maintainable? – Held, No, section 29 of the Act, clearly mandate the Financial Corporation have the right to take over the management or possession or both of the Industrial concern, as well as the right to transfer by way of lease on sale and realize the property, inter alia pledge or mortgaged to the financial corporation.

(Para 7 to 8)

For Petitioner : Mr. Suryakanta Dash

For Opp. Parties : Mr. G.N. Rout, ASC, Mr. Amitav Das, Mr. Rakesh Nayak

JUDGMENT Date of Hearing: 10.11.2022, 02.12.2022,17.02.2023 & 02.05.2023 : D.O. J : 18.05.2023

ARINDAM SINHA, J.

1. Petitioner is purchaser from Odisha State Financial Corporation [(OSFC)/opposite party no.4]. The purchase was made by deed of transfer dated 29th January, 2003 executed by the corporation in favour of petitioner. Three recital clauses and first witness clause are reproduced below.

> "xxxx xx xx xx xx xx xx
>
> *Whereas the transferor has taken over possession of the industrial concern, M/s. Green Valley Limes (P) Ltd. on 21.11.96* ***with a view to exercising the right of the transferor to transfer and realize the mortgaged and hypothecated property.***
>
> Whereas the ***assets available at the time of takeover U/s.29 of the SFCs Act, 1951; were offered for transfer to general public by calling for offers.***
>
> *Whereas the transferee offered to transfer the assets more fully described in the schedule below on outright transfer basis for a consideration of Rs.25,00,000.00. (Rupees Twenty five Lakh only).*
>
> xx xx xx xx xx xx xx xx
>
> *NOW THIS INDENTURE WITNESSETH AS FOLLOWS*
>
> *That in consideration of Rs.25,00,000/- the transferee has paid the full amount i.e., Rs.25,00,000/- to the Corporation to which the Corporation duly hereby acknowledge and* ***do hereby convey and transfer the right, title over the schedule land, building and other structures thereon*** *with subservient right of light, air, passage to the public road and drainage and all other easement right* ***which the borrower enjoyed to the exclusion of the borrower and his successor in favour of the transferee and the transferee being already in possession of the schedule property in terms of a separate agreement to transfer, shall be deemed to be the owner in possession*** *from this day and shall enjoy all easement right as stated above.*
>
> xx xx xx xx xx xx xx xx"
>
> (emphasis supplied)

2. Mr. Dash, learned advocate appears on behalf of petitioner and submits, the corporation took possession of the industrial unit, in exercise of power under section

29 in State Financial Corporations Act, 1951. His client thereafter sought for settlement of the property, in its favour. There was direction by the administration to do so. A third party appealed against the direction and the Additional Sub-Collector passed order dated 27th August, 2015 saying that the transfer is invalid. His client petitioned for revision. By impugned order dated 29th April, 2020, the revision was disallowed.

3. Mr. Nayak, learned advocate appears on behalf of OSFC. He too submits, the appeal was at instance of a third party. It ought not to have been entertained. His client duly acted in exercise of power under section 29. He draws attention to letter dated 17th August, 1999, written by his client to the Tahsildar. Text of the letter is reproduced below.

> *"With reference to the above, this is to inform you that the assets (land & building) of the erstwhile unit M/s. Green Valley (P) Ltd., Gochhapada Road, Phulbani were seized by the Corporation u/s.29 of SFCs Act 1951 on dated 21.11.96 due to non-payment of dues and subsequently sold in favour of M/s. Orissa Jesuit Society, Loyola Bhawan, 58, Forest Part, Bhubaneswar on outright purchase basis. The purchaser has taken over possession of the land and building on 20.7.99.*
>
> *Now for transfer of title deed in the name of the purchaser, you are requested to inform us the cess dues lying against the old unit, so that appropriate action for payment of the said dues shall be taken at our end."*

4. Mr. Rout, learned advocate, Additional Standing Counsel appears on behalf of State. He draws attention to order dated 27th August, 2015 made by the Additional Sub-Collector. He demonstrates from reasoning given therein that the lease was for industrial purpose. Conditions of the lease had not been fulfilled by the lessee. Initially the land was recorded in Anabadi Khata and, therefore, purpose and conditions of the lease became important. Since lease conditions were violated, the land was be returned to Government Khata and it was so directed. There is nothing wrong in impugned order. The lessee did not have authority to mortgage the land.

5. He draws attention to paragraph-8 in the counter filed by State. The paragraph is reproduced below.

> *"8. That, the Appellate Authority on receipt of field report of the Amin engaged for field verification has observed that the purpose of lease and the condition of lease was not fulfilled by the lessee. Further, observed that* ***the lessee has not obtained any written permission from Collector, Kandhamal for transfer of the whole land or part of lease land as per the condition of the lease. Since, the Odisha State Financial Corporation has no right, title and interest over the lease land which was granted by the Government for Industrial purpose. The Mortgage and the subsequent sale transactions without written permission are void."*** (emphasis supplied)

He next draws attention to lease deed dated 10th June, 1981, granted by the authority to lessor Ganesh Lime Products Private Limited. He relies on a clause and provisos thereunder, reproduced below.

> ***"ii. That the Lessee shall not without the consent in writing of the Lessor assign or underlet or otherwise part with the possession*** *of the whole of the demised land or any part thereof, which consent shall not be unreasonably with-held.*
>
> *PROVIDED THAT in the case of reconstruction of the Lessee or amalgamation of the Lessee with any new Company or Corporation formed to take over the Lessee this Convenant shall not apply to a transfer of the demised land to such reconstructed or new Company or Corporation.*
>
> *PROVIDED FURTHER that* ***this Convenant shall not apply to any transfer or assignment of the said demised land or any part thereof by way of mortgage for securing loans*** *for the under taking and/or for completing the construction work of the factory or other works of the Lessee and/or in favour of the Trustees of Debenture Trust in respect of any issue of debentures or debenture stock which may be here-after issued by the Lessee."* (emphasis supplied)

He also relies on another clause, reproduced below.

> *"ii. That upon the breach or non-observance of any of the conditions of the Lessee herein granted, the Lessor may declare that the Lease has been determined and the Collector, Boudh-Kandhamal or any Officer or person appointed on that behalf by the Lessor shall be entitled to re-enter and take possession of the demised land and of the buildings and other structures erected thereupon and materials thereof, as well as the stores and stocks.*
>
> *PROVIDED HOWEVER that before such re-entry the Lessor shall give to the Lessee written notice of his intention so to do and the Lessee shall have the right to remedy the breach or non-observance complained of within three months from the date of such notice in which event the Lessor shall not be entitled to re-enter and take possession.*

On query from Court Mr. Rout submits, there was no necessity to initiate resumption proceeding. This was because of said appellate order and impugned order in revision, whereby transfer made to petitioner was found to be illegal. On further query from Court Mr. Rout refers to impugned order, wherein upon reliance of field verification report of the Tahsildar, there is clear record that petitioner was and still is in possession. Mr. Dash points out, impugned order also records the possession by possession letter dated 20th July, 1999.

6. First and foremost, it must be said that transfer to petitioner was made, as aforesaid, by deed of transfer dated 29th January, 2003. Transferor was the financial corporation and transferee, petitioner. Question does not arise of breach of covenant by original lessee, who was not transferor. The question that does arise is whether opposite party no.4 could have so transfered.

7. Section 29 in State Financial Corporations Act, 1951 clearly mandates the financial corporation to have the right to take over the management or possession or both of the industrial concern, as well as the right to transfer by way of lease or sale and realize the property, inter alia, pledged or mortgaged to the Financial Corporation. Furthermore, provision is also that any transfer of property made by the corporation, in exercise of its powers, shall vest in the transferee all rights in or to

the property transferred as if the transfer had been made by the owner of the property. Other provisions are also there in the section. As such, it is sufficient that the transfer was duly made and there is no challenge thereto. The challenge or resistance by State is based on violation of covenants made by original lessee of lease conditions. However, here, the right and interest of the lessee stood transferred not by it but by the corporation, as permissible by law.

8. We have looked at original lease deed dated 10th June, 1981, including relied upon clauses, reproduced above. We notice that second proviso under first sub-clause (ii) relied upon by State, clearly says that the covenant does not apply to any transfer or assignment of the demise or any part thereof by way of mortgage on, inter alia, securing loan for the undertaking. There is nothing on record to show that the mortgage of the property created by original lessee was illegal. Accordingly, the corporation acted in exercise of its power to deal with the demise that it had taken possession of being the property mortgaged to it for financial accommodation obtained by original lessee.

9. Impugned order in revision is set aside and quashed. Concerned authority, Mr. Dash submits is the Collector, who is directed to carry out direction in order dated 24th September, 2014 made by the Assistant Settlement Officer (ASO), within four weeks of communication. This is because petitioner is assignee of the lease on same terms by operation of section 29.

10. The writ petition is disposed of.

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2023 (II) ILR – CUT- 770

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

JCRLA NO.10 OF 2012

GOURI @ GOURANGA PRADHAN .....Appellant

.V.

STATE OF ODISHA .....Respondent

CRIMINAL TRIAL – Offences under section 302 and 201 of the IPC – Conviction – The case of the prosecution rests upon the evidence of the eye witness and medical evidence –There are several discrepancies in the statement during cross examination – The Investigating Officer has not been examined – Effect of – Held, the right of bringing contradictions in the statement of prosecution witnesses made before the investigating officer is a very valuable right of the accused, It is by

showing that the witness has made improvements or given evidence which contradicts his earlier statement – The accused is able to satisfy the court that the witness is not a reliable witness – Non-examination of the investigating officer is a serious infirmity in the prosecution case which result in prejudiced to the accused – The judgement of conviction and order of sentence set-aside. (Para 20-23)

For Appellant : Mr. Amrut Baral, Amicus Curiae

For Respondent : Ms. Samapika Mishra, ASC

JUDGMENT Date of Hearing:29.11.2022 : Date of Judgment:17.05.2023

Dr. S.K. PANIGRAHI, J.

1. In this JCRLA, the convict/Appellant (Gouri @ Gouranga Pradhan) challenges the judgment of conviction and order of sentence dated 20.08.2005 passed by the learned Additional Sessions Judge, Khurda, Circuit at Banpur in Sessions Trial Case No.1/1 of 2003, whereby the Petitioner was convicted and sentenced to undergo imprisonment for life for commission of offence under Section 302 and 201 of the Indian Penal Code, 1860 (hereinafter referred to as "the I.P.C." for brevity).

I. CASE OF THE PROSECUTION:

2. The case of the prosecution is that on the intervening night of 16/17.06.2002, at about 4 am, the accused/appellant Gouri @ Gouranga Pradhan, due to previous animosity, committed murder of deceased Naba Pradhan, by slitting his throat by means of a knife on the eve of Ramalila opera exhibition during Raja festival at Saliadam colony Domuni Thakurani.

3. On the basis of the aforesaid allegation, the brother of the deceased Kabiraj Pradhan, (P.W.22) lodged a F.I.R, before the Banpur Police station vide Banapur P.S Case No.113 dated 17.06.2002 and accordingly investigation was conducted against the accused appellant and subsequently thereafter on 18.06.2002, the appellant was arrested.

4. After completion of investigation, the investigating officer submitted charge sheet under Section 302 I.P.C and the accused was committed to the Court of the learned Additional Sessions Judge, Khurdha, Circuit at Banpur in S.T Case No.1/1 of 2003 to face the trial and finally convicted and sentenced to undergo imprisonment for life for commission of offence under Sections 302 and 201 of the I.P.C.

II. SUBMISSION OF THE APPELLANT:

5. 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 it borne out from the statement of the accused under Section 313 of the Cr.PC. is that he (accused) is in no way connected or concerned with the death of the deceased. He had further deposed that he cannot say who has killed the deceased, however, he was not involved in the incident.

6. Learned Counsel for the Appellant has contended that, in the persent case, the order of conviction has been awarded basing on the sole testimony of the P.W.5. But close scrutiny of the statement of the P.W.5 would show that he has actually not witnessed the role played by the appellant by cutting the throat of the deceased. P.W.5 has himself contradicted his own statement by stating in Para.10 of his cross examination that after the shout "SAPA" "SAPA", people shouted that the throat of a person was cut and he then got up and saw that Naba Pradhan was running towards the stage with profused bleeding from his neck and fell down. In addition, P.W.5 has exaggerated the fact that the appellant followed deceased to the place of jatra and was sitting behind him. After some time, appellant asked for a BIDI to deceased and the latter complied the request and there after appellant again asked for a matchbox and when deceased was about to hand over a match box, appellant caught hold of the head of deceased in one hand and cut the throat of deceased by means of a knife. The P.W.5 has admitted that he had made the aforesaid exaggerated statement for the first time before the learned trial Court without having stated the same before the investigating officer at the time of recording of his statement under section 161 of Code of Criminal Procedure. P.W.5 has further deposed that Sukumari Dei (P.W.11), Subash Pradhan (P.W.12) and Dinabandhu Pradhan (P.W.13) had seen this incident. However, surprisingly, scrutiny of the evidence of the aforesaid prosecution witnesses goes on to show that they are post-occurrence witnesses and also they have not stated that they witnessed that the appellant has committed murder of the deceased by cutting his throat. So, the statement of P.W.5 suffers from serious infirmity which raises a reasonable doubt regarding complicity of the appellant in the commission of the crime.

7. Learned Counsel for the Appellant has contended that Section 145 of the Evidence Act prescribes that for the purpose of contradicting the statement of a witness, his/her attention has to be drawn to the contradictory part appearing in the previous statement or statement recorded under Section 161 of Cr.P.C by giving him / her reasonable opportunity to explain the same and subsequently thereafter the contradiction part has to be proved through investigating officer. If the attention of the witness to his previous statement was drawn to which the witness denied but the same was not proved through investigating officer, then the contradiction available in the deposition of the witness remained not proved. The law is well settled that the non-examination of the investigating officer would not ipso facto discredit the entire case of prosecution. However, it is needless to point that the right of the accused to bring on record, the contradictions in the statement of witnesses as made before the investigating officer during investigation, is a very valuable right. By way of questions put to the investigating officer, the defence demonstrates that the witness

has deposed contradictory to his earlier statement made before the investigating officer as such the defence is able to satisfy the Court that the said witness is not reliable.

8. Learned Counsel for the Appellant has contended that the right of bringing contradictions in the statement of prosecution witnesses made before the investigating officer is a very valuable right of the accused. It is by showing that the witness has made improvements or given evidence which contradicts his earlier statement, the accused is able to satisfy the court that the witness is not a reliable witness. The non-examination of the investigating officer is a serious infirmity in the prosecution case which results in serious prejudice to the accused.

9. Learned Counsel for the Appellant has further contended thatP.W.2 and P.W.4 has stated in their deposition that the deceased uttered that the accused had cut his neck and died but aforesaid statements of the P.W.2 and P.W.4 are neither find place in the F.I.R vide Ext.1 nor was it corroborated by the informant (P.W.22), (P.W.5) and other prosecution witnesses who are allegedly to be very much present at the spot of occurrence. So, on the aforesaid background of the case, especially when the investigating officer is not examined by the prosecution, the statement of P.W.2 and P.W.4 that the deceased has made the dying declaration by allegedly demonstrating the culpability of the appellant cannot be relied upon.

III. SUBMISSIONS OF THE STATE/ RESPONDENT

10. The prosecution has examined as many as 24 witnesses, including the brother of the deceased as P.W.23. P.W.1 (Gantayat Pradhan), P.W.5 (Bijay Kumer Pradhan), P.W.6 (Bijay Kumar Pattnaik), P.W.12 (Subash Ch. Pattnaik), P.W.13 (Dinabandhu Pradhan), P.W.19 (Bipra Charan Pradhan) &P.W.23 (Debaraj Pradhan) are all eye witnesses to the occurrence and all of them were present when the alleged incident took place.

11. Learned Counsel for the prosecution has submitted that from the report of P.W.14, Dr. Basudev Mohapatra, it is found that on 17.6.2002, while he was attached as Specialist, O& G, Banpur C.H.C., on that day, at 4.30 pm, on police requisition, he had conducted post- mortem examination over the dead body of Naba Pradhan, and found one incised wound of size 2" x 4" x 3/4" bone deep, extending from 1" below the border of left ear upto the centre of the neck, just below the thyroid cartilage. The wound was boldly cut. Left carotid artery, left jugular vein, left sterno mastoid muscle were cut and the injuries were sufficient in the ordinary course of nature to cause death. This shows that it is a homicidal case, involving the death of the deceased, Naba Pradhan.

12. Learned Counsel for the prosecution has further provided that P.W.5, Bijay Kumar Pradhan, is an eye witness to the occurrence. He has stated in his deposition that the accused came to Domuni Thakurani in the night when jatra for Raja festival was going on. The accused followed the deceased to the place of jatra and was

sitting just behind him. After some time, the accused asked for a 'BIDI' to the deceased and the latter complied the request. The accused once again asked for a match-box and when the deceased was about to hand over the match-box, the accused caught hold of the head of the deceased in one hand and cut the throat of the deceased by means of a knife. This act could be facilitated simply since at that point in time, the accused was sitting behind the deceased. It is further found from the testimony of this P.W.5 that at that time the accused shouted, "SAPA", "SAPA" and then as the people witnessing the opera got up and tried to set dispersed, getting opportunity, the accused escaped to the nearest jungle. This witness has seen that the deceased died at that place due to profused bleeding. This witness has been duly cross-examined; but, nothing has been elicited that this witness was otherwise inimically inclined towards the accused.

13. Learned Counsel for the prosecution has also contended that such eye witness account of witnesses cannot be thrown out and these witnesses are found wholly reliable. This Court should not have any difficulty in coming to a conclusion that the accused is guilty of the offence.

IV. COURT'S REASONING AND ANALYSIS:

14. The case of the prosecution rests upon the evidence of the eye-witnesses P.W.5 and 23 and the medical evidence. However, it is pertinent to mention here that the Trial Court has not conducted a thorough analysis and scrutiny of the depositions of the prosecution witnesses. The prosecution has adduced P.W.1 (Gantayat Pradhan), P.W.5 (Bijay Kumar Pradhan), P.W.6 (Bijay Kumar Pattnaik), P.W.12 (Subash Ch. Pattnaik), P.W.13 (Dinabandhu Pradhan), P.W.19 (Bipra Charan Pradhan) & P.W.23(Debaraj Pradhan) as eye witnesses to the occurrence stating all of them were present when the alleged incident took place. However, on perusal of the depositions and cross-examinations, it is clear that only P.W. 5 and P.W.23 are eyewitnesses whereas P.W.1, P.W.6, P.W.12, P.W.13 and P.W.19 are all post occurrence witnesses considering they never saw the accused slitting the throat of the deceased.

15. Before moving on to the deposition of the prosecution witnesses, it is pertinent to determine whether the death of the deceased was homicidal in nature.P.W.14, Dr. Basudev Mohapatra, while he was attached as a Specialist, O & G, Banpur C.H.C., on the day of occurrence at 4.30 pm, on police requisition, he conducted post- mortem examination over the dead body of Naba Pradhan, and found one incised wound of size 2" x 4" x 3/4" bone deep, extending from 1" below the border of left ear up to the centre of the neck, just below the thyroid cartilage. The wound was boldly cut. Left carotid artery, left jugular vein, left sterno mastoid muscle were cut and the injuries were sufficient in the ordinary course of nature to cause death. This shows that it is a homicidal case, involving the death of this deceased.

16. Now, coming to the important determination, whether the accused has caused the death of the deceased intentionally. P.W.5, Bijay Kumar Pradhan, is an eye witness to the occurrence. He has stated in his deposition that the accused came to Domuni Thakurani in the night when jatra for Raja festival was going on. The accused followed the deceased to the place of jatra and was sitting just behind him. After some time, the accused asked for a 'BIDI' to the deceased and he handed over the same. The accused again asked for a 'match-box' and when the deceased was about to hand over the match-box. The accused caught hold of the head of the deceased in one hand and cut the throat of the deceased by means of a knife. This act could be very easy because at that point of time, the accused was sitting behind the deceased. It is further found from the testimony of this P.W.5 that at that time the accused shouted, "SAPA", "SAPA" to divert the attention at the crowd. As the people witnessing the opera got up and tried to disperse, getting a golden opportunity, the accused escaped to the nearest jungle. This witness has seen that the deceased died at the spot due to profuse bleeding.

17. However, there are several discrepancies in his statement during cross-examination. The P.W.5 has admitted that he had made the aforesaid exaggerated statement for the first time before the trial Court without stating the same before the investigating officer at the time of recording his statement under Section 161 of Code of Criminal Procedure. P.W.5 has further deposed that Sukumari Dei (P.W.11), Subash Pradhan (P.W.12) and Dinabandhu Pradhan (P.W.13) had seen this incident but surprisingly on the scrutiny of the evidence of the aforesaid prosecution witnesses goes on to show that they are post occurrence witnesses and also they have not stated that they had witnessed that the appellant had committed murder of the deceased by cutting his throat. So, the statement of P.W.5 suffers from serious infirmity which raises a reasonable doubt regarding complicity of the appellant in the commission of the crime. Similarly, the discrepancies have been brought out during the cross-examination testimony of the P.W.23.

18. Additionally, non-examination of the investigating officer has caused serious prejudice to the appellant as he was precluded from bringing the material contradictions in the evidence of the P.W.5 who is alleged to be the sole eyewitness to the culpability of the appellant.

19. P.W.2 and P.W.4 have stated in their depositions that deceased uttered that the accused had cut his neck and died. The non-examination of the investigating officer has precluded the appellant to bring on record the material contradictions in the statements of P.W.2 and P.W.4 to the alleged dying declaration of the deceased that has caused serious prejudice to the appellant. Moreover, stating that the deceased was able to speak when his throat had been severely cut is quite unbelievable when we look at the injury.

20. Law is settled that the right of bringing contradictions in the statement of prosecution witnesses made before the investigating officer is a very valuable right

of the accused. It is by showing that the witness has made improvements or given evidence which contradicts his earlier statement. The accused is able to satisfy the court that the witness is not a reliable witness. The non-examination of the investigating officer is a serious infirmity in the prosecution case which results in prejudice to the accused.

21. P.W.2 and P.W.4 have stated in their deposition that the deceased uttered that the accused had cut his neck and died but aforesaid statements of the P.W.2 and P.W.4 neither mentioned/ indicated in the F.I.R. vide Ext.1 nor corroborated by the informant (P.W.22) and (P.W.5) and other prosecution witnesses who were allegedly very much present at the spot of occurrence. On the aforesaid background of the case, when the investigating officer has not been examined by the prosecution, the statements of P.W.2 and P.W.4 that the deceased has made dying declaration by allegedly demonstrating the culpability of the appellant cannot be relied upon. Further, when the neck was cut, it is almost impossible to utter words to make statements.

22. The fact that the accused and the deceased used to quarrel is hearsay evidence which is inadmissible. P.W.5 and 23 have also not stated anything in detail by citing instances.

23. On a conspectus of the analysis of evidence made hereinbefore, this Court thus find that the judgment of conviction and order of sentence passed by the Trial Court in convicting the accused for commission of offence under section-302/201 of the IPC by holding the prosecution to have proved the charges against the accused beyond reasonable doubt are liable to be set aside.

24. In the result, the Appeal is allowed. The judgment of conviction and order of sentence 20.08.2005 passed by the learned Additional Sessions Judge, Khurda, Circuit at Banpur in Sessions Trial Case No.1/1 of 2003 are hereby set aside.

25. The Appellant (accused) be set at liberty forthwith in case his detention is not so required in connection with any other case.

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2023 (II) ILR – CUT- 776

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

CRLA NO.785 OF 2017

IMTIAZ KHAN ……....Appellant

.V.

STATE OF ODISHA ……..Respondent

CRIMINAL TRIAL – Offence Under Section 364 (A) of the Indian Penal Code, 1860 – Conviction – The victim as pillion rider has travelled quite a long distance from place to place and nowhere had made any attempt to escape nor does she says that having made any such attempt, she became unsuccessful for the positive action from the side of accused persons – The victim further says that during her stay in the lonely house, the accused and other had never been cruel to her and treated her as such – Effect of – Held, on perusal of evidence with circumstances, the commission of the offence under section 364-A of the IPC do not established. (Para 15-16)

For Appellant : Mr.B.Sahoo

For Respondent : Mr.Sitikant Mishra, Addl. Standing Counsel

JUDGMENT Date of Hearing : 19.05.2023: Date of Judgment:21.06.2023

D.DASH, J.

The Appellant, by filing this Appeal, has assailed the judgment of conviction and order of sentence dated 20th November, 2017 passed by the learned Sessions Judge, Jharsuguda, in S.T. Case No.32/16/34/54 of 07/14/15 corresponding to G.R. Case No.254 of 2007 arising out of Brajrajnagar P.S. Case No.37 of 2007 of the court of learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Jharsuguda.

By the same, the Appellant (accused) has been convicted for commission of offence under section 364-A of the Indian Penal Code, 1860 (for short called as 'the IPC'). Accordingly, he has been sentenced to undergo imprisonment for life and pay fine of Rs.20,000/- (Rupees Twenty Thousand), in default to undergo further imprisonment for three (3) months.

2. <u>Prosecution Case:</u>

On 11.02.2007 at about 4.30 p.m., the minor daughter of Madhab Oram (informant-P.W.1), having left the house, did not return till late evening. The informant and other members of the family, therefore, went in search of the victim at different places and in that mission, they failed. However, on the next morning, a call from an unknown person was received by the informant (P.W.1) in his mobile phone and it was told that his minor daughter had been kidnapped. He was then asked to pay a sum of Rs.25,000/- (rupees twenty-five thousand) as ransom for being delivered at Sambalpur for onward release of his minor daughter. The informant (P.W.1) then had the occasion to talk with his minor daughter, who had been put on line through the phone set for some time to speak to her father (informant-P.W.1).

The informant (P.W.1) then on 13.02.2007 around 10.30 a.m., lodged written report with the Sub-Inspector of Police (S.I.) who is in charge of the

Inspector-in-Charge. He treated the same as the First Information Report (F.I.R.-Ext.1) and registering the case, took up investigation.

3. In course of investigation, the Investigation Officer (I.O.-P.W.11) examined the informant (P.W.1) and other witnesses, sent the requisition to the Inspectors-in-Charge of Sambalpur and Ainthapalli Police Station for tracking of the phone number 0663-293240. He also verified the telephone calls coming from the No.06645-274461 of pay-phone booth under Jharsuguda. On 14.02.2007, the I.O. (P.W.11), got the information of return of the victim to her house. On that day, he re-examined the informant (P.W.1), who happens to be the father of the victim and also examined the victim (P.W.6). The motorcycle bearing registration No.OR-15-5440 belonging to the accused said to have been used in carrying the victim was seized under seizure list (Ext.5) and so also cash of Rs.25,000/- (Rupees Twenty-Five Thousand) from the house of the accused under seizure list Ext.6,w which was paid for getting the victim released. One Nokia mobile phone set was seized from the possession of this accused under seizure list (Ext.4). The accused then was apprehended along with one Md. Sk. Ishrar Alam and they were forwarded in custody to Court on 16.02.2007. The victim (P.W.6), in course of investigation, was also medically examined. On completion of the investigation, the Final Form was submitted placing this accused with other accused Md. Sk. Ishrar Alam to face the Trial for commission of offence under section 364-A of the IPC.

4. On receipt of the above Final Form, learned S.D.J.M., Jharsuguda, took cognizance of the said offence and after observing formalities committed the case to the Court of Sessions. That is how the Trial commenced by framing the charge against this accused as the presence of other accused Md. Sk. Ishrar Alam could not be secured at subsequent point of time.

5. In the Trial, the prosecution in total has examined eleven (11) witnesses. Out of them, as already stated, P.W.1 is the father and P.W.2 is the mother victim. P.W.4 is the Doctor, who examined the victim and P.W.9 is the Doctor, who examined this accused. P.W.5 is a friend and co-villager of the informant. The victim has been examined as P.W.6. The I.O., at the end, has come to the witness box as P.W.11.

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 13.

6. The defence plea is that of complete denial and false implication. The accused, in support of his case, has examined one Amit Oram as D.W.1.

7. Learned counsel for the Appellant (accused) submitted that the evidence of P.Ws.1 & 2 and the victim (P.W.6), having not been properly examined and appreciated in proper perspective, the Trial Court has committed the error in holding

that the prosecution has proved the charges against this accused beyond reasonable doubt. He further submitted that even if the evidence of the victim (P.W.6) is accepted on its face value, the same take together with the evidence of P.W.1 do not establish the charge under section 364-A of the I.P.C.. He further submitted that the manner in which the victim (P.W.6) has stated about the incident and what P.W.1 has said in his evidence, the prosecution story as projected is highly unbelievable. He further submitted that the evidence of P.Ws.1 to 5 and 6 do not go to establish all the required ingredients for commission of the offence under section 364-A of the I.P.C. He also submitted that the evidence of the prosecution witnesses do not establish the fact that this accused had threatened to cause the death or hurt to the victim (P.W.6) and that such threat to cause hurt or death to such person was in order to compel P.W.1 to do the particular act of paying the money and buy-back his daughter (victim). He also submitted that on the basis of the evidence on record, the factum of kidnapping of P.W.6 is also not acceptable as here the circumstances go to show that the victim (P.W.6) accompanied the accused on account of her own will and volition and not being so compelled in that regard.

8. Learned Additional Standing Counsel for the Respondent (State) submitted all in favour of the finding returned by the Trial court holding the accused guilty for commission of the offence under section 364-A of the IPC. According to him, when it has been proved through P.Ws.1, 2, 5 & 6 that the accused and another had accompanied the victim (P.W.6) and was later on released on payment of a sum of Rs.25,000/- (Rupees Twenty-Five Thousand) by P.W.1 after he was given the threat that her daughter would be killed and after her daughter was also threatened in that light, the finding of guilt, as has been recorded by the Trial Court, against the accused is not liable to be disturbed. He further submitted that the Trial Court, having analyzed the evidence from every possible angle, has rightly concluded that for the act of this accused, he is guilty for commission of the offence punishable under section 364-A of the I.P.C.

9. Keeping in view the submissions made, we have carefully read the impugned judgment of conviction. We have also gone through the depositions of all the witnesses P.W.1 to P.W.11 and have perused the documents admitted in evidence and marked as Ext.1 to 13 from the side of the prosecution.

10. Proceeding to address the rival submission and thereby ascertain the sustainability of the finding of conviction of the accused, as has been returned by the Trial court, we are now called upon to undertake the exercise of examination of the evidence on record.

The important witnesses for the prosecution are P.Ws.1 & 2, who are the parents of the victim and P.W.6 is the victim herself. Another important witness on whose version, the prosecution has placed reliance is P.W.5, who had accompanied the informant (P.W.1) to the Police Station when he had gone to lodge the report regarding the missing of his daughter.

11. It has been stated by P.W.1 states his daughter did not return on 11.02.2007 after having left their house around 4.30 p.m. He has further stated that on the next morning around 8.00 a.m., a phone call was received in his mobile from an unknown person demanding a sum of Rs.50,000/- (Rupees Fifty Thousand), in order to release her daughter (P.W.6) and it is said that his daughter then told him that they (not named nor described by any other manner) had taken her and she then requested P.W.1 to fulfill their demand. He, however, states that he received another call from that very person asking for payment of Rs.25,000/-. It is his evidence that such unknown person had threatened P.W.1 with dire consequences if he would inform the matter to the police. He has further stated that responding to the call, he went in a scooty to a place on the ring road behind Samleswari Temple. It has been further stated by him that at that time, two culprits covering their face with clothes and asked him to keep the cash on the seat of that scooty, which he did and that they having taken away the said sum, left the victim (P.W.6) at Ainthapalli. This witness nowhere has stated that any information was given to him that his daughter's wife would be at stake or that she would be killed or hurt in the event of failure on his part to comply the demand of payment of Rs.50,000/-, while being reduced to later Rs.25,000/-. He rather says that threat was given to him if he would disclose the matter to the police. He is also not saying that his daughter (P.W.6) when talked with her over phone and while stating them that she had been brought by them (culprits) and requested him to fulfill their demand, she had not stated that she apprehend any danger to her body or life in the hands of the accused persons.

12. The evidence of P.W.2, the mother of the victim is also in the same line. It is stated by her that P.W.1 received a call from some unknown person, who demanded cash of Rs.50,000/- as ransom for releasing the victim (P.W.6) and subsequently the quantum of ransom was reduced to Rs.25,000/-. Both these witnesses are not stating that the victim (P.W.6) had ever stated either the names of this accused and the other or had given any sort of description in respect of them.

13. It has been stated by P.W.5 that the victim (P.W.1) received the anonymous telephone call in his presence and thereunder, the ransom was demanded for release of his daughter, who had been kidnapped. He is silent that by that call, any threat to the body or life of the daughter of P.W.1 had been so communicated to P.W.1 nor that victim (P.W.6) had spoken anything to P.W.1 during that call or subsequent thereto expressing any danger to her body and life at the hands of the accused persons. His evidence is that P.W.1 told him on the next day that as the life of his daughter (P.W.6) was in danger, he would be paying ransom for release of his daughter (P.W.6) and that he did.

14. P.Ws.1, 2 & 3 are not stating to have known this accused. P.W.6, the victim, has stated her age to be 18 years in the year 2008 and therefrom, her age at the time of incident is ascertained to be 17. She has stated that this accused and the other came in a motorcycle, asked her to go for a ride and then, took her in that

motorcycle. Nowhere, this P.W.6 is complaining that any force was applied to her for riding the motorcycle and sitting as a pillion rider or that she was so compelled that finding no alternative to save her from their clutch, she had to sit. It is further stated by her that she first rode the motorcycle at G.M. Complex of Golchakar, Brajarajnagar and from there, she was taken to Kolabira road. She states that having stopped the motorcycle near the jungle,this accused showed her a chaku and threaten not to shout by saying that if she would do so, she would be killed. It is her further evidence that she was taken to the house of the maternal uncle of this accused at Babupara and on the next morning, she was brought to Jharsuguda town. It thus reveals that P.W.6 has travelled quite a long distance from place to place and nowhere had made any attempt to escape nor does she says that having made any such attempt, she became unsuccessful for the positive action from the side of the accused persons.

15. At the same time, the witness says that during her stay in the lonely house at Sambalpur, this accused and the other had never been cruel to her and treated her as such. She has further stated that this accused told her father (P.W.1) that they had kidnapped her and unless he would pay them a ransom of Rs.50,000/-, they would be killed. Here also, this P.W.6 is not stating that this accused had told that unless the ransom was paid by her parents in fulfilling their demand, she, the victim (P.W.6), would be killed. She also states to have never told her father (informant-P.W.1) that there was any threat to her body and life. She simply says that accused Israr was standing behind her holding a chaku. But, then it is not stated that under that threat, she was compelled to tell P.W.1 to meet the illegal demand of the accused persons. It is her evidence that this accused and the other left her alone near Laxmi Talkies chhak of Sambalpur and therefrom she informed her father over phone requesting him to take her with him. She is also not stating anything about the factum of payment of Rs.25,000/-. The friends of the victim, who have been examined as P.Ws.7 & 10, have not whispered a word against this accused and so also an independent witness (P.W.8) has not supported the prosecution.

16. The above obtained evidence with the circumstances, as discussed, in our considered view do not establish the commission of offence under section 364-A of the I.P.C.

In that view of the matter, we are of the considered view that the finding of the Trial Court that this accused is guilty for commission of the offence under section 364-A of the I.P.C. cannot be sustained and is liable to be set aside.

17. In the result, the appeal stands allowed. The judgment of conviction and order of sentence dated 20th November, 2017 passed by the learned Sessions Judge, Jharsuguda, in S.T. Case No.32/16/34/54 of 07/14/15 are hereby set aside.

Since the accused, namely, Imtiaz Khan is in custody, he be set at liberty forthwith, if his detention is not wanted in any other case.

2023 (II) ILR – CUT- 782

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

CRLA NOS. 921 & 1131 OF 2022

RAME MURMU & ORS. .....Appellants
KANDA @ NARASINGH MURMU
(In CRLA NO. 1131/2022)

.V.

STATE OF ODISHA .....Respondent
(IN BOTH CRLAS)

CRIMINAL TRIAL – The Trial Court, has found the accused persons guilty of the offence U/s. 326/302/34 of IPC r/w Section 6 of O.P.W.H. Act. – Though most of the prosecution witnesses have resiled from their previous version, the trial Court keeping in view the surrounding circumstances and on the basis of the evidence on record imposed punishment – Effect of – Held, on the conspectus of the analysis of the evidence let in by prosecution, the court is of the considered view that, the prosecution has failed to establish the charges against accused person – Therefore the Judgement of conviction and order of sentence are liable to set aside. (Para-11)

For Appellants : Mr. D. Nayak, Sr. Adv. (In CRLA No.921/2022)
Mr. Niranjan Lenka, (In CRLA No.1131/2022)

For Respondent : Mr.Sitikant Mishra, ASC (In both CRLAs)

JUDGMENT Date of Hearing : 17.05.2023: Date of Judgment:21.06.2023

D.DASH, J.

Since in both the Appeals, the judgment of conviction and order of sentence dated 29th June, 2022 passed by the learned 1st Additional Sessions Judge, Baripada, Mayurbhanj, in S.T. Case No.154 of 2018 corresponding to G.R. Case No.344 of 2018 arising out of Kuliana P.S. Case No.35 of 2018 on the file of the learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Baripada, has been called in question, those were heard together for being disposed of by common judgment.

These Appellants (accused persons) faced the trial for commission of the offence under section 302/307/323/324/325/ 326/342/34 of the Indian Penal Code, 1860 (for short, 'the IPC') read with section 5/6 of the Odisha Prevention of Witch Hunting Act (in short, 'the O.P.W.H. Act'). The Trial Court, has found the accused persons guilty of the offence under section 326/302/34 of the IPC read with section 6 of O.P.W.H. Act. Accordingly, each of them has been has been sentenced to undergo rigorous imprisonment for a term of ten (10) years with payment of fine of Rs.3,000/- (Rupees ThreeThousand) in default, to undergo rigorous imprisonment

for three (3) months for the offence under section 326 of the IPC; rigorous imprisonment for three (3) years with payment of fine of Rs.1,000/- (Rupees One Thousand) for the offence under section 6 of the O.P.W.H. Act; and imprisonment for life with payment of fine of Rs.5,000/- (Rupees Five Thousand) in default to undergo rigorous imprisonment for five (5) months for the offence under section 302 of the IPC with stipulation that the substantive sentences would run concurrently.

2. **Prosecution Case:-**

Accused Rame Murmu is said to be a witch doctor and used to treat patients for different ailments in his own style. One Bhaga Murmu, who is the mother of the informant, namely, Rama Murmu (P.W.7) was not well and, therefore, she had been taken to the house of accused Rame, who happens to be her brother. Accused Rame told that he would do *"JHADA FUNKA''* in treating Bhaga and accordingly, he went ahead in treating Rame in his own style. On the relevant day, the sister of the informant, namely, Sombari Murmu had gone to the house of accused Rame to see the treatment of her mother as was going on there. This Sombari, having seen the manner of treatment, being frightened suddenly shouted. Therefore, accused Rame immediately expressed that Sombari had been captured by evil power and he then tied her hands and legs. The wife, sons and daughter-in-law of Rame, arraigned as accused persons, namely, Jitu @ Sukul Murmu, Kanda @ Narasing Murmu and Chhita Murmu @ Hansdah caught hold of Sombari and thereafter accused Rame started piercing a trident (Trishul) on her body and at that time, other accused persons started piercing by means of Sabala (crow-bar) and gainti. Sombari started crying loudly. Hearing the same, the informant, namely, Rama, the brother of Sombari came to the house of accused Rame and saw her sister Sombari lying with injuries all over her body. Rama (Informant-P.W.7) along with accused Jitu @ Sukul Murmu and others rescued Sombari in a serious condition. Sombari while being shifted to Baripada Hospital in an ambulance, died on the way. It is stated that prior to the death of Sombari, accused Rame, as a witch doctor, had performed *JHADA FUNKA* upon Sita Murmu, who happens to be the daughter-in-law of Dhuma Murmu and had put burnt charcoal on her hand and face causing burn injuries for which she too had been admitted into Hospital. It is further stated that on 25.04.2018 around 11.00 a.m., the accused persons had tied the legs and hands of Sombari and assaulted her by means of an trident (Trishul) for which she lost her life.

On 26.04.2018, the informant Rama lodged a written report with the Officer-in-Charge (O.I.C.), Kuliana Police Station. The O.I.C., receiving the said written report, registered the case and took up investigation. She, in course of investigation, examined the informant (P.W.7) and other witnesses, visited the spot, seized the incriminating articles from the spot. She also held inquest over the dead body of the deceased (Sombari) and then sent the same for post mortem examination by issuing necessary requisition. The accused Rame was then arrested and he, having given the statement as to have kept the trident (Trishul) and ropes in the

place known to him, led the I.O. (P.W.33) and others to that place and gave recovery of those articles, which were seized. The incriminating articles then being sent for chemical examination through Court, the report to that effect has been received. On completion of the investigation, the I.O. (P.W.33) submitted the Final Form placing the accused persons to face the trial for commission of offence under section 302/307/323/324/325/ 326/342/34 of the IPC read with section 5/6 of the O.P.W.H. Act.

3. Learned S.D.J.M., Baripada, having received the Final Form, as above, took cognizance of the said offences and after observing the formalities, committed the case to the Court of Sessions. That is how the Trial commenced by framing the charges for the above offences against these accused persons.

4. In the Trial, the prosecution in total has examined thirty-three (33) witnesses. The informant is P.W.7 whereas the mother and nephew of the Informant (P.W.7) are P.Ws.6 & 12 respectively. Injured Sita Murmu, her mother-in-law and her husband have been examined as P.Ws.9, 8 & 19 respectively. The witnesses to the seizure of weapon on production of accused Rame from his house are P.Ws.17, 18 & 21 respectively. The Doctor, who had examined accused Chhita is P.W.26 whereas the Doctor, who had examined accused Rame is P.W.28. P.W.26 is the Doctor, who conducted the autopsy over the dead body of Sombari (deceased) and the I.O. is P.W.33 whereas the others are the seizure and inquest witnesses.

Besides leading the evidence by examining the above witnesses (P.Ws.1 to 33); the prosecution has proved several documents, which have been admitted in evidence and marked Exts.1 to 39. Out of those, the important are the FIR (Ext.10) whereas the inquest report is Ext.11/1 and the post mortem report is Ext.27. The spot map has been admitted in evidence and marked Ext.30 and the statement of accused Rame, has been admitted in evidence and marked Ext.20/1. During Trial, crow-bars (Sabala) and trident (Trishul), gainti and rope etc. have also been produced as Material Objects (M.O.I to M.O.XVI).

5. The plea of the accused persons is that of complete denial and false implication. However, they have not led any evidence in support of their defence.

6. The Trial Court, on examination of evidence, both oral and documentary on record, has found the accused persons to be guilty of commission of the aforesaid offences.

7. Learned Counsels for the Appellants (accused persons) submitted that the finding of guilt as against the accused persons, which has been recorded by the Trial Court, is based on no evidence. According to them, when all most all the prosecution witnesses have not stated about the incident and even the post occurrence witnesses have not supported the prosecution case and they, having been cross-examined by the prosecution, no such material to the aid of the case of the prosecution has been elicited, the Trial Court ought not to have found the accused persons guilty of all the

above offences. They further submitted that when one witness, i.e., Sita (P.W.9) has stated as to how she received the burn injury on her hand, chest and tongue and was bitten on her knee and head attributing the accused persons including accused Rame, the same cannot be believed if her evidence during cross-examination is seen when she has clearly stated that she could not know as to who inflicted burn injuries on her hands, chest and tongue as it was then dark. They, therefore, submitted that even the conviction for the offence under section 326 of the I.P.C. as against any of the accused persons including accused Rame with the evidence on record as stand cannot be sustained.

8. Learned Counsel for the Respondent-State submitted that although most of the prosecution witnesses have resiled form their previous versions, yet on the basis of the evidence on record, the Trial Court, keeping in view the surrounding circumstances as to the happenings in the house of the accused Rame where Sombari died and Sita sustained injuries, when the accused persons have not provided any explanation, the conviction, as has been ordered by the Trial Court, cannot be unsettled.

9. Keeping in view the submissions made, we have carefully read the entire judgment passed by the Trial Court. We have also gone through the deposition of all the witnesses (P.W.1 to P.W.33) and have travelled perused the documents admitted in evidence and marked Exts.1 to 39.

10. Rama Murmu (P.W.7) has lodged the FIR, which has been admitted in evidence and marked Ext.10. The FIR has been lodged on 26.04.2018. It is indicated that Bhaga, the mother of the informant was not keeping good health for last two days and, therefore, his sister Sombari had taken Bhaga to the house of their maternal uncle, accused Rame, who used to perform *"GUNI GAREDI"* and was known to be a witch doctor. It has further been stated that accused Rame then told that if *Guni Garedi Puja* would be performed, Bhaga would be right and so saying, he started doing puja. It is said that seeing the manner of treatment when Sombari raised shout, accused Rame told that Sombari came under the control of evil power and so saying, her hands and legs were tied and thereafter accused Rame and his other family members (accused persons) pierces her with sharp and pointed weapons, which ultimately led to her death. It was also stated that the daughter-in-law of one Dhuma, namely, Sita Murmu had been treated in that way by accused Rame and she having received several injuries on her person including burn injuries was under treatment in the Hospital.

All these having been narrated in the F.I.R. (Ext.10), P.W.7, who is the author of the said FIR, has, however, resiled not only from the FIR version, but also from the statement,which he had given before the I.O(P.W.33). during investigation. He has stated that he did not enquire as to how her sister sustained the injury marks. Although he has stated to have lodged the FIR, which has been proved by him as Ext.10, yet he has not stated anything in support of the contents. The prosecution has

cross-examined the witnesses with the permission of the Court. But then the prosecution has simply remained satisfied by throwing some suggestions. But no other material has been elicited from him to provide any aid to their case. During cross-examination, she has further shown her strong disinclination towards the prosecution and inclination towards the defence in saying that when he arrived, the dead body of her sister was covered by a white cloth and he had not even removed that and saw the dead body. It is also stated that he did not know as to how his sister Sombari died.

Ganesh Hansdah (P.W.1), who has been projected as a witness in support of the prosecution case, has also not supported while deposing in Court and this is also the situation in case of Sauna Hembram (P.W.2) and P.W.6, is the mother of the informant (P.W.7) when the fact remains that she was first taken to the house of accused Rame for treatment of her ailments by her daughter Sombari (deceased), but she too has not supported the prosecution case and the cross-examination from the side of the prosecution, with the permission of the Court, has not yielded any result in their favour. She, having also been examined in course of investigation by the I.O. (P.W.33) and having given her statement, which was recorded by the learned Magistrate under section 164 of the Code of Criminal Procedure, 1973 (in short, 'the Cr.P.C'), has simply asserted to have never stated so. The statement of this witness recorded under section 164 Cr.P.C. thus is of no help as that is not the substantive evidence when the maker herself has not so deposed. The father-in-law of the injured, namely, Sita Murmu, has been examined as P.W.9. He, however, has stated that his daughter-in-law (Sita Murmu) was taken to the house of accused Rame, who to practised sorcery on her in order to cure her ailments and in that process, burn injuries had appeared on her both hands, chest and tongue and for that, she was taken to the District Headquarters Hospital, Mayurbhanj at Baripada and remained under treatment for eleven (11) days. The evidence of P.W.9 is to the effect that she was taken to the house of accused Rame, who is practicing sorcery on her to cure her ailments and then burn injuries were caused on her hands and tongue and also injuries had been caused on her knee and head. She has stated that for treatment of such injuries, she was taken to the Hospital. During cross-examination, this witness has, however, stated that since it was dark, she could not know as to who caused burn injuries on her hands and tongue. This is given much of emphasis by the learned counsel for the accused Rame that the evidence of this P.W.9 is not running against the accused persons and is not believable. In this way, the evidence of P.W.8 is adversely commented upon when he says to have not reported the matter to the police. It be stated at this stage that this P.W.9 having received the burn injuries in the house of accused Rame where Rame, with his family members, used to reside and when evidence of P.Ws,8 & 9 stand clear on the score that P.W.9 had been taken to the house of accused Rame, the non-explanation as regards such injuries appearing on the person of P.W.9 by accused Rame, who as per the evidence of these two witnesses was a witch doctor and when support is derived form the

evidence of P.Ws.17, 18 & 19 as well as the evidence of P.Ws.20, who is the husband of P.W.19 lead to presume that it is the accused Rame, who is the author of such injuries upon P.W.9. We, however, find that the evidence of the above prosecution witnesses as to be reliable to the extent that Sita while being under the treatment of witch doctor (accused-Rame) had received burn and other injuries on her person which receive the support on that score from the evidence of P.W.26, who had examined Sita (P.W.9) and had noted second degree burn over both hands with impending gangrene of right hand AND cellulitis upto right elbow and patchy gangrene of fourth, finger and thumb of left hand as well as another ulcer of size 2 cm X 2 cm over sternum.

11. On the conspectus of the analysis of the evidence let in by prosecution, we are of the considered view that the prosecution has failed to establish the charges against accused persons, namely, Mahi Murmu, Chhita Murmu @ Hansdah @ Sita Murmu and Jitu @ Sukul Murmu (Appellants in CRLA No.921 of 2022) and Kanda @ Narasingh Murmu (Appellant in CRLA No.1131 of 2022) under section 326/302/34 of the I.P.C. read with section 6 of O.P.W.H. Act beyond reasonable doubt by leading clear, cogent and acceptable evidence. Therefore, the judgment of conviction and order of sentence impugned in these Appeals, in so far as the above accused persons are concerned, are liable to be set aside.

In so far as accused Rame Murmu (one of the Appellants in CRLA No.921 of 2022) is concerned, this Court, while setting aside the judgment of conviction and order of sentence passed against him under section 302/34 of the I.P.C., confirms the same passed against him under section 326 of the I.P.C. read with section 6 of O.P.W.H. Act.

12. In the result, the Appeal, i.e., CRLA No.921 of 2022 is allowed in part with the above modification as to judgment of conviction and order of sentence.

The accused persons, namely, Mahi Murmu, Chhita Murmu @ Hansdah @ Sita Murmu and Jitu @ Sukul Murmu (Appellants in CRLA No.921 of 2022) and the accused, namely, Kanda @ Narasingh Murmu (Appellant in CRLA No.1131 of 2022) be set at liberty forthwith, if their detention is not wanted in any other case.

In so far as accused Rame Murmu (one of the Appellants in CRLA No.921 of 2022) is concerned, he is sentenced to undergo rigorous imprisonment for a term of eight (8) years with payment of fine of Rs.3,000/- (Rupees Three Thousand) in default, to undergo rigorous imprisonment for three (3) months for the offence under section 326 of the IPC; and rigorous imprisonment for two (2) years with payment of fine of Rs.1,000/- (Rupees One Thousand) in default to undergo rigorous imprisonment for one (1) month for the offence under section 6 of the O.P.W.H. Act with the stipulation that the sentences would run concurrently.Accordingly, CRLA Nos.921 and 1131 of 2022 stand disposed of accordingly.

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2023 (II) ILR – CUT- 788

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

W.P.(C) NO.13359 OF 2023

RASMI RANJAN MOHAPATRA .....Petitioner

-V-

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

MINIMUM WAGES ACT, 1948 r/w Notification No. 8536 dated 6.10.2012 notified by Government of Odisha in Labour and ESI Department – The petitioner being a contractor claim for enhancement in the minimum wages as per the notification – Whether the revised minimum wages have automatic application to all cases? – Held, No – To avail the benefit, a contractor has to satisfy that there is a provision in the agreement and there must be proof in release of enhanced wage to the labourer – This contingency must prevail to avoid unjust enrichment to the contractors, as benefit in fact does not go to the real beneficiaries.

(Para-11)

Case Law Relied on and Referred to :-

1. 2012(Supp.-I) OLR 1035 : Mahesh Prasad Mishra Vs. State of Odisha & Ors.

For Petitioner : Mr.J.K.Mohapatra

For Opp. Parties : U.K.Sahoo, ASC

JUDGMENT Date of Hearing & Judgment : 10.05.2023

BISWANATH RATH,J.

1. The Writ Petition involves the following prayer:-

> "In the aforesaid circumstances, it is humbly prayed that this Hon'ble Court be pleased to admit the writ petition, issue notice to the Opposite Parties calling for show cause as to why this writ application shall not be allowed and if the Opposite Parties fail to file any show cause or file insufficient cause the writ petition be allowed, the order dt.26.08.2022 passed by the Principal Secretary to Govt. Department of Works under Annexure-4 be quashed and necessary direction be passed to release the differential amount payable to the petitioner due to enhancement of minimum wages of labour during execution of work within a stipulated period."

2. Background involving the case appears to be in the attempt to challenge the order passed by the Principal Secretary to Government,Works Department, O.P.1, on 26.8.2022, the Petitioner-Contractor claims, pursuant to the tender for the work "Site Development for Construction of proposed Kendriya Vidyalaya No.6 at Pokhariput,Bhubaneswar", the Application submitted by the Petitioner was accepted being the lowest tenderer for the contract value of Rs.1,04,22,714/-. In the process, the Petitioner was communicated with the acceptance of tender by the Superintending Engineer, Bhubaneswar (R & B) Division-III, O.P.4, vide letter dated 27.3.2012. As a development, an agreement was executed between the

Petitioner and the Executive Engineer, vide assigning agreement no.-2 P1/2012-13. The Petitioner has averment through Paragraph-3 of the Writ Petition that the work under contract was to be commenced from 10.4.2012 and to be completed by 9.8.2012. However, the work was actually completed on 2.8.2014. The Petitioner also claims, the delay in finishing the work occurred for some reason at the instance of the Department. There is however pleading that there has been extension of contract till 2.8.2014. It is in the premises that in execution of the work, there has been enhancement in the minimum wages by way of revised minimum wages Notification by the Competent Authority, taking que from the decision in ***Mahesh Prasad Mishra vrs. State of Odisha & ors***. *Reported in 2012(Supp.-I) OLR 1035*, the Petitioner submitted representation approaching the Competent Authority for release of additional labour wages. For no attending to the request of the Petitioner, it appears, the Petitioner filed a Writ Petition bearing W.P.(C) No.7926/2021, which Writ Petition came to be disposed of by a Division Bench of this court on 7.2.2022 directing the Engineering-cum-Secretary to Government, Works Department to take a decision on the representation of the Petitioner within a period of two months from the date of receipt of copy of the order, vide Annexure-2. It is claimed, upon receipt of the order of this Court, a Technical Committee was constituted on 21.4.2022 taking five numbers of Technical Experts. It is claimed, the Technical Committee prepared a report on 13.6.2022 observing the Petitioner to be entitled to get the differential amount arising out of enhancement of minimum wages as appearing at Annexure-3. It is taking some observations of the Committee, the Petitioner claims, there has been illegal rejection of the claim of the Petitioner on his entitlement of enhanced minimum wages by the Principal Secretary to Government by its order dated 26.8.2022 resulting filing of the Writ Petition.

3. Mr.J.K.Mohapatra, learned counsel for the Petitioner in the above factual background claims, there has been clear observation in the Committee report entitling the Petitioner to differential minimum wages and there has been mechanical consideration of such observation by the Principal Secretary to Government. Mr. Mohapatra, learned counsel for the Petitioner thus prays this Court for interfering with the impugned order,vide Annexure-4 thereby setting aside the same and granting appropriate relief in terms of the Committee observation.

4. Mr.U.K.Sahoo, learned Additional Standing Counsel appearing for the O.Ps., however, taking this Court to the plea of the Petitioner at Paragraph-3 of the Writ Petition contended, the period of work in the contract remaining from 10.4.2012 to 9.8.2012 and the revision Notification applying with effect from 6.10.2012 with stipulated date of completion stated to be 9.8.2012, the notification pressed herein has no application to the case at hands. Mr. Sahoo, learned Additional Standing Counsel also contends, for undisputedly, the actual date of completion on 2.8.2014, there is no application of this revised minimum wages Notification to the case of the Petitioner. Further also taking this Court to the final observation of the Committee, vide Annexure-3, Mr Sahoo attempted to take support of the said

observation and objected the entitlement of the Petitioner thereby submitting that there has been right consideration by the Competent Authority in the rejection of the claim of the Petitioner as appearing at Annexure-4 requiring no interference in the impugned order.

5. Considering the rival contentions of the Parties, this Court finds, undisputedly, the work period remains to be within 10.4.2012 till 9.8.2012. However, there has been extension taking the actual date of completion of the work to be 2.8.2014. For P-1 agreement filed by the Petitioner appearing at Page-10 of the Brief, Clause-33(a) of the agreement reads as follows :-

> "Clause-33(a)- The contractor shall not employ for the purpose of this contract any person who is below the age of twelve (12) years and shall pay to each labourer for work done by such labourers fair wages. PWD No.-22059 Dtd.-16.08.77."

In Clause-33(a), fair wage means, wages, whether for time or piece work prescribed by the State Public Works provided that where higher rate has been prescribed under the Minimum Wages Act, 1948. Wages at such higher rate should be considered. This Court here taking into consideration the introduction of revised minimum wages circular even taking into account the actual date of completion of work to be 2.8.2014, from the pleadings herein, nowhere finds, there has been actual payment of higher wages dependent on the introduction of minimum wages circular. To add to this, this Court finds, the Writ Petition is in a second round litigation. In the first round of litigation, the Petitioner moved this Court in W.P.(C) No.7926/2021 on the selfsame issue, but in the said writ petition even there was no pleading on payment of higher wages, if any. This Writ Petition appears to have been disposed of by this Court with the direction as follows :-

> 4. Considering such submissions, this Court without expressing any opinion on the merits of the case, directs Opposite Party No.1-Engineer-in-Chief-cum-Secretary, Works Department, Government of Odisha to take a decision on the above noted representation of the Petitioner in accordance with law within a period of two months from the date of receipt of a copy of this order and communicate result of such exercise to the Petitioner."

6. It appears, pursuant to such direction, Government thought it appropriate to form a Technical Committee to look into the claim of the Petitioner. The Committee in its proceeding on the claim of the Contractor observed as follows :-

> "II. Details of Claims of the Contractor :-
>
> The Contractor in his letter dated 16.10.2020 in the address of E.I.C.-cum-Secretary to Govt., Works Department with copy to Chief Engineer, Buildings, Odisha had claimed for differential cost of enhanced Minimum Wages enhanced from Rs.90/- to Rs.150/- with effect from 09.10.2012 vide Notification No.-1942 dated 09.10.2012 in the line of the Order of Hon'ble High Court in W.P.(C) No.11158 of 1996 between Sri Suryamani Nayak vrs. Odisha State Housing Board and Others."

7. On the disclosures in the representation through Paragraph-D at Page-21 of the Brief, the Committee observed as follows :-

> "D. Details of Compliance on the Representation :-
>
> The S.E. Bhubaneswar (R & B) Division-III,Bhubaneswar has submitted a information sheet to Works Deptt. Vide Lt. no.1561 Dt.11.03.2022. In replythe S.E. has mentioned that Sri Rashmi Ranjan Mohapatra "A" Class contractor was given an affidavit for not claiming any escalation and compensation during the extended period."

Through Paragraph-D, it becomes clear that the Contractor had given an undertaking by way of affidavit for not claiming any escalation and compensation during the extended period.

8. This apart, on examination of the case of the Petitioner dependent on the observation and direction of this Court in Paragraph-F, it is observed as follows:-

> "F.Examination of Order of Hon'ble High Court By the Technical Committee:
>
> The Technical Committee examined the Order of Hon'ble High Court in their Order No-2 dated 07.02.2022 with reference to the judgments given by the Hon'ble Court on similar case like order dated 17.11.2011 In the Writ Petition bearing W.P.(C) No.-29271 of 2011 between Sri Mahesh Prasad Mishra Vrs. State of Odisha and order dated 25.03.2019 of Hon'ble High Court, Odisha in W.P.(C) No-20724 of 2018 between M/S Bhagabati Build & Construction Pvt. Ltd. vrs. State of Odisha as well as the views of Learned Advocate General, Odisha in his letter No-27646 dated 09.12.2020 on order dated 25.03.2019. In the Writ Petition bearing W.P.(C) No-29271 of 2011 between Sri Mahesh Prasad Mishra Vrs. State of Odisha and other the Hon'ble High Court, Odisha in their order dated 17.11.2011 opined that "the expression 'Escalation' used in the agreement ordinarily means, an agreement allowing for adjustment up and down according to change in circumstances as in cost of material in a Works Contract or in cost of living in a wage agreement. The expression 'escalation' would not bring within its sweep higher rate of wages which a contractor is otherwise liable to pay in view of the notification issued by the State Government under the provision of Minimum Wage Act, 1948, failing which he may have to face criminal prosecution. No equitable reason is also there to give extended meaning to the expression and bring such enhanced rate of wages within the area of compensation since payment itself made to the workers at higher rate is pursuance to a statutory notification issued under the provision of the Minimum Wages Act,1948 and the claim of the contractor on that score is not for his own enrichment." Hon'ble High Court, Odisha had also referred to the decision of Hon'ble Supreme Court, India in Tarapore and Co Vrs. State of Madhya Pradesh wherein the Apex Court had clearly held that the payment of wages as per the rate fixed under Minimum Wage Act is a statutory obligation and although the term of the contract is silent about payment of minimum wages, the contractor is statutorily bound to pay the minimum wages to the workers. The Hon'ble Court had also referred the judgment passed by the Division Benches of High Court, Odisha in similar cases between Suryamani Nayak Vrs. State of Odisha, Surendranath Kanungo Vrs. State of Odisha and M/S Nilagiri Corporation Society Vrs. State of Odisha. In view of aforesaid statement of Law which has been declared by the Hon'ble Supreme Court followed by the Division Benches of High Court Odisha, the Hon'ble High Court Odisha directed the Govt. Of Odisha to reimburse the enhance minimum wages to the petitioner Mahesh Prasad Mishra which has been implemented."

Coming to the finding of the Committee at Paragraph-G claims to be observed as follows:-

> "G. Finding of the Technical Committee:-
>
> The Technical Committee after due deliberation of the various judgments on similar cases as referred by Hon'ble High Court, Orissa, views of Learned Advocate General of Odisha in similar case and the representation of the Petitioner Contractor in his letter dated 16.10.2020 is of the opinion that present case i.e. W.P.(C) No-7926 of 2021 between Sri Rasmi Ranjan Mohapatra vrs. State of Odisha is covered within the per view of the order passed by Hon'ble High Court, Odisha in W.P.(C) No-29271 of 2011 between Mahesh Prasad Mishra Vrs. State of Odisha. The Committee unanimously recommends that as per the above mentioned order of Hon'ble High Court, Odisha dated 07.02.2022 in W.P.(C) No-7926 of 2021, Sri Rasmi Ranjan Mohapatra is eligible to get the differential amount arises out of enhancement of minimum wages as notified by the Govt. of Odisha in Labour & ESI Department in their Notification No-8536 dated 06.10.2012 on the value of work scheduled to be executed after date of enhancement of minimum wages as per the approved work programme or as per actual execution whichever is less and as per actual involvement of labour component for such works as per analysis."

For the findings of the Committee, the Committee unanimously recommended that the Petitioner would be eligible to get the differential amount arises out of enhancement of minimum wages as notified by the Government of Odisha in Labour & ESI Department in their Notification No.8536 dated 6.10.2012 on the value of work scheduled to be executed after the date of enhancement of minimum wages as per the approved programme or as per the actual execution whichever is less and as per actual involvement of labour component for such works as per analysis.

9. Keeping in view the report of the Committee, the Principal Secretary to Government following the direction of this Court required to take decision, vide Annexure-4 came to observe as follows :-

> "AND WHEREAS, the claim of labour escalation of the petitioner contractor in the instant case is for the period from 09.10.2012 (date of Notification in Gazette) to 02.08.2014 (date of actual completion of the work). At the same time, it is observed that the said period from 09.10.2012 to 02.08.2014 is covered under extended time period beyond the original intended completion period and during the said extended period, the delay being attributable to the contractor, penalty has been imposed for delayed completion of work in the Office of the Superintending Engineer, Bhubaneswar (R&B) Division No.III. It is also observed that Clause 31(b) of the contract agreement clearly postulates that for reimbursement of increased wage rate, one of the precondition is that work has to be carried out within stipulated time or extension thereof is not attributable to the contractor. In the instant case, the delay in completion of the work is clearly attributable to the contractor and for which penalty has been imposed."

10. Reading through the above, this Court finds, there has been taking into account the provision contained in Clause-33(b) of the contract agreement and thereby there is denial of the claim of the Petitioner. This Court finds, there is no infirmity in such bill of the Competent Authority.

11. To add to the above, reading the Gazette Notification involved herein on the enhancement of minimum labour wages, this Court finds, the revised minimum wages have no automatic application to all cases. In bringing in such claim a contractor has to first satisfy that there is such provision in the agreement and secondly there must be proof in release of enhanced wage. This contingency must prevail to avoid unjust enrichment to the contractors as benefit in fact does not go to the real beneficiaries.

12. It is on the restriction through Clause-31(b) of the contract agreement and no establishing of payment of escalated wages to the labourers, this Court finds, Contractors are busy in taking advantage of the decision in Mahesh Prasad Mishra (supra) and attempting to earn this amount for themselves, which is not permissible in the eye of law.

13. It is at this stage, Mr. Mohapatra, learned counsel for the Petitioner seeks leave of this Court to rebuild the contractor's case to fit into revised minimum wage circular.

This Court first of all finds, there is no foundation to such claim, secondly lot of exercises have been done at different ends by different competent authorities and thirdly the issue raised here is almost ten years back leaving no scope to entertain such request in 2023. In the ultimate outcome, this Court finds, there is no defect in the impugned order requiring to interfere in the same. The Writ Petition thus stands dismissed and in the circumstance, there is no order as to cost.

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2023 (II) ILR – CUT-793

BISWANATH RATH,J.

W.P.(C) NO. 7270 OF 2023

BISHNUPADA PATRA .....Petitioner

-V-

RABINDRA NATH GIRI & ANR. .....Opp. Parties

ODISHA GRAM PANCHAYAT ACT, 1964 – Sections 30,39 – Election misc. case was filed by the defeated candidate – Present petitioner being return candidate filed objection – During Pendency of the Election Petition, petitioner filed an application for amendment of the objection – The learned Civil Judge, Jr. Division rejected the application for amendment – Effect of – Held, the petitioner wants to take away the clear admission made in the objection petition through amendment which is not permissible in the eyes of law, the trial Court gave a reasonable consideration to the application involved and rightly rejected the amendment application. (Para 11-12)

For Petitioner : M/s. B. Baug, M.R. Baug, G. R. Sahoo

For Opp. Parties : Mr. A. Nandy
Mr. S. Mishra, ASC

JUDGMENT Date of Hearing :11.05.2023 : Date of Judgment:17.05.2023

BISWANATH RATH,J.

1. This Writ Petition at the instance of the return candidate involves a challenge to the order dated 01.12.2022 vide Annexure-5 passed by the learned Civil Judge (Jr. Divn.), Jaleswar in Election Misc. Case No.11 of 2022 thereby rejecting the application for amendment of the objection but at the instance of the return candidate.

2. Short background involved in this case is that the present Petitioner-the return candidate and Opposite Party No.1 herein-the defeated candidate were contestants for the post of Sarapanch of Baiganabadia Gram Panchayat in the three tier election held on 16.02.2022. It is averred that Petitioner was declared as the return candidate through declaration dated 28.02.2022 and as such continuing as the elected Sarapanch of Baiganabadia Gram Panchayat. It is claimed that while the matter stood thus Opposite Party No.1 being unsuccessful in such Election filed the Election Petition U/s.30 read with Section 39 of Odisha Gram Panchayat Act on the file of the learned Civil Judge (Jr. Divn.), Jaleswar being registered as the Election Misc. Case No.11 of 2022. During pendency of the said Election Misc. Case and after filing of objection to the Election Misc. Case the Petitioner being the return candidate coming to know that there has been inadvertent mistakes in his objection, brought an application for amendment of the objection thereby seeking replacement in several places. The defeated candidate-the election Petitioner filed objection and contested the matter and finally by order dated 1.12.2022 the application for amendment was rejected by the Election Tribunal impugned herein.

3. Petitioner herein has enclosed copy of the amendment application, objection as well as the order dated 1.12.2022 vide Annexures-3, 4 & 5 respectively.

4. Mr. Baug, learned counsel for Petitioners challenging the impugned order claimed that the trial court passed the impugned order without application of judicial mind and also losing its sight to the facts and circumstances of the case. Mr. Baug, leaned counsel for Petitioners also contested the impugned order on the ground of perversity. It is on the premises of amendment being formal in nature Mr. Baug, learned counsel for Petitioner alleged that the Election Tribunal remained casual in considering such application. Giving reference to the documents taken support by the return candidate in the amendment application Mr. Baug, learned counsel for Petitioner alleged that Petitioner's application for amendment gets serious foundation through the documents appended therein. It is, in the process Mr. Baug, learned counsel for Petitioner attempted to take this Court to the documents herein vide Annexures-6, 7,8 & 9 and also attempted to satisfy this Court that there in fact

requires an amendment to the objection of the return candidate and failure of which, case of the Petitioner is seriously affected.

5. It is, in the above background of the matter Mr. Baug, learned counsel for Petitioner attempted to oppose the impugned order and requested for setting aside of the same.

6. Mr. Nandy, learned counsel for Opposite Party No.1, however, reading through the particular paragraphs in the objection filed by the return candidate in the trial process, further also reading together with the proposed amendment vide amendment application at the instance of the return candidate attempted to submit that the return candidate has clear intention of taking away the admissions. Further taking this Court to the manner of conduct of the return candidate in the trial process and also taking this Court to the previous round of litigation in this Court through W.P.(C) No.3408 of 2023 disposed of on 7.02.2023 Mr. Nandy, learned counsel for Opposite Party No.1 contended that the impugned order though was passed on 1.12.2022, however, Petitioner-the return candidate remained silent and even did not bring to the notice of the Court about pendency of such application even in the final hearing of W.P.(C) No.3408 of 2023 and it is, accordingly, the return candidate is in clear attempt of prolonging the Election Dispute somehow or other and not only that there is also deliberate withholding of the above position and deliberately kept such issue alive to get into the second round of litigation in this Court. Taking this Court to the findings of the Election Tribunal and the development in the Election Dispute that in the meantime the complainant9s witnesses as well as the return candidate have all been examined, Mr. Nandy, learned counsel for Opposite Party No.1 contended that the attempt of the return candidate herein clearly aims to drag the Election Dispute and nothing else. It is, in the above circumstance, Mr. Nandy, learned counsel for Opposite Party No.1 claimed for dismissal of the Writ Petition.

7. Considering the submissions and contentions of the respective parties, this Court finds, this Writ Petition is in the second round of litigation. In the first round of litigation the return candidate being kept away of the Election Dispute so far bringing in its evidence on rejection of an application for adjournment preferred W.P.(C) No.3408 of 2023. This application came to be disposed of vide order of this Court dated 7.02.2023, but allowing the Petitioner herein to effectively participate in the Election Dispute while also imposing heavy cost on the Petitioner to ensure that there is no repeating of such situation and further also targeting the Election Dispute. It is unfortunate to note here that even in the meantime there has been rejection of the amendment application on 1.12.2022, the return candidate deliberately kept the rejection of amendment aspect away from this Court and on the other hand took an order targeting the Election Dispute. This Court, therefore, observes, the return candidate clearly suppressed the vital aspect from this Court and it is made clear that in the event the impugned order taking place was brought to the notice, there would have been effective adjudication of the issue vide W.P.(C) No.3408 of 2023. Further

from the discussions in W.P.(C) No.3408 of 2023 this Court finds, there has been clear recording that there has been more than a dozen of adjournments attempt only at the instance of the return candidate the Petitioner herein and this Petitioner was busy in delaying the trial of the Election Dispute. Considering this aspect alone in disposal of the W.P.(C) No.3408 of 2023 this Court had imposed an exemplary cost of Rs.10,000/- on the return candidate only to check dilatory tactics in the trial.

8. Keeping in view the pending application in the trial court involving the present case, this Court finds, development therein already taken place by the time of disposal of Writ Petition indicated hereinabove satisfies the allegation of the defeated candidate that there has been constant attempt by the return candidate to hold on the election dispute, which clearly demonstrates the conduct of the Petitioner herein.

9. Coming back to the amendment aspect, this Court finds, the core issue involved herein appears to be, prior to filing of the amendment application the return candidate in paragraph nos.7 & 8 of the objection to the Election Dispute had the following objection:-

> "7. That, the facts mentioned in paragraph no. 6 of the petition are unnecessary repetitions. This OP has never adopted any corrupt practice and that his name was not included in the voter list of Baiganbadia GP, rather it was there all along and that he has also not included his name in the voter list of Madhupura GP and that the same impliedly leads to corrupt practice and that this OP influenced the OP No. 1 to accept his nomination as Sarpanch, Baiganbadia GP and that the nomination of this OP No. 2 was improperly accepted by the OP No. 1 despite lawful objection made by the petitioner and that the same materially affected the result of the petition are false and concocted for the purpose of filing of this case.
>
> 8. That, the OP No. 2 is a permanent resident of village Khagadapal under Madhupura GP and is name appears in the voter list along with his other family members pertaining to house no. 7 of village Khagadapal. Being a valid voter of village Baiganbadia under baiganbadia GP, the OP No. 2 filed nomination to contest the election as Sarpanch of the said GP. On the date of scrutiny, the petitioner was grumbling that this OP No. 2 was having house under Madhupura GP and the entry of his name as voter under Baiganbadia GP was illegal and he had no right to contest as Sarpanch of the said GP. Since the contentions of the petitioner was not lawful, the OP No. 1 rightly rejected his claim and accepted the nomination of this OP No.2. In the election, the OP No. 2 got majority of votes and he owned the election by good margin of votes."

10. Parties have participated in evidence in the above background of factual aspect. It be recorded herein that it is only after examination of the witness from the defeated candidate gets over and even the evidence of Opposite Party No.2 therein clearly disclosing Opposite Party No.2 to be a resident of Khagadapal as clearly borne through the objection as well as pleadings also, there is attempt of filing of the amendment application. It is here coming back to take note of the amendment application, this Court finds, the proposed amendment therein reads as follows:-

PROPOSED AMENDMENT

1. In the written objection of OP No.2 in past Para-8 in the 1st line after the word "village and before the word 'under' the word "Khagadapal" may be deleted and in its place 'Kalikapur' may be written.

Similarly in the 2nd line of the same para-2 after the word "under" and before the word 'end' the word "Madhupura GP" may deleted and in its place "Baiganbadia GP" may be inserted. Similarly in page 4 in the 1st line the word "Khagadapal" may be deleted and in its place the word "Kalikapur" may be written."

11. Even though the amendment application did not contain any additional document as nothing such disclosures in the application,however, filing the writ petition here the return candidate attempted to take support of number of documents in consolidating its attempt for amendment. For there is no such document available and/or accompanied with the amendment application, this Court finds, none of these documents can be taken into account at this stage. Further even assuming that the documents have support seeking of amendment, but for these documents remaining outside consideration of the Election Dispute, the new documents had no place to be considered at all. Further looking to the proposed amendment, this Court finds, the attempt therein appears to be clearly taking away the clear admissions through paragraph nos.7 & 8 taken note hereinabove, which is not permissible in the eye of law.

12. It is here looking to the observation and findings of the trial court in considering the amendment application, this Court finds, the trial court has clearly recorded closure of P.W.1. This Court finds, the return candidate has established through Annexure-A/12 as available at page 83 of the brief clearly disclosing the chief and cross examination of the return candidate is already taken place in the Election dispute. This Court through the impugned order also finds, the Election Dispute is already in argument process. It is, in the whole background of the matter indicated hereinabove, this Court observes, the trial court gave a reasonable consideration to the application involved and rightly rejected the amendment application impugned herein. It is necessary to observe here that the impugned order dated 1.12.2022 involved consideration of multiple applications and the order impugned herein dated 1.12.2022 only involves rejection of application for amendment and there is no challenge to the other part of the order dated 1.12.2022 herein by either of the parties as of now. For there is already sufficient delay in closure of the trial, this Court while recording the submissions of the respective parties that there has been no challenge to the other part of the order dated 1.12.2022, also declines to interfere in the order dated 1.12.2022 in the rejection of the amendment petition and confirms the same by taking out the interim order dated 13.03.2023 herein. While affirming the impugned order, this Court directs the Election Tribunal to conclude the proceeding at least within a period of two months from the date of communication of a copy of this judgment.

13. Both the parties are restrained from taking further adjournments in the Election Misc. Case No.11 of 2022.

14. Writ Petition stands dismissed. There is, however, no order as to costs.

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2023 (II) ILR – CUT - 798

S. K. SAHOO, J.

JCRLA NO.109 OF 2018

DILU JOJO .....Appellant

-V-

STATE OF ODISHA .....Respondent

CRIMINAL TRIAL – Offence U/s 376(2)(i) of the Indian Penal Code and Section 6 of the POCSO Act, 2012 – Whether as per the evidence of the victim during her examination in chief and the statement given before the police the necessary ingredients of the offences are made out – Held, No – Reason indicated. (Para 11-12)

For Appellant : Mr. Malaya Kumar Swain

For Respondent : Mrs. Susamarani Sahoo, ASC

JUDGMENT Date of Hearing and Judgment: 28.06.2023

S. K. SAHOO, J.

1. The appellant Dilu Jojo faced trial in the Court of learned Additional Sessions Judge -cum- Special Judge, Sundargarh, Camp at Bonai in connection with Special G.R. Case No.52 of 2015/Trial No.54 of 2017 for the offence under section 376(2)(i) of the Indian Penal Code (hereinafter, 'I.P.C.') and section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO Act') on the accusation that on 08.05.2015 in between 5 p.m. to 12 a.m. midnight at 'C' Zone, Jhumpudi playground, Tensa, the appellant committed rape on the victim girl, who was under 10 years of age.

The learned trial Court vide impugned judgment and order dated 21.08.2018 found the appellant guilty of both the charges and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.5,000/- (Rupees five thousand), in default, to undergo Rigorous Imprisonment for a further period of one year under

section 376(2)(i) of the I.P.C., however, no separate sentence was awarded for his conviction under section 6 of the 'POCSO Act' in view of section 42 of the said Act.

2. The prosecution case, as per the first information report (Ext.2) lodged by Asha Kamal (P.W.2), the mother of the victim on 09.05.2015 before the Inspector-in-Charge of Lahunipada Police Station is that the victim was five years of age at the time of occurrence and at about 5 p.m. while she had gone to play in 'C' Zone Jhumpudi playground, Tensa, she did not return home. P.W.2 searched for the victim, but could not locate her. At about midnight, P.W.2 found the victim in a naked condition and on being confronted; the victim disclosed that the appellant had committed rape on her.

On the basis of such First Information Report, Lahunipada P.S. Case No.51 dated 09.05.2015 was registered under section 376(2)(i) of the Indian Penal Code and section 6 of the POCSO Act. After registration of the case, the Inspector -in-charge, Lahunipada entrusted the case for investigation to P.W.5 Champabati Soren, the Sub-Inspector of Lahunipada Police Station, who during course of investigation, examined the informant, the victim and also victim's father. The victim was sent for medical examination on police requisition. P.W.5 visited the spot along with the victim and her parents and prepared the spot map (Ext.4). The panty and frock of the victim in torn condition was recovered during the spot visit, which were seized under the seizure list Ext.5. A prayer was made by P.W.5 to the Court for recording the 164 Cr.P.C. statement of the victim, which was accordingly done on 12.05.2015. The appellant was apprehended on 20.05.2015 and sent for medical examination. The biological samples of the appellant were collected by the Medical Officer and the Investigating Officer seized the same under seizure list Ext.7. After the appellant was forwarded to the Court, the Investigating Officer also made a prayer to the Court for sending the biological objects for chemical examination and accordingly, the same was done. The school admission register of the victim, where the victim was prosecuting her study, was seized under seizure list Ext.13 from which it reveals that the date of birth of the victim was 24.03.2008. The school admission register was given in the zima of Headmaster under zimanama Ext.14 and on completion of investigation on 25.06.2015, charge sheet was placed against the appellant under section 376(2)(i) of the I.P.C. and section 6 of the POCSO Act.

3. The defence plea was one of denial and it was pleaded that on account of previous dispute, the appellant has been falsely implicated in the case.

4. During course of trial, in order to prove its case, the prosecution examined eight witnesses.

P.W.1 is the victim and she supported the prosecution case.

P.W.2 is the mother of the victim, who is the informant in the case and P.W.3 is the father of the victim. Both P.W.2 and P.W.3 stated about the disclosure made by the victim about the overt act committed by the appellant on her.

P.W.4 Dr. Abanindra Mishra was the Medical Officer attached to C.H.C., Lahunipada, who examined the victim on police requisition and proved the report marked as Ext.1.

P.W.5 Champabati Soren is the Investigating Officer.

P.W.6 Gabriel Kamal @ Etual and P.W.7 Julias Surin did not say anything about the occurrence.

P.W.8 Dr. Saroj Ranjan Nanda, Medical Officer, Art CHC, Lahunipada, who on police requisition examined the appellant and proved his report marked as Ext.11.

The prosecution exhibited sixteen documents. Ext.1 is the Medical examination report of the victim, Ext.2 is the plain paper F.I.R., Ext.3 is the formal F.I.R., Ext.4 is the sport map, Ext.5 is the seizure list, Ext.6 is the requisition for medical examination of the accused, Ext.7 is the seizure list of biological objects of the appellant, Ext.8 is the seizure list of wearing apparels of the apparels, Ext.9 is the payer made by the I.O. for sending biological objects and wearing apparels for chemical examination, Ext.10 is the copy of forwarding report for sending exhibits, P.W.11 is the medical report in relation to the appellant, P.W.12 is the true copy of school admission register, P.W.13 is the seizure list of school admission register, Ext.14 is the Zimanama, Ext.15 is the chemical examination report and Ext.16 is the statement of the victim recorded under section 164 Cr.P.C.

5. No witness was examined on behalf of the defence.

6. The learned trial Court after assessing the evidence on record, came to hold that the victim was a minor girl and she was below twelve years of age at the time of occurrence and the appellant had committed sexual assault on her and there is nothing to disbelieve the evidence of the victim and her parents and that the prosecution has successfully proved the charges against the appellant.

7. Mr. Malaya Kumar Swain, leaned counsel, who was engaged for the appellant through Legal Aid, contended that the evidence of the victim (P.W.1) runs contrary to the evidence of her parents (P.W.2 & P.W.3) and since the medical evidence adduced by P.W.4 does not corroborate the ocular evidence regarding commission rape on the victim and even though the victim was held to be below twelve years of age at the time of occurrence, it cannot be said that the prosecution has successfully established the charges against the appellant and therefore, benefit of doubt should be extended in favour of the appellant.

Mrs. Susamarani Sahoo, learned Additional Standing Counsel, on the other hand supported the impugned judgment and argued that in view of the documentary evidence as well as ocular evidence, it has been established that the victim was seven years of age at the time of occurrence. The victim has stated about commission of rape on her by the appellant and disclosed about the same before her

parents (P.Ws.2 & 3) immediately after the occurrence. Even though the evidence of the doctor does not indicate any bodily injury on the victim or any physical clue of sexual assault on her, however, the same cannot be a ground to disbelieve the prosecution case. Therefore, the learned trial Court has rightly held the appellant guilty under section 376(2)(i) of the I.P.C. and section 6 of the POCSO Act.

Age of the victim:

8. Adverting to the contentions raised by the learned counsel for the respective parties, let me first discuss about the age of the victim (P.W.1) on the date of occurrence.

The Investigating Officer (P.W.5) has stated that during course of investigation on 21.06.2015, she seized the school admission register of the victim to ascertain her date of birth. She has proved true copy of the school admission register with seal and signature of the Headmaster of the school and the same has been marked as Ext.12 and the concerned seizure list has been marked as Ext.13. She further stated that as per the entry made in the school admission register, the date of birth of the victim is 24.03.2008. The victim was examined in Court on 11.09.2017 as P.W.1 and she stated her age to be eight years. Her statement under section 164 Cr.P.C. was recorded on 12.05.2015 when she stated her age to be five years. No challenge has been made to the evidence of the victim regarding her age in the cross-examination by the learned defence counsel.

Therefore, I am of the humble view that from the evidence of the victim and the entry made in her school admission register, it has been established that when the occurrence in question took place, i.e., on 08.05.2015, the victim was below twelve years of age.

Evidence of the victim:

9. The victim being examined as P.W.1 was put some formal questions by the learned trial Court and the answers given by the victim to such questions have been noted down. On the basis of answers given by the victim, the learned trial Court having come to the conclusion that she is competent to give evidence and accordingly her statement was recorded.

Section 118 of the Evidence Act states that a child is a competent witness provided that he understands the questions put to him and is in a position to give rational answers to such questions. It is the duty of the Court while assessing the evidence of a child witness to see whether the child understands the duty of speaking the truth. The Court should make necessary examination of the child witness by putting a few questions in order to find out whether the witness is intelligent enough to understand what he had seen and afterwards to inform the Court thereof and also give his opinion that why it thinks that the child is a competent witness. The evidence of a child witness should be scanned carefully and if no flaws or infirmities are found therein then there is no impediment in accepting his evidence.

The victim has stated in her examination-in-chief that on the date of occurrence, in the evening hours, while she was in her home and playing, the appellant called her and took her to the nearby bushes of the village and at that time, her parents had been to bring fire wood. The appellant undressed her and made her to sleep on a stone and then he slept over her. Then the appellant gave her to eat and dragged her hand and told her to return home. She further stated to have disclosed the incident to her mother. The learned Special Public Prosecutor declared the victim as hostile and put some leading questions and she admitted to have stated before police that the appellant had closed her mouth and told her to put his penis inside her mouth and further told her to put his penis in her vagina and the appellant left her at about 12 midnight. She further stated that she had been to the police station with her mother and she was medically examined and she was taken to Court and her statement was recorded under section 164 Cr.P.C. In the cross-examination, she stated her age to be eight years and further stated that her friend Benika and another were playing with her when the appellant called her and took her. She further stated that her elder sister had seen while the appellant took her and though she shouted, but nobody came. It is true that the two friends of the victim and her elder sister have not been examined during trial. However, in my humble view, the non-examination of those witnesses cannot be a ground to disbelieve the victim's evidence. No particular number of witnesses is required for proving a certain fact. It is the quality and not the quantity of the witnesses that matters. Evidence is weighed and not counted. Evidence of victim of rape, if found to be truthful, consistent and inspires confidence, the same is sufficient for maintaining conviction. It is not necessary that all those persons who had seen a part of occurrence must be examined by the prosecution in order to prove the guilt of the accused. Even if some persons present in the vicinity are not examined, the evidence of victim cannot be discarded.

Corroboration to the evidence of the victim:

10. P.W.2, the informant of the case and the mother of the victim has stated that on the date of occurrence, she and her husband had been to bring fire wood and when they returned home, they could not find the victim and the friends of the victim told that the appellant had taken the victim towards the bush area of Jhumpudi basti. She further stated that at about 12 midnight, the victim returned home and on being asked, she told that the appellant left her in the home and she further disclosed that the appellant undressed her and told her to suck his penis and when the victim shouted, the appellant closed her mouth. The victim also disclosed that the appellant was also touching his penis with her vagina. When the victim shouted and cried, the appellant left her in her house. In the cross-examination, P.W.2 stated that her elder daughter disclosed to her that the appellant had taken away the victim.

The father of the victim being examined as P.W.3 has stated that the victim returned home at about 12 midnight and on being asked, she told that the appellant

had taken her and told her to hold his penis. He was declared hostile by the prosecution and put leading questions.

Even though P.W.2 stated that the victim disclosed before her that the appellant after undressing her asked her to suck his penis and that the appellant was also touching his penis with her vagina but the evidence of the victim is silent in that respect. P.W.3 on the other hand stated that the victim disclosed before him that the appellant told her to hold his penis.

Whether the ingredients of offences are made out:

11. Section 376(2)(i) of the I.P.C. deals with punishment for commission of rape on a women when she is under sixteen years of age. 'Rape' has been defined in section 375 of the I.P.C., wherein it is stated that a man is said to commit 'rape', if he-

> (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
>
> (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
>
> (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
>
> (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions.

Similarly, section 6 of the POCSO Act prescribes punishment for aggravated penetrative sexual assault. 'Aggravated penetrative sexual assault' has been defined under section 5 of the POCSO Act and it indicates, inter alia, that if any one commits penetrative sexual assault with a child below twelve years of age then it would come under aggravated penetrative sexual assault. Penetrative sexual assault has been defined in section 3 of the POCSO Act which reads as follows;

> "**3. Penetrative sexual assault**- A person is said to commit "penetrative sexual assault" if—
>
> (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
>
> (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
>
> (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
>
> (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

The evidence of the victim (P.W.1) in his examination-in-chief is that the appellant undressed her and made her to sleep on the stone and he slept over her and

even her statement before the police which she admitted to have stated is that the appellant closed her mouth and told her to put his penis inside her mouth and further told her to put his penis into her vagina. In my humble view, none of such act of the appellant would come within the definition of 'rape' as defined in section 375 of the I.P.C. or 'penetrative sexual assault' as defined in section 3 of the POCSO Act. The statement of the victim in her examination-in-chief is completely silent that the appellant penetrated his penis, to any extent, into her vagina or any part of her body or made her to do the same with him, or the appellant inserted any object or a part of his body to any extent, not being the penis, into her vagina or any other part of her body. Her evidence is also silent that the appellant manipulated any part of her body so as to cause penetration into her vagina or any part of her body or made her do so with him. Her evidence is also silent that the appellant applied his mouth to her vagina or anus, urethra or made her to apply her mouth to his penis. Therefore, it is very difficult to hold that the 'rape' as per the definition of section 375 of the I.P.C. or penetrative sexual assault as per definition under Section 3 of the POCSO Act has been committed on the victim by the appellant.

Section 7 of the POCSO Act defines 'sexual assault' and it reads as follows;

> "7. Sexual assault- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

'Sexual assault' is punishable under section 8 of the POCSO Act. Aggravated sexual assault has been defined under section 9 of the POCSO Act which is punishable under section 10 of the POCSO Act. If any one commits sexual assault on a child below twelve years of age, then as per section 9(m), he can be said to have committed 'aggravated sexual assault'. Since the conduct of the appellant in undressing the victim and making her to sleep on a stone and then the appellant slept over her, even though the victim has not stated that the appellant undressed himself, in my humble view, the same would be an act of the appellant with sexual intent, which involved physical contact with the victim without penetration and therefore, it would come within the definition of 'sexual assault' as defined under section 7 of the POCSO Act and since the age of the victim has been proved to be below twelve years, thus the prosecution can be said to have established that the appellant committed 'aggravated sexual assault' with the victim (P.W.1). Even though no specific charge has been framed for section 10 of the POCSO Act, but since charge has been framed under section 6 of the POCSO Act, which is a higher offence, it cannot be said that the appellant would claim prejudice if he is convicted under section 10 of the POCSO Act. Section 222 of Cr.P.C. is in the nature of a general provision which empowers the Court to convict for a minor offence even though charge has been framed for a major offence. Illustrations (a) and (b) to the said section also make the position clear.

Conclusion:

12. In view of the foregoing discussions, in my humble view, the impugned judgment and order of conviction of the appellant under section 376(2)(i) of the I.P.C. and section 6 of the POCSO Act is not sustainable in the eye of law and accordingly, the same is hereby set aside, instead, the appellant is held guilty under section 10 of the POCSO Act and he is sentenced to undergo R.I. for seven years, which is maximum punishment for such offence. In view of the financial condition of the appellant, no fine is imposed on him. It appears that the appellant was taken into the judicial custody on 20.05.2015 and he was never released on bail during trial of the case and even during pendency of the appeal before this Court. Thus, he has already undergone substantive sentence of seven years, which has been imposed on him for his conviction under section 10 of the POCSO Act. Therefore, the appellant be set at liberty forthwith, if his detention is not otherwise required in any other case.

Accordingly, the JCRLA is partly allowed.

The trial Court records along with a copy of the judgment be sent down to the concerned Court forthwith for information and necessary action.

Before parting with the case, I would like to put on record my appreciation to Mr. Malaya Kumar Swain, learned counsel for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned counsel shall be entitled to his professional fees, which is fixed at Rs.7,500/- (rupees seven thousand five hundred only). This Court also appreciates the valuable help and assistance provided by Mrs. Susamarani Sahoo, learned Additional Standing Counsel.

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2023 (II) ILR – CUT - 805

S.K. SAHOO, J.

JCRLA NO. 37 OF 2019

SANTANU KAUDI .....Appellant

-V-

STATE OF ODISHA .....Respondent

CRIMINAL TRIAL – Commission of offence under section 376(2)(n) 506 of IPC r/w section 3(2)(v) of Schedule Cast and Schedule Tribe (Prevention of Atrocities) Act and Section 4 of POCSO Act – The victim voluntarily accompanying the appellant deep into the jungle every day where they used to have sexual intercourse and she was not complaining before anybody nor raising any protest against the overt

act committed by the appellant nor disclosed before anyone till she was found pregnant for seven months – The prosecution have not taken any step for conducting DNA Test to determine the paternity aspect of child – Effect of – There is absence of cogent materials that the appellant committed any act of criminal intimidation and the prosecution has failed to establish the charges U/s 376(2)(n)/506 of the IPC. (Para-10)

For Appellant : Mr. Akhaya Kumar Beura, Amicus Curiae
For Respondent : Mr. Priyabrata Tripathy, Addl. Standing Counsel

JUDGMENT Date of Hearing & Judgment: 05.07.2023

S.K. SAHOO, J.

1. The appellant Santanu Kaudi was initially charged on 14.05.2014 for commission of offences under sections 376(i)/506 of the Indian Penal Code (hereinafter, 'I.P.C.'), section 3(2)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereafter '1989 Act') and section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO Act') by the learned Sessions Judge-cum-Special Judge, Sundargarh in Special G.R. Case No.15 of 2013. In the midst of trial, the case was transferred to the Court of Additional Sessions Judge-cum-Sessions Judge, Sundargarh where the trial proceeded. After examination of the prosecution witnesses and also recording of the accused statement, charge was re-framed under sections 376(2)(n)/506 of the I.P.C., section 3(2)(v) of 1989 Act and section 6 of the POCSO Act.

The learned trial Court vide impugned judgment and order dated 14.08.2018, while acquitting the appellant of the charges under section 3(2)(v) of the 1989 Act and section 6 of POCSO Act, found him guilty of the offences punishable under sections 376(2)(n)/506 of I.P.C. and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.10,000/- (rupees ten thousand), in default, to further undergo rigorous imprisonment for one year for the offence under section 376(2)(n) of the I.P.C. and rigorous imprisonment for a period of two years for the offence under section 506 of the I.P.C. and both the substantive sentences were directed to run concurrently.

2. The father of the victim, namely, Baisakhu Munda (P.W.2) lodged an F.I.R. before the Inspector-in-charge of Sadar police station, Sundargarh on 14.08.2013 stating therein that the victim was aged about seventeen years and she used to go to the jungle for grazing goats everyday and the appellant, who is a co-villager, also used to visit the jungle for the same purpose every day. By giving threat to the victim and also alluring her, the appellant used to keep physical relationship with the victim for which she became pregnant for seven months as on the date of lodging of the F.I.R. It is also stated in the F.I.R. that the appellant was threatening the victim not to disclose such act before any body or else she would have to face dire

consequences for which she did not disclose about the incident before her family members. She was examined by the Asha Karmi, who found her pregnant and when she was asked about the name of the person who made her pregnant, the victim disclosed the name of the appellant before the Asha Karmi.

On the written report presented by P.W.2, Ms. Iti Das (P.W.14), the Inspector-in-charge registered Sundargarh Sadar P.S. Case No.103 dated 14.08.2013 under sections 376/506 of the I.P.C. and directed Kuni Besra (P.W.16), the S.I. of Police, Sadar P.S., Sundargarh to take up investigation of the case.

During the course of investigation, P.W.16 examined the informant, the victim and other witnesses, seized the wearing apparels of the victim under seizure list Ext.4. On 15.08.2013, she visited the spot, prepared the spot map (Ext.11) and on the same day, sent the victim for her medical examination. Dr. Mrs. Lipika Dei (P.W.8), who was attached to the District Headquarters Hospital, Sundargarh as Assistant Surgeon examined the victim and prepared the report (Ext.6) wherein she gave a finding that the victim was having pregnancy for thirty to thirty two weeks and possibility of commission of rape on the victim cannot be ruled out. The appellant was arrested on 15.08.2013 and his wearing apparels were seized as per seizure list Ext.8 and then he was also sent for medical examination and P.W.11, the Medical Officer attached to the District Headquarters Hospital, Sundargarh examined the appellant and found that the appellant was capable of having sexual intercourse and accordingly, he prepared the report vide Ext.7.

During the course of investigation, since as per the statement of the victim and other witnesses, it was ascertained that the case is one under sections 376(2)(n)/506 of the I.P.C., section 3(2)(v) of 1989 Act and section 4 of the POCSO Act, as per the order of the Superintendent of Police, Sundargarh, P.W.16 requested Sri P.K. Patel, (P.W.15), D.S.P., HRPC, Sundargarh to take up the charge of investigation on 15.08.2013 and accordingly, P.W.16 handed over the charge of investigation to P.W.15. After taking over charge of investigation, P.W.15 re-examined the informant, the victim and other material witnesses, seized the biological materials of the appellant collected by the Medical Officer, which were produced before him as per the seizure list (Ext.9) and forwarded the appellant to the Court on 15.08.2013. The biological materials of the victim were also seized on 16.08.2013 as per the seizure list (Ext.5) and those were sent for chemical examination through Court. The admission register of Chakramal Sevashram School, where the victim was prosecuting her studies, was initially seized by P.W.15 and requisition was made to the Tahasildar, Tangarpali to furnish the caste certificate of the informant and also that of the appellant. He received the caste particulars from the Tahasildar, Tangarpali and on completion of investigation, submitted charge sheet under sections 376(1)/506 of the I.P.C., section 3(2)(v) of 1989 Act and section 4 of the POCSO Act against the appellant on 10.10.2013.

3. The defence plea of the appellant is one of denial.

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

P.W.1 Sanjulata Patel is the Asha Karmi who examined the victim after which she came to know that the victim was pregnant.

P.W.2 Baisakhu Munda is the father of the victim and also the informant in the case who lodged the written report at Sadar Police Station, Sudargarh, alleging therein that his daughter was sexually assaulted.

P.W.3 is the victim herself.

P.W.4 Rohit Kumar Patel is a co-villager of the informant, the scribe of the F.I.R.

P.W.5 Kishore Kumar Patel was the Headmaster of the school where the victim was prosecuting her studies.

P.W.6 Sunita Munda is the mother of the victim.

P.W.7 Menaka Patel who was the constable attached to Sadar police station, Sundargarh is a witness to the seizure of wearing apparels vide Ext.4 as well as biological samples of the victim as per the seizure list Ext.5.

P.W.8 Dr. Lipika Dei, who was Assistant Surgeon attached to the District Headquarters Hospital, Sundargarh examined the victim on police requisition and submitted her report vide Ext.6.

P.W.9 Swetalina Patnaik was the teacher of the school where the victim was prosecuting her studies and she is a witness to the seizure of school admission register as per seizure list Ext.2.

P.W.10 Manoj Panda who was the Ward Member of the village of the informant stated that on the request made by the Asha Karmi, he convened a panch meeting whereafter, he advised the parents of the victim to report the matter to the police.

P.W.11 Dr. Sagar Dalei was the Medical Officer attached to the District Headquarters Hospital, Sundargarh, who examined the appellant on police requisition and submitted his report as per Ext.7.

P.W.12 Kalipada Oram who was the police constable attached to Sadar police station, Sundargarh is a witness to the seizure of wearing apparels of the appellant as per seizure list vide Ext.8 and the envelopes containing the biological samples of the appellant as per the seizure list Ext.9.

P.W.13 Niranjan Guria was the retired Havildar of police is a witness to the seizure of envelopes as per seizure list Ext.9.

P.W.14 Iti Das was the Inspector-in-Charge of Sundargarh Police Station who registered the case on the report of P.W.2 and directed P.W.16 to take up the investigation.

P.W.15 Promod Kumar Patel was the D.S.P., H.R.P.C., Sundargarh who was handed over the charge of investigation from P.W.16 pursuant to the order of the Superintendent of Police, Sundargarh.

P.W.16 Kuni Besra, who was the Sub-Inspector of Police attached to the Sadar Police Station, Sundargarh was the initial Investigating Officer of the case.

The prosecution also proved thirteen documents through exhibits. Ext.1 is the F.I.R., Ext.1/3 is the formal F.I.R., Exts.2, 4, 5, 8, and 9 are the seizure lists, Ext.3 is the zimanama, Exts.6 and 7 are the medical examination reports of the victim and the appellant respectively, Ext.10 is the caste certificate of the victim, Ext.11 is the spot map, Exts.12 and 13 are the medical requisitions of the victim and the appellant respectively.

The appellant neither examined any witness nor proved any document.

5. The learned trial Court after analyzing the oral and documentary evidence on record came to hold that the prosecution evidence clearly revealed that the victim was raped by the appellant many a times while they used to visit jungle for grazing goats and livestock. The learned trial Court further held that the victim's parents were illiterate and the school admission register has not been produced and proved in the Court. No horoscope or date of birth of the victim was seized and the victim's father (P.W.2) has stated the age of the victim as per his guess and accordingly, it was held that the prosecution has failed to prove the date of birth of the victim. The ossification test disclosed that the age of the victim to be around 16-17 years and if a variation is taken into account in the higher side, the victim would be more than eighteen years of age and as such, it was held that the prosecution has failed to prove that the victim was less than eighteen years of age as on the date of alleged date of rape. Accordingly, the offence under section 6 of the POCSO Act could not be proved against the appellant. It was further held that the victim was an illiterate girl and belonged to labour class scheduled tribe family. The incident took place inside the jungle while she used to graze the goats and as such, the consent of the victim, if any, to the act of the appellant was under misconception of fact and such consent cannot be construed to be a valid consent. The learned trial Court further held that the prosecution has been able to prove the charge under section 376(2)(n) of the I.P.C. as the appellant was committing rape on the victim regularly by which she became pregnant and a male child was born to her. Since the evidence on record indicates that the appellant had committed rape on the victim by giving threat to kill her and her parents if she would disclose the incident to others, the victim could not disclose the same before her parents out of fear till she became pregnant and her pregnancy was ascertained by the Asha Karmi (P.W.1) and hence, the offence under section 506 of the I.P.C. is established. The learned trial Court further held that even though the victim belonged to S.T. category as per the case particulars furnished by the Tahasildar, Tangarpali and the accused belonged to 'Gouda' by caste, which

comes under SEBC category, however, it was held that there is no evidence that the appellant committed rape on the victim as because she was a member of S.T. and accordingly, it was held that the offence under section 3(2)(v) of the 1989 Act is not proved against the appellant.

6. Mr. A.K. Beura, learned Amicus Curiae appearing for the appellant contended that the prosecution has failed to prove that the victim was less than eighteen years of age as on the alleged date of rape for which the appellant was acquitted of the charge under section 6 of the POCSO Act, which has not been challenged before this Court. Since the victim was a major girl as on the date of occurrence, in view of her evidence that even though other persons were grazing the goats and cattle nearby, she did not raise any hue and cry nor offered any resistance to the act of the appellant and her evidence that she was having sexual intercourse with the appellant going deeper into the jungle almost every day would substantiate that she was a consenting party and being fully aware that the appellant, who was her co-villager, is a married man having wife and four children and the eldest child has already been given in marriage, since she allowed the appellant to have sex with her, it cannot be said that consent of the victim, if any, to the act of the appellant was under misconception of fact and that such consent cannot be construed to be a valid consent in the eye of law as observed by the learned trial Court. Learned counsel further argued that even though the school admission register of the victim was seized by P.W.15, but for the best reasons known to the prosecution, the said register was not proved during trial. He further submitted that the prosecution has not taken any step for conducting the DNA test to determine the paternity aspect of the child of the victim and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Priyabrata Tripathy, learned Additional Standing Counsel, on the other hand, submitted that no appeal has been filed by the State challenging the order of acquittal of the appellant under sections 3(2)(v) of the 1989 Act and section 6 of the POCSO Act. He however, submitted that the victim has specifically stated how she was dragged deeper into the jungle and raped forcefully against her will and without her consent by the appellant and how the appellant threatened her not to disclose about the incident before anybody. Learned counsel further argued that the reasons given by the victim for non-disclosing the act committed by the appellant before her family members appears to be satisfactory. Further, the act of the appellant came to the fore when she was found to be pregnant and her belly started bulging gradually. Learned counsel further submitted that P.W.1, who was the Asha Karmi with the approved Government supply kits conducted the test known as ‘Mixture test’ with the urine of the victim and from the result of the test, she came to the conclusion that the victim was pregnant and the victim disclosed before her that the appellant was responsible for her pregnancy. Learned counsel for the State further argued that before her father (P.W.2) and mother (P.W.6), the victim disclosed that the appellant was responsible behind her pregnancy and the doctor (P.W.8) who examined her on

15.08.2013 also stated that the ultrasound examination was conducted and it was found that the victim was pregnant for thirty to thirty-two weeks. It is argued that in view of the available materials on record, it is clear that the appellant not only committed rape on the victim, but also threatened her not to disclose before any one for which the victim became pregnant and delivered a child and therefore, the learned trial Court has rightly held the appellant guilty under sections 376(2)(n) and 506 of the Indian Penal Code and thus, the appeal being devoid of merits, should be dismissed.

Age of the Victim :

7. Adverting to the contentions raised by the learned counsel for both the parties, so far as the age of the victim is concerned, it is no doubt true that when the victim (P.W.3) was examined on 1st May 2015 in the learned trial Court, she stated her age to be seventeen years and further stated that the incident in question took place in the year 2013 and the father of the victim being examined as P.W.2 has stated that P.W.3 was born in the year 1996 and the mother of the victim stated that the victim was aged about sixteen years at the time of the incident, however, it appears that the I.O. (P.W.15) seized the school admission register of Chakramal Sevashram School Vol. IV with effect from 1996 to 2008 in which the victim is shown to have been admitted in Class-I of the Sevashram school on 03.07.2002 vide Sl.No.1/498/2002 and her age has been mentioned to be six years and twenty three days. The Headmaster of Chakramal Sevashram School being examined as P.W.5 also stated about seizure of the school admission register by the police as per seizure list (Ext.2) and further stated to have taken the admission register in zima by executing zimanama (Ext.3), but the prosecution did not take any step to call for the admission register during the trial of the case to prove the same, particularly the page where the date of birth of the victim has been mentioned. This is, certainly, a lacuna in the prosecution case. Admittedly, the birth certificate of the victim has not been proved. Since one of the charge under which the appellant is being prosecuted at the initial stage was under section 4 of the POCSO Act, which was subsequently altered to one under section 6 of the POCSO Act and for such offence, it was the requirement on the part of the prosecution to prove that the victim was a 'child' as per the definition provided in section 2(1)(d) of the POCSO Act, the date of birth entry in the school admission register would have been the vital factor to be proved. It appears that on account of the laches on the part of the prosecution, the same could not be done even though it was seized and given in the zima of the Headmaster of the School, who was examined as P.W.5.

The learned trial Court while assessing the age of the victim girl has observed that the school admission register was not proved and the victim girl was an illiterate one and neither her horoscope nor her birth certificate was produced in the school while admitting her into the school and also, no horoscope or birth certificate of the victim has been seized by the I.O. The evidence of the father of the

victim as P.W.2 regarding the age of the victim was as per his guess work and the evidence of the doctor revealed that according to the ossification test, the age of the victim was 16-18 years. However, for such test, the error margin of two years on either side is generally taken into consideration. Further, the X-ray plate has not been produced in the Court basing on which the ossification test report was prepared and if the variation would be taken into consideration on the higher side, the victim would be more than eighteen years. Accordingly, the learned trial Court came to hold that the prosecution has failed to prove that the victim was less than eighteen years of age as on the date of commission of rape and therefore, the offence under the POCSO Act has not been proved against the appellant. The prosecution has not challenged the order of acquittal of the appellant under section 6 of the POCSO Act. The conclusion arrived at by the learned trial Court that the victim was more than eighteen years of age at the time of occurrence, according to me, is quite justified.

Evidence of the victim :

8. The victim in her examination-in-chief has stated that she used to graze cattle in the nearby jungle of her village and the appellant, who is a married man was having four children and the eldest one having given in marriage and he was also grazing his livestock in the same manner in the jungle and that the appellant one day came to her, dragged her deeper into the jungle and raped her against her will and consent. She further stated that the appellant forcibly made her lie down on the ground, removed her chadi and forcibly committed sexual intercourse with her and threatened her not to disclose the incident before anybody or else, he would kill her as well as her parents for which she did not venture to disclose about the incident before anybody till her pregnancy was detected by the Asha Karmi. She further stated that the appellant used to forcibly sexually intercourse with her in the jungle many a times. However, in the cross-examination, she stated that the spot, where she was raped, was inside the jungle which was situated at a distance of half an hour journey from the village locality. She further stated that almost all the cattle grazers of her village took their respective cattle for grazing into the jungle including herself. She further stated that the appellant along with four cattle grazers used to graze their cattle inside that jungle. She further stated that those cattle grazers did not know the overt act committed by the appellant on her inasmuch as he and the appellant were having sexual intercourse going deeper into the jungle and almost all the days, the appellant used to have sexual intercourse with her in the jungle and at no point of time, she had raised any hue and cry nor offered resistance. She further stated not to have disclosed about the sexual intercourse by the appellant with her to anybody else even before her parents. She further stated that at the Anganwadi Center of her village, she entered her name being the mother of the child but the name of the father of the child was not mentioned.

Thus, the victim being a major girl seems to be going along with the appellant deeper into the jungle and used to have sexual intercourse with him every

day knowing full well that the appellant was a married person having four children and the eldest one was given in marriage. She did not raise any objection to the act of the appellant nor even disclosed before anyone against the appellant about the sexual intercourse. The appellant never promised her to marry. She also knew that marriage with the appellant was not possible as the appellant was a married person having been blessed with children. Therefore, in my humble view, she was a consenting party. The learned trial Court held that the consent of the victim, if any, to the act of the appellant was under misconception of fact and such consent obtained cannot be construed to be valid consent. According to Cambridge Dictionary, 'misconception' is an idea that is wrong because it has been based on a failure to understand a situation. Section 90 of the Indian Penal Code provides any consent given under a misconception of fact, would not be considered as valid consent so far as the provision under section 375 I.P.C. is concerned and thus, such a physical relationship would tantamount to committing rape. The consent of a woman under section 375 I.P.C. is vitiated on the ground of a misconception of fact where such misconception was the basis for her choosing to engage in the said act. The consent of a woman with respect to section 375 I.P.C. must involve an active and reasoned deliberation towards the proposed act. It must denote an active will in the mind of the woman to permit the doing of an act complained of. In the factual scenario, it cannot be said that the consent that was given by the victim was under misconception of fact for which it cannot be construed to be a valid consent as observed by the learned trial Court. The victim (P.W.3) did not resist to the act committed by the appellant every day. She was freely exercising her choice in accompanying the appellant deep into the jungle to have sexual act being conscious of the fact that their marriage was not possible. All the circumstances lead to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant and her consent was not the consequence of any misconception of fact.

The learned trial Court has also taken into account the provision under section 114-A of the Indian Evidence Act which states about presumption as to the absence of consent in certain prosecution for rape. This presumption is not conclusive but rebuttable and the accused has to rebut the same by proving that his sexual act with the prosecutrix was with her consent. Merely because the victim of rape said that she did not consent to the sexual act is not sufficient to convict the accused. The Court has to assess the entirety of evidence that comes during trial to come to the just conclusion. Consent or absence of it could be gathered from the attendant circumstances. The previous or contemporaneous acts or the subsequent conduct can be legitimate guides. Even in the absence of a specific defence plea of consent being taken by an accused charged with the offence of rape, if the evidence on record indicates that the victim was a consenting party, then the Court can take a view that sexual intercourse with the victim was not against her will but with her consent.

Mr. Beura has rightly pointed out that the prosecution should have taken step for conducting the DNA test to determine the paternity aspect of the child, which would have strengthened the prosecution case that the appellant was the father of the child whom the victim gave birth to.

9. In view of the available materials on record and foregoing discussions, I am of the humble view that the prosecution has failed to establish the charge under section 376(2)(n) of the I.P.C. against the appellant. Though the victim has stated during the first act committed by the appellant, he threatened her not to disclose the same before any one, but when she seems to be voluntarily accompanying the appellant deep into the jungle every day where they used to have sexual intercourse and she was not complaining before anybody nor raising any protest against the overt act committed by the appellant nor disclosed before any one till she was found pregnant for seven months by P.W.1, I am of the view that there is absence of cogent materials that the appellant committed any act of criminal intimidation and therefore, the charge under section 506 of the I.P.C. is also not sustainable in the eye of law.

10. When the matter was taken up for hearing on 15.03.2023 and the evidence of the victim (P.W.3) was placed, this Court directed the learned counsel for the State to obtain instruction through the Inspector in-charge of Sadar Police Station, Sundargarh about the status of the victim and her male child and whether any compensation has been received by any of them and whether the victim has filed any maintenance case for herself and her child against the appellant in any Court. Accordingly, the learned counsel for the State has produced the written instruction today received from Inspector-in-Charge of Sadar Police Station, Sundargarh wherein it is mentioned that the Inspector-in-charge personally visited the house of the victim and found that she was living with her son and her father in her village and her son is now prosecuting his studies in Class-IV. It also revealed that the victim has received compensation under the Victim Compensation Scheme to the tune of Rs.1,35,000/- (one lakh thirty five thousand) from the office of the District Welfare Officer, Sundargarh and for that the Inspector-in-charge also enquired about the matter of compensation from the office of the District Welfare Officer, Sundargarh and ascertained that the victim has already received compensation amount in three phases i.e. Rs.60,000/-, Rs.15,000/- and Rs.60,000/-. The statement of account of the victim annexed by the Inspector-in-Charge regarding payment of the aforesaid amount has been enclosed. The report is taken on record.

11. In view of the foregoing discussions, I am of the humble view that the prosecution has failed to establish the charges under sections 376(2)(n)/506 of the I.P.C. against the appellant and accordingly, he is acquitted of such charges. The appellant, who is in jail custody, be set at liberty forthwith if his detention is not required in any other case. Even though the appellant is acquitted, but the compensation amount paid to the victim shall not be recovered from her.

Accordingly, the Jail Criminal Appeal is allowed.

Trial Court Records with a copy of this judgment be sent down to the learned trial Court.

Before parting with the case, I would like to put on record my appreciation to Mr. A.K. Beura, the learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.7,500/- (rupees seven thousand five hundred only).

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2023 (II) ILR – CUT- 815

K.R. MOHAPATRA, J.

W.P.(C) NO. 6308 OF 2022

ASHOK KUMAR RATH ……..Petitioner

.V.

ANNAPURNA RATH & ANR. ……..Opp. Parties

(A) HINDU ADOPTION AND MAINTENANCE ACT, 1956 – Petitioner filed an application for dissolution of marriage, which was dismissed by the learned judge family court – Petitioner assailed the same before the Hon'ble High Court – The Hon'ble Court as an interim measure directed the petitioner to deposit half of his salary for the maintenance of Opp. Party, subsequently matrimonial appeal was disposed of remanding the matter to trial court – In trial Court the Opp. Party claim arrear interim maintenance as directed by the Hon'ble High Court as an interim measure – Whether such claim is sustainable? – Held, No. – The interim arrangement made by a court merges with the final order, if no specific order to that effect is passed in the final order itself, she cannot claim the same.

(B) INTERPRETATION OF STATUTE – Whether the order passed as interim measure will persist after disposal of the Appeal – Held, No. – The interim arrangement made by a court merge with the final order if no specific order to that effect is passed in the final order itself.

Case Laws Relied on and Referred to :-

1. 2022 SCC OnLine SC 1770 : State of U.P. thr. Secretary & Ors. .Vs. Prem Chopra.
2. (2010) 9 SCC 437 : Kalabharati Advertising .Vs. Hemant Vimalnath Narichania.
3. (2022) 5 SCC 449 : Ajanta LLP .Vs. Casio Keisanki Kabushiki Kaisha D/B/A Casio Computer Company Limited & Anr.

For Petitioner : Mr. Tusar Kumar Mishra
For Opp. Parties: Mr. Anupam Dash

JUDGMENT Heard and disposed of on 13.04.2023

K.R. MOHAPATRA,J.

1. This matter is taken up through hybrid mode.

2. The Petitioner in this writ petition seeks to assail the order dated 20th December, 2021 (Annexure-3) passed by learned Judge, Family Court, Rourkela in Civil Proceeding No.42 of 2007, whereby a direction has been made to the Petitioner to pay a sum of Rs.18,90,000/- to Opposite Party No.1 within a period of three months failing which, liberty was given to Opposite Party No.1 to realize the same by due process of law.

3. Marriage between the parties was solemnized on 10th June, 1995. Out of their wedlock, a son was born on 11th May, 1996 and a daughter was born on 30th October, 2001. Due to dissention arose between the parties, Opposite Party No.1 left the matrimonial home. Subsequently, Opposite Party No.1-Wife along with children filed an application under Sections 18 and 20 of the Hindu Adoption and Maintenance Act, 1956 (for brevity 'the HAM Act') in C.P. No.154 of 2005 in the Court of learned Judge, Family Court, Rourkela.The Petitioner also filed an application under Section 9 of the Hindu Marriage Act, 1955 (for brevity 'the HM Act') for restitution of conjugal right in C.P. No.214 of 2005. Both C.P. No.154 of 2005 and 214 of 2005 were heard analogously. While dismissing the application under Section 9 the HM Act, learned Judge allowed the petition under Sections 18 and 20 of the HAM Act vide order dated 16th September, 2006 directing the Petitioner to pay maintenance of Rs.3,000/- per month to the Wife, Rs.800/- per month to the son and Rs.300/- per month to the daughter. The said order was not challenged and attained its finality. Thereafter, the Petitioner filed C.P. No.42 of 2007 for dissolution of marriage by a decree of divorce, which was dismissed by learned Judge, Family Court, Rourkela vide judgment dated 26th August, 2011 under Annexure-1. Assailing the same, the Petitioner filed MATA No.75 of 2011 before this Court. During pendency of the appeal, this Court vide order dated 8th October, 2015 passed the following order:

> *".....As an interim measure, therefore, we direct the appellant-husband to come with a bank draft of Rs.5,00,000/- (Rupees five lakh) of a Nationalized Bank standing in the name of his wife on 30th October, 2015, on which date this Matrimonial Appeal shall come up for further deliberation. Meanwhile, we direct that the appellant-husband should not be allowed by the Authority of the Rourkela Steel Plant to take out any money except a sum of Rs.5,00,000/- from his Provident Fund, Gratuity etc. He will get only half salary per month. Henceforth, half of the salary of the appellant-husband be deposited by the Rourkela Steel Plant in a bank account to be opened by it which amount shall be utilized subject to further order passed by this Court."*

4. On 17th November, 2015, this Court passed the following order:

> *"List this matrimonial appeal again on 30.11.2015. On the next date, learned Counsel for the appellant shall intimate us as to what amount the appellant would like to part away to be given to his wife. Meanwhile, half of the salary of the appellant, which has now been deposited in a separate account, is directed to be paid to the wife."*

5. Subsequently, MATA No.75 of 2011 was allowed vide judgment dated 15th April, 2019 under Annexure-2 with the following directions:

> ***"11**. In view of the discussion of facts and circumstances of the case, we feel it appropriate to remand the matter back to the learned trial Court to frame a specific issue as to cruelty and give a specific finding thereon after giving reasonable opportunity of hearing to both the parties, that being more so for the reason that both the parties are staying separately since the year, 2003.*
>
> ***12.** Accordingly, the judgment dated 26.08.2011 passed by the learned Judge, Family Court, Rourkela in Civil Proceeding No.42 of 2007 is set aside and the matter is remanded back to the learned trial court who would do the needful as per out observations made in the preceding paragraph. Both the parties are directed to appear before the learned trial court on 2nd of May, 2019 to take further instruction in the matter and the learned trial court would do well todispose of the proceeding as expeditiously as possible."*

Thereafter, learned Judge, Family Court proceeded with C.P. No.42 of 2007. During pendency of the Civil Proceeding, Opposite Party No.1 filed an application on 1st February, 2020 with the following prayer:

> *"It is therefore prayed that your honour will be graciously pleased to pass necessary orders directing the Petitioner to abide by the orders passed by the Hon'ble High Court of Orissa vide order dated 08.10.2015 and 17.11.2015 paying the arrear payment since October, 2015 calculating to be Rs.15,60,000/- (Rupees fifteen lakh sixty thousand) only till January 2020 (calculated in the basis of the declaration made by the Petitioner in the Hon'ble High Court of Orissa and which is likely to be substantially enhanced as there has been increment in salary of the Petitioner after 2017) and further directing the personal appearance of the his employer CEO, SAIL Rourkela Steel Plant, Rourkela along with the monthly salary certificate paid to the Petitioner since October, 2015 till date and further initiating appropriate action for flouting the orders of the Hon'ble High Court of Orissa, and staying the present proceeding No.C.P. No.42 of 2007.*
>
> *And for this act of your graciousness the Petitioner shall ever pray."*

The said application was dismissed due to non-prosecution. Subsequently, Opposite Party No.1 filed another application on 7th April, 2021 with the following prayer:

> *"It is therefore prayed that your honour will be graciously pleased to pass necessary orders directing the Petitioner to abide by the orders passed by the Hon'ble High Court of Orissa vide order dated 08.10.2015 and 17.11.2015 paying the arrear payment since October 2015 calculating to be Rs.18,90,000/- (Rupees eighteen lakh ninety thousand) only till March 2021 (calculated in the basis of the declaration made by the Petitioner in the Hon'ble High Court of Orissa and which is likely to be substantially enhanced as*

there has been increment in salary of the Petitioner after 2017) and further directing the personal appearance of the his employer CEO, SAIL Rourkela Steel Plant, Rourkela along with the monthly salary certificate paid to the Petitioner since October, 2015 till date and further initiating appropriate action for flouting the orders of the Hon'ble High Court of Orissa, and staying the present proceeding No. C.P. No.42 of 2007.

And for this act of your graciousness the Petitioner shall ever pray."

6. The Petitioner also filed objection to the same stating that he is not liable to pay the amount of Rs.18,90,000/-, as claimed by Opposite Party No.1. However, learned Judge, Family Court vide order dated 20th December, 2021 under Annexure-3 observing that admittedly salary of the Petitioner is Rs.1,00,000/- per month and the Petitioner has admitted to pay the arrear maintenance of Rs.18,90,000/- to his wife-Opposite Party No.1, directed to pay the said amount within a period of three months from the date of the order in three equal installments failing which, the Opposite Party No.1 was given liberty to realize the same by due procedure of law. Assailing the same, the writ petition has been filed.

7. Mr. Mishra, learned counsel for the Petitioner submits that the tenor of the order dated 8th October, 2015 clearly discloses that the Petitioner was liable to pay Rs.5,00,000/- to Opposite Party No.1, which he has already paid and he was also directed to pay half of his salary to Opposite Party No.1-Wife subject to further orders to be passed by this Court. The matter was again taken up on 17th November, 2015, on which date this Court while posting the matter to 30th November, 2015 directed that half of the salary of the Petitioner, which has been deposited in a separate account, is to be released in favour of Opposite Party No.1-Wife. No further order was passed by this Court for payment of any amount. Thus, the Petitioner is not liable to pay any amount beyond the said date. It is also submitted that the Petitioner has never conceded before learned Judge, Family Court in C.P. No.42 of 2007 admitting his liability to pay Rs.18,90,000/- pursuant to the direction of this Court. To the contrary, in his objection he has vehemently objected to the claim made by the Opposite Party No.1-Wife.

8. Mr. Mishra, learned counsel for the Petitioner further submits that after disposal of MATA No.75 of 2011, interim order, if any, passed in the said appeal gets merged with the judgment in view of the ratio decided in the case of ***State of U.P. thr. Secretary and Others –V- Prem Chopra***, reported in 2022 SCC OnLine SC 1770, wherein it is held as under:

*"**24**. From the above discussion, it is clear that imposition of a stay on the operation of an order means that the order which has been stayed would not be operative from the date of passing of the stay order. However, it does not mean that the stayed order is wiped out from the existence, unless it is quashed. Once the proceedings, wherein a stay was granted, are dismissed, any interim order granted earlier merges with the final order. In other words, the interim order comes to an end with the dismissal of the proceedings. In such a situation, it is the duty of the Court to put the parties in the same position they would have been but for the interim order of the court, unless the order*

> *granting interim stay or final order dismissing the proceedings specifies otherwise. On the dismissal of the proceedings or vacation of the interim order, the beneficiary of the interim order shall have to pay interest on the amount withheld or not paid by virtue of the interim order."* ***(emphasis supplied)***

9. He also relied upon the decision in the case of ***Kalabharati Advertising –v- Hemant Vimalnath Narichania***, reported in (2010) 9 SCC 437, wherein at Paragraph-24, it is held as under:

> ***"24.*** *It is not permissible for a party to file a writ petition, obtaining certain orders during the pendency of the petition and withdraw the same without getting proper adjudication of the issue involved therein and insist that the benefits of the interim orders or consequential orders passed in pursuance of the interim order passed by the writ court would continue. The benefit of the interim relief automatically gets withdrawn/neutralised on withdrawal of the said petition. In such a case concept of restitution becomes applicable otherwise the party would continue to get benefit of the interim order even after losing the case in the court. The court should also pass order expressly neutralizing the effect of all consequential orders passed in pursuance of the interim order passed by the court. Such express directions may be necessary to check the rising trend among the litigants to secure the relief as an interim measure and then avoid adjudication on merits. (Vide Abhimanyoo Ram v. State of U.P. [(2008) 17 SCC 73 : (2010) 1 SCC (L&S) 904])* ***(emphasis supplied)***

He, therefore, submits that the interim orders passed by this Court in MATA No.75 of 2011 no more exist after the disposal of the appeal itself. Hence, impugned order under Annexure-3 is not sustainable and is liable to be set aside.

10. Mr. Dash, learned counsel for Opposite Party No.1 refuting to the submission made by Mr. Mishra, learned counsel for the Petitioner contends that the language and tenor of the order dated 8th October, 2015 is clear and unambiguous to the extent that the arrangement made by this Court was subject to further orders to be passed by this Court. No order either varying or modifying such order has been passed subsequently. Even after disposal of MATA No.75 of 2011, the Petitioner filed an application in I.A. No.4 of 2021 in the disposed of appeal (MATA No.75 of 2011) with a prayer to direct Rourkela Steel Plant, Manager Personnel, Iron and Steel i.e. the employer of the Petitioner not to deduct 50% from his salary. The said application was disposed of on 20th April, 2021 with the following direction:

> ***"5****. Considering the above, this Court disposes of this application with an observation that in case of appellant files an application before the Judge, Family Court, Rourkela in C.P. No.42 of 2007, in such event, the court below shall consider his application after giving opportunity of hearing to the parties and fix the quantum of interim maintenance till disposal of C.P. No.42 of 2007. The Court below is further directed to conclude C.P. No.42 of 2007 in accordance with law, as expeditiously as possible, preferably by end of December, 2021."*

11. After disposal of the said I.A., the Petitioner waited for more than one year to file an application in terms of the order passed in I.A. No.4 of 2021 in the

disposed of appeal, i.e. MATA No.75 of 2011. Seven days before disposal of C.P. No.42 of 2007, the Petitioner filed an application on 18th April, 2022 in terms of the order dated 20th April, 2021 passed by this Court in I.A. No.4 of 2021. However, the said application could not be taken up due to non-cooperation of the Petitioner and civil proceeding was disposed of on 29th June, 2022 with the following direction:

> *"The petition under section 13(1) (i-b) of the Hindu Marriage Act, 1955 filed by the petitioner, is allowed on contest against the respondent but in circumstances without cost. The marriage between the petitioner, Ashok Kumar Rath and respondent, Smt. Annapurna Rath solemnized on 10.06.1995 is to be dissolved by a decree of divorce, subject to payment permanent alimony of Rs.13,67,000/- (Rupees thirteen lakhs sixty seven thousand) only to the respondent-wife. If any amount has been paid by the petitioner-husband, the same shall be adjusted, failing which the respondent-wife is at liberty to realize the same according to law of this land."*

12. Mr. Dash, learned counsel for Opposite Party No.1further fairly concedes that the permanent alimony, as directed in judgment dated 29th June, 2022 passed in C.P. No.42 of 2007 has already been paid to Opposite Party No.1. However, the judgment passed in C.P. No.42 of 2007 is under challenge before this Court in appeal and is sub-judice. It is his submission that since the Petitioner has admitted his liability to pay Rs.18,90,000/- to Opposite Party No.1 pursuant to the direction of this Court in MATA No.75 of 2011, he is estopped to challenge the same before this Court. The Petitioner cannot dispute recording of learned Judge, Family Court, Rourkela before this Court. It is his submission that the remedy lies to the Petitioner to file appropriate application before the said Court, correctness of recording of which is challenged. No such application has been filed as yet by the Petitioner. As such, the impugned order under Annexure-3 warrants no interference. He further submits that the writ petition is barred for suppression of materials fact and the Petitioner is tried to mislead the Court.

13. In support of his case, Mr. Dash, learned counsel for Opposite Party No.1 relied upon the ratio decided in the case of ***Manoranjan Parida –v- Debts Recovery Tribunal, Cuttack and others,*** reported in (2009) 108 CLT 78, wherein this Court has held as under:

> ***"4****. Admittedly, the Petitioner was the Defendant No. 3 in the said case and the Tribunal had recorded a finding that he had personally been served with the notice. Learned Counsel for the Petitioner Shri Mallik, was confronted with the proceedings recorded by the Tribunal. He could not furnish any explanation as to why the Petitioner had not taken any ground before the Tribunal while filing the application to set aside the ex parte Judgment and order that the said proceeding dated 28.11.2002 had wrongly been recorded. We have gone through the entire application submitted by the Petitioner. He had never disputed that proceeding. In the Writ Petition, he has seriously challenged the said proceeding. The Writ Petition has been filed against the Judgment and order of the Tribunal wherein no pleadings has been taken in this regard. In such a fact-situation, there is no occasion for us to examine this issue and record any finding as to whether the Petitioner had been aware of subsequent proceedings before the Tribunal which are continuing till now.*

> ***5***. *It is settled legal proposition that Court is bound to accept the statement of the Judges recorded in their Judgment, as to what transpired in Court. Judges' record was conclusive. Neither lawyer nor litigant may contradict it, except before the Judge himself. It is for the party that if any proceeding had wrongly been recorded by the Court, there is a course to file recall or review before the same Court. (vide State of Maharashtra v. Ramdas Shrinivas Nayak, (1982) 2 SCC 463 : AIR 1982 SC 1249).*
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> ***6***. *In D.P. Chadha v. Triyugi Narain Mishra, (2001) 2 SCC 221 : AIR 2001 SC 457, the Apex Court held that the record of the proceeding made by the Court is sacrosanct. The correctness thereof cannot be doubted merely for the asking.*
>
> ***7***. *Similar view has been reiterated by the Apex Court in Bhabnagar University v. Palitana Sugar Mill (P) Ltd., (2003) 2 SCC 111 : AIR 2003 SC 511; Guruvayoor Devaswom Managing Committee v. C.K. Rajan, (2003) 7 SCC 546; and Bhagubhai Dhanabhai Khalasi v. State of Gujarat, (2007) 4 SCC 241, placing reliance upon its earlier Judgment in Ramdas Shrinivas Nayak (supra)."*

14. He also relied upon the decision in the case of ***Ajanta LLP –v-Casio Keisanki Kabushiki Kaisha D/B/A Casio Computer Company Limited and another***, (2022) 5 SCC 449, wherein the Hon'ble Supreme Court has held as under:

> ***"24***. *The High Court applied its mind and passed a decree in terms of the settlement agreement dated 16- 5-2019. Though, the High Court dismissed the application by refusing to entertain the application on the ground that it was filed under Section 152CPC, we have considered the submissions of the parties to examine whether the appellant has made out a case for modification of the decree by treating the application as one under the proviso to Order 23 Rule 3 read with Section 151CPC. There is no allegation either of fraud or misrepresentation on the part of the respondent. We are unable to agree with the appellant that there was a mistake committed while entering into a settlement agreement due to misunderstanding. Correspondence between the advocates for the parties who are experts in law would show that there is no ambiguity or lack of clarity giving rise to any misunderstanding. Even assuming there is a mistake, a consent decree cannot be modified/altered unless the mistake is a patent or obvious mistake. Or else, there is a danger of every consent decree being sought to be altered on the ground of mistake/misunderstanding by a party to the consent decree."*

He, therefore, submits that the writ petition is not maintainable and is liable to be dismissed.

15. Considering the rival contentions of the parties, this Court finds that the case has a chequered carrier and the parties are litigating since 2005 for their legal right. This Court vide interim order dated 8th October, 2015 has made certain arrangement as stated above. Vide order dated 17th November, 2015, this Court while adjourning the matter to 30th November, 2015 directed that in the meanwhile, half of the salary of the Petitioner, which was deposited in a separate account should be paid to Opposite Party No.1-Wife. Apparently no further order with regard to interim arrangement vide order dated 8th October, 2015 has been passed. While making interim arrangement, this Court has recorded a finding that such arrangement is made subject to further orders to be passed by this Court. Ordinarily, the interim arrangement made by a Court merges with the final order, as held in the case of

State of U.P. thr. Secretary and Others (supra) and ***Kalabharati Advertising*** (supra), if no specific order to that effect is passed in the final order itself. But, in the instant case, no such order has been passed. However, recording of learned Judge, Family Court, Rourkela in impugned order under Annexure-3 to the effect that the Petitioner has admitted to pay the arrear maintenance of Rs.18,90,000/- to Opposite Party No.1 is a stumbling block in considering the veracity of the order impugned herein. Further, Mr. Mishra, learned counsel for the Petitioner submits that no such concession has ever been made before learned Judge, Family Court, which is apparent from the counter affidavit filed by the Petitioner to the petition filed by the Opposite Party No.1, wherein it has been categorically stated that the claim of Opposite Party No.1 is without any basis and not sustainable. When the Petitioner is seriously objecting to the claim of Opposite Party No.1, there was no occasion on the part of the Petitioner to make a concession before learned Judge, Family Court, Rourkela. However, such a contention made by Mr. Mishra, learned counsel for the Petitioner cannot be adjudicated by this Court in view of the ratio in the case of ***Manoranjan Parida*** (supra) and the decision of the Hon'ble Supreme Court in ***Ajanta LLP*** (supra). If the Petitioner objects to the recording made by it before learned Judge, Family Court, it should have filed an application to that effect before the said Court to expunge/delete such an observation.

16. In view of the above, the writ petition is disposed of with an observation that in the event, the Petitioner files an appropriate application before learned Judge, Family Court, Rourkela to delete/expunge the concession made by it admitting his liability to pay Rs.18,90,000/-, the same shall be considered in accordance with law giving opportunity of hearing to the parties concerned notwithstanding the fact that C.P. No. 42 of 2007 has been disposed of in the meantime.

17. Sine the Civil Proceeding, in which the impugned order under Annexure-3 was passed is of the year, 2007, if an application, as aforesaid, is filed within a period of fifteen days hence along with certified copy of this order, learned Judge, Family Court, Rourkela shall do well to consider the same as expeditiously as possible preferably within a period of two months from the date of appearance of the parties before the Court.

18. With the aforesaid observation and direction, the writ petition is disposed of.

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2023 (II) ILR – CUT- 822

K.R.MOHAPATRA, J.

GUAP NO. 2 OF 2023

MAMATA PARAMAGURU .....Appellant

.V.

COLLECTOR, KHORDHA .....Respondent

GUARDIANS AND WORDS ACT, 1890 – Section 11 – Whether the mother can sell the case land for welfare of the children and her maintenance? – Held, Yes – Keeping the property idle with the Appellant without any income there from will be beneficial for none, it should be utilized in a manner which will be for the welfare of the minor and also meet the legal necessities of the Appellant.

Case Laws Relied on and Referred to :-

1. FAO No.155 of 2013 : Jageet Kaur Vs. State.
2. CMA No.1577 of 2016 : Naveetha Vs. Mohamed Nahub Basha.

For Appellant : Mr. Dipti Ranjan Bhokta

For Respondent :Mr. Baibaswata Panigrahi, ASC.

JUDGMENT Heard and disposed :02 .05.2023

K.R.MOHAPATRA, J.

1. This matter is taken up through Hybrid mode.

2. This appeal has been filed assailing the order dated 25th January, 2023 (Annexure-6) passed by learned District Judge, Khurda at Bhubaneswar in Gua (P) No.12 of 2022, where by an application under Section 11 of the Guardians and Wards Act, 1890 (for short, *'the Act'*), has been dismissed.

3. Mr. Bhokta, learned counsel submits that Appellant is the mother guardian of two minor children, namely Mayaan Paramaguru (son) and Roshni Bharadwaj (daughter). The property in question, i.e., Plot No.811/4033 under Khata No.703/3767 in Chaka No.268 measuring an area Ac.0.019 decimal and Plot No.813/4034 under aforesaid Khata in Chaka No.270 to an extent of Ac.0.036 decimal (total Ac.0.055 decimal) situated in mouza Dumuduma under Bhubaneswar tahasil in the district of Khordha (for short,'the case land') was purchased by the deceased husband of the Appellant, namely, late Shakti Paramaguru and after his death, the case land has been recorded in the name of the Appellant and her two minor children and ROR has already published in the name of the Appellant as well as the minor children (Annexure-4). After untimely death of her husband, the Appellant is facing immense difficulties to upkeep and maintain the children and meet with their expenditure for education. Finding no other alternative, the Appellant made an application under Section 11 of the Act for grant of permission before learned District Judge, Khurda at Bhubaneswar to sell the case land for welfare of the children and her maintenance. All relevant documents in support her case were produced before learned District Judge. Learned District Judge, while adjudicating the petition, i.e., Gua (P) No.12 of 2022, held that her minor daughter is studying Std.VII and the minor son is studying in Std.III at DPS, Kalinga. As such, it appears that there is no legal necessity to alienate minors' share of the case land. Accordingly, the petition under Section 11 of the Act was dismissed.

3.1 It is submitted by learned counsel for the Appellant that before death of her husband, the minor children were prosecuting their study at DPS, Kalinga. As a mother, it is her duty to see that the children should get better education. It is further submitted that the Appellant does not have any independent source of income. Thus, only because her children are studying at DPS, Kalinga, it cannot be presumed that the Petitioner has sufficient means of livelihood and there is legal necessity to alienate the case land.

3.2 It is his submission that in similar nature of cases, Delhi High Court in ***Jageet Kaur Vs. State*** (FAO No.155 of 2013 disposed of on 25th February, 2014) and the High Court of Judicature at Madras in ***Naveetha Vs. Mohamed Nahub Basha*** (CMA No.1577 of 2016 disposed of on 3rd August, 2016) have granted permission to the mother of the minor children to alienate the property by making certain arrangements. He, therefore, submits that the Appellant should be permitted to alienate the case land protecting the interest of the minor children.

4. Mr. Panigrahi, learned ASC submits that admittedly the Appellant does not have any independent source of income, but learned District Judge, holding that the minor children of the Appellant are studying in DPS, Kalinga, opined that there is no legal necessity to alienate the case land. The same may not be correct in all circumstances. But while adjudicating a petition under Section 11 of the Act, learned Court should examine the matter with circumspection and be careful to see that the property and the interest of the minor children is not affected by the permission for alienation and the alienation is for the welfare of the children. He, therefore, submits that the Appeal may be disposed of in accordance with law.

5. Taking into consideration the rival contentions of the parties and that the Appellant does not have any independent source of income, this Court is of the considered opinion that keeping the property idle with the Appellant without any income there from, will be beneficial for none. It should be utilized in a manner which will be for the welfare of the minors and also meet the legal necessities of the Appellant. As such, permission under Section 11 of the Act should be granted with certain conditions to sell the case land. Accordingly, the impugned order is set aside.

6. The appeal is allowed directing that learned District Judge, Khurda at Bhubaneswar shall allow the Appellant to sell the case land. 2/3rd of the sale consideration shall be kept in fixed deposit in any Nationalized Bank till the minor children, namely, Mayaan Paramaguru (son) and Roshni Bharadwaj (daughter) attain majority and interest accrued there from shall be spent for the welfare of the children. The Appellant may utilize rest 1/3rd of the sale consideration for her day-to-day requirements as well as for upkeep, maintenance and education of the minor children. It is further directed that in case of any exigency for utilization of the deposited amount in favour of the minor children, the Appellant is at liberty to move the competent Court for appropriate direction. Learned District Judge, Khurda may also pass necessary orders to monitor the utilization of the sale proceeds.

2023 (II) ILR – CUT - 825

B.P. ROUTRAY, J.

CRA NOS.70, 71, 72, 73, 74 & 75 OF 2002

BINOD BIHARI PATNAIK …….Appellant

-V-

REPUBLIC OF INDIA …….Respondent

CRIMINAL TRIAL – The Offences charged are under section 5(1)(d) r/w section 5(2) of the P.C. Act, 1947 and sections 468, 471 of the IPC – The trial Court framed six charges – Trial initiated against the Appellant for the same series of acts allegedly committed by him – Whether framing of six charges for the same series of act is maintainable? – Held, Yes. – Since the offences which were committed in series of acts extended for a period of six years, the learned trial court split it into six parts in the form of six separate charges confining each part within the space of one year – It seems perfectly appropriate without violating the legal provisions concerning charge, keeping each part of the offence not beyond the period of twelve months, the trial court did not commit any irregularity or illegality and his approach cannot be viewed with any error. (Para-19)

For Appellant : Mr. Manas Chand

For Respondent : Mr. Sarthak Nayak, Counsel for CBI

JUDGMENT Date of Judgment : 26.06. 2023

B.P.ROUTRAY, J.

1. All the appeals concerning the same First Information Report, but split in six trials are heard together and disposed of by this common judgment.

The Appellant has been convicted and sentenced to undergo R.I. for one year along with fine of Rs.5000/- in each trial for commission of offences under Sections 468/471 of I.P.C. and Section 5(2) read with 5(1)(d) of the Prevention of Corruption Act, 1947 by learned Special Judge (C.B.I.), Bhubaneswar in T.R. Nos.14/10 of 99/90, 12/8 of 99/90, 13/9 of 99/90, 11/2 of 99/90, 16/12 of 99/90 & 15/11 of 99/90. The Appellant challenges his conviction and sentence in these appeals.

2. The Appellant was working as Inspector-cum-Development Officer in Oriental Fire and General Insurance Company, Berhampur Branch during the year 1981 to 1986. As per prosecution case, the Appellant obtained signatures of Miss Gitamayee Das (a prosecution witness) of Bhanjanagar and neighbour of the Appellant in two application forms for appointing her as an Insurance Agent of Oriental Fire and General Insurance Company. The Appellant filled in those

application forms in his own handwriting and submitted the same to the Divisional Office, Cuttack on 3rd August 1981 along with his recommendation, and based on these applications and recommendations of the Appellant, the Division Office issued appointment letter in favour of Miss Gitamayee Das to act as the licenced agent of the Insurance Company for the period from 8th September 1981 to 30th August, 1984. The Appellant received the appointment letter of Miss Gitamayee Das from the Divisional Office and without intimating her about her appointment as the Insurance Agent he himself did insurance business in the name of Gitamayee and received the commission cheques from the Division Office. The Appellant also opened Savings Bank Account No.282 in Indian Overseas Bank, Mujagarh Branch in the name of Gitamayee without her knowledge and operated the bank account by depositing agent commission cheques of Gitamayee received by him and withdrew money by presenting withdrawal cheques in the name of Gitamayee. During the relevant period, from 1981 to 1986, the Appellant undertook several insurance business in the name of Gitamayee putting her agent code number (3570/16/487) on the proposal forms and submitted commission vouchers forging signatures of Gitamayee and received twenty six commission cheques for different amounts from the period from 1981 to 1986, with details as follows:-

Sl. No.	Cheque No.	Amount	Date of presentation in I.O.B, Mujaguda.
1	007134	300.00	24.10.81
2	007191	350.30	16.11.81
3	000603	1656.10	30.1.82
4	002354	320.25	19.6.82
5	002391	1400.60	19.6.82
6	003761	930.40	4.10.82
7	004317	3191.55	18.10.82
8	572073	2398.95	20.1.83
9	574246	1062.50	7.4.83
10	575980	1746.05	18.7.83
11	575983	375.80	18.7.83
12	577361	743.40	12.10.83
13	579547	2248.60	22.12.83
14	579589	1162.15	23.1.84
15	886178	2421.35	7.7.84
16	863298	3078.40	25.10.84
17	853238	3889.70	11.3.85
18	853268	473.60	11.4.85
19	853357	1895.40	6.6.85
20	853457	2418.25	12.8.85
21	844141	5019.00	7.1.86
22	843564	1614.10	3.2.86
23	843631	1176.10	26.2.86
24	843776	459.50	30.5.86
25	627442	2285.95	11.8.86
26	627511	3134.75	24.10.86

3. In all these six appeals the accused and victim are same. The accusations relate to same series of transaction starting from the year 1981 till 1986. One F.I.R. was registered and the same charge-sheet filed in all the six trials. The learned trial court while framing charge, split it into six charges confining the charge in each trial within the span of twelve months. In T.R. No.14/10 of 1999/90 concerning CRA No.70, the period of transaction is from January 1984 to December 1984, where the Appellant received three commission cheques for different amounts from the Division Office, deposited the same in SB Account No.282 and withdrew total sum of Rs.6652/- from the account presenting cheques on 27th January 1984, 7th July 1984 and 25th October 1984 using forged signatures of Gitamayee Das on the withdrawal cheques. Similarly the period of transaction in T.R. No.12/8 of 1999/90 concerning CRA No.71 is for the year 1982, the period of transaction in T.R. No.13/09 of 1999/1990 concerning CRA No.72/2002 is for the year 1983, the period of transaction in T.R. No.11/02 of 1999/1990 concerning CRA No.73/2002 is from August 1981 to December 1981, the period of transaction in T.R. No.16/12 of 1999/19990 concerning CRA No.74/2002 is for the year 1986 and in T.R. No.15/11 of 1999/1990 concerning CRA No.75/2002, the period of transaction is for the year 1985.

4. The Appellant admits his employment as such in Oriental Fire and General Insurance Company, Berhampur Branch and also admits his recommendation in favour of Gitamayee for her appointment as insurance agent. He denies rest of the accusations and submits in his defence that the family of Gitamayee wanted her marriage with him and as the proposal of marriage could not be materialized, they created such false story being revengeful against him.

5. Prosecution examined many witnesses (varying from eleven or twelve in each case) in support of their case and proved up-to 99 documents including the opinion of the handwriting expert. Most of the witnesses and documents are either same or of similar nature in each case. No evidence was adduced from the side of the Appellant in his defence. Learned Trial Court formulated three points for determination in each trial, which can be summed up as that, whether the Appellant obtained illegal pecuniary advantage of such amounts, i.e. Rs.6,652/- in CRA 70/2002, Rs.7,498.40 paisa in CRA 71/2002, Rs.8,675.20 paisa in CRA 72/2002, Rs.640/- in CRA 73/2002, Rs.8,670.40 paisa in CRA 74/2002 and Rs.13,695.95 paisa in CRA 75/2002, by falsely and dishonestly operating the bank account in the name of Gitamayee using forged withdrawal cheques in her name by operating agency licence of Gitamayee without her knowledge?

6. Miss Gitamayee Das has been examined as a witness in each case. She denied her knowledge about her appointment as Insurance Agent, the insurance business undertaken in her name, receipt of commission cheques from Division Office, opening of SB Account No.282 in IOB at Mujagarh Branch, receipt and deposit of commission cheques in SB Account No.282 and withdrawal of such amounts from said account through withdrawal cheques.

7. In CRA 70 of 2002, the application forms for agent in the name of Gitamayee have been proved under Ext.1 and Ext.2; commission vouchers under Ext.36, 37, 39 & 40 along with endorsement certificates of the Appellant under Ext.36/1, 37/1, 39/1 & 40/1; commission cheques issued by Division Office under Ext.35/2, 38 & 41 along with appending signatures on the counter foils of those cheques under Ext.35/3 & 38/1; the pay-in-slips (deposit slips) depositing different cheques in SB Account No.282 have been proved under Ext.35/4 & 41/1. The withdrawal cheques under Ext.6, 42 & 43 along with signatures of the Appellant thereon under Ext.6/1, 42/1 & 43/1 have been proved. Further, the admitted signatures and specimen signatures of the Appellant have been proved under Ext.15 to Ext.31 and Ext.5 to Ext.5/19. The admitted and specimen signatures of Gitamayee have been proved under Ext.7/1, 7/2, 8/1, 8/2, 9/1, 9/2, 10/1 to 10/4 & Ext.11 to Ext.11/29 along with her specimen handwriting under Ext.12 to Ext.12/5 have been proved by the prosecution. Similarly all such documents have been proved by prosecution in each case which are not detailed here.

8. The employment and working of the Appellant as Inspector-cum-Development Officer at Berhampur Branch of Oriental Fire and General Insurance Company during the relevant period is not disputed. This has been stated specifically by all official witnesses. The Appellant has also admitted the same during his examination under Section 313 of the Cr.P.C. So it is established that the Appellant was a public servant during the relevant period.

9. It came to the notice of the authority regarding fraudulent activities of the Appellant for the first time when the Branch Manager (Murali Behera) of the IOB, Mujagarh Branch wrote letters to Gitamayee in later part of the year 1986 to furnish her fresh specimen signature and Gitamayee in her letter dated 24th December, 1986 replied that she did neither open the bank account, nor did present cheques nor withdraw money from the account, but someone else has done the forgery in her name. The letters of the Branch Manager as well as the reply of Gitamayee were produced in evidence and proved by the prosecution. The Branch Manager, Murali Behera as well as Gitamayee, both have been examined in support of prosecution case and they have stated in favour of the prosecution. It is evident from their evidence coupled with the cheques presented (marked under different exhibits), the signatures and the endorsements appended thereon and read with the opinion of the handwriting examiner (expert) that, those cheques presented concerning the amounts withdrawn are in the handwriting of the Appellant and not in the handwriting of Gitamayee. It also came out from the evidence of the cashiers (Bata Krushna Mohanty and Bijay Kumar Panda), the then Branch Managers (Gokulananda Panda and Murali Behera) of IOB, Mujagarh Branch that Account No.282 was operated by the Appellant and he received the amounts paid by the withdrawal cheques. The Appellant is also the person who presented the commission cheques in the account.

10. Hemanta Kumar Pradhan is the concerned Clerk working in the Division Office at Cuttack and dealing with issuance of Insurance Agency Licence during the relevant period of 1984. He, as a witness for prosecution, has spoken about issuance of Insurance Agency Licence in the name of Gitamayee on the recommendation of Appellant. Said Gitamayee was appointed as the Insurance Agency under the Appellant and this fact is not disputed.

11. The officials of the Division Office and Branch Office (Mr. S.K. Nasipuri– P.W.5 in T.R.No.14/10 of 1999/90 relating to CRA 70 of 2002), Mr.B.P.Pattnaik – the Development Officer of Berhampur Branch and a witness for prosecution in all the six trials, have stated about the role played by the Development Officer for issuance of Insurance Agency Licence and his authority to receive the commission cheques from the Branch Office on behalf of the agent. Mr. B.P. Pattnaik has further stated that the Appellant has received those twenty six commission cheques from the Branch Office by using the code number of Gitamayee (3570/16/487) and Licence No.ORI 3510938, by putting his signature in the counter foils. Said B.P.Pattnaik being acquainted with the handwriting and signature of the Appellant has certified that the signatures as well as handwritings appearing in the cheques for presenting in the bank account and for withdrawal of money from the bank account are of the Appellant. This has been confirmed by the handwriting examiner in his opinion with reasoning under Ext.57 to 60, Ext.77 to 80, Ext.88 to 91, Ext.68 to 71, Ext.88 to 91 and Ext.80 to 83 in different trials against the Appellant.

12. Therefore, from the evidence of all such witnesses examined on behalf of the prosecution and the documents produced under different exhibits along with the opinion handwriting expert examiner it is established that the Appellant operated bank account no.282 in the name of Gitamayee and deposited the commission cheques issued in the name of Gitamayee which he received from the Insurance Branch Office on her behalf, deposited the same in her name and withdrew/ received respective amounts on different occasions during that relevant period from 1981 to 1986 by forging the signature and handwriting of Gitamayee for such transactions in the bank account.

13. In order to attract the offence of criminal misconduct defined under Section 5(1)(d) of the P.C.Act, 1947, it is required to be established that the public servant by abusing his position as such obtains the pecuniary advantage by corrupt or illegal means. In the instant case, it has been categorically stated by Mr. B.P. Pattnaik that the Appellant either as the Inspector or as the Development Officer is not entitled to receive the commission amount meant for the agent in respect of the insurance proposals. As has been discussed in above paragraphs, the Appellant taking advantage of his position as a public servant appointed Gitamayee Das as the Insurance Agent under him without her knowledge and received the commission amounts totaling to Rs.45,852.75 paisa during the relevant period meant for Gitamayee. So the prosecution has established commission of offence of criminal

misconduct under Section 5(1)(d) punishable under Section 5(2) of the P.C. Act, 1947 against the Appellant beyond all reasonable doubts.

14. In respect of offences of forgery and forging a valuable security or document punishable under Section 468 and 471 of the Indian Penal Code, it has been established through the evidence of different witnesses and those relevant exhibits, as discussed in the foregoing paragraphs, that how the Appellant has forged the withdrawal cheques in the name of Gitamayee Das to receive the amounts from the bank account after depositing the commission cheques fraudulently received on her behalf without her knowledge. The proved handwritings of the Appellant in the concerned cheques and records speak everything on this.

15. It is urged on behalf of the Appellant that six trials have been initiated against him, instead of one, for the same series of acts allegedly committed by him. It is submitted that framing of six charges for the same series of acts is illegal and the charge ought have been one instead of six separately and thus, the impugned convictions in all the appeals Viz. CRA No.70, 71, 72, 73, 74 & 75 of 2002 are liable to be quashed for error in the charges.

16. Before delving into the contentions of the Appellant, the facts need to be described more specifically. The FIR in RC 53 dated 30th November 1987 was lodged on 30th November 1987. It is true that this same FIR gave rise to six separate charges in TR No.14/10 of 1999/1990 (CRA No.70/2002), TR No.12/08 of 1999/1990 (CRA No.71/2002), TR No.13/09 of 1999/1990 (CRA No.72/2002), TR No.11/02 of 1999/1990 (CRA No.73/2002), TR No.16/12 of 1999/19990 (CRA No.74/2002), TR No.15/11 of 1999/1990 (CRA No.75/2002). In all such trials, the accused is one and same, the victim is Gitamayee Das, prosecution witnesses and seizure lists are same and one sanction order was issued for prosecution in all the cases. The first cheque was encashed on 24th October 1981 and the last cheque on 10th November 1986 and in between number of cheques were encashed by the Appellant in respect of same victim, namely Gitamayee.

17. Section 464 of the Cr.P.C. empowers the appellate court to direct for de-novo trial on the ground of error, omission or irregularity in the charge if it is felt and in the opinion of the appellate court that failure of justice has in fact been occasion by such error, omission or irregularity in the charge.

18. Section 219 of the Cr.P.C. prescribes that when a person is accused of more offences than one, but not exceeding three, of same kind within a space of twelve months from first to last date of such offences, he may be charged with and tried at one trial. Sub-Section (2) of Section 220 read with sub-section (2) of Section 212 of the Cr.P.C. enumerates that when a person charged with one or more offences of dishonest misappropriation of property is accused of committing one or more offences of falsification of accounts either to facilitate or conceal the commission of such offence, he may be charged with and tried at one trial for every such offence,

provided that the time included between the first and last date of such offence shall not exceed one year.

19. In the case at hand, the offences charged are under Section 5(1)(d) read with Section 5(2) of the P.C. Act, 1947 and Section 468, 471 of the I.P.C. The span of time of such offences is extended from 24th October 1981 to 10th November 1986 and in between various cheques in the name of Gitamayee were encashed by the Appellant fraudulently with dishonest intention. Since the offences which were committed in series of acts extended for a period of six years, the learned trial court split it into six parts in the form of six separate charges confining each part within the space of one year. It seems perfectly appropriate without violating the legal provisions concerning charge. Keeping each part of the offence not beyond the period of twelve months, the trial court did not commit any irregularity or illegality and his approach cannot be viewed with any error. It is not the submission of the Appellant that he was in fact prejudiced and he does not explain specifically in which manner failure of justice has occasioned on his part by separation of charges into six spans. Nonetheless, it is not a case of misjoinder of charges in which event there would have been a say arose in favour of the Appellant to contend failure of justice. It is also not the case that the Appellant has not been provided with the exact dates of encashement of cheques with specific amounts in the charge against him, but it is the simple submission that had all the charges been joined it would not have occasioned in six convictions separately. As seen from the LCR, the Appellant did not raise his objection, with regard to framing of charges separately as stated hereinabove, either at the time of framing of charge by the trial court or before the trial court till pronouncement of judgment, but is raising his objection for the first time before this appellate court at the time of hearing of the appeal. As per sub-Section (2) of Section 465 of the Cr.P.C., while determining such failure of justice on the ground of error, omission or irregularity in the charge, the fact whether objection could or should have been raised at an earlier stage of the proceeding has to be materially regarded with. Therefore, viewing from any angle, no point is made out in favour of the Appellant to grant any benefit to him on his contentions relating to charge or error in charge. Accordingly, all such contentions are rejected entirely being devoid of merit.

20. It is further submitted that learned trial court while convicting the Appellant did not specify the conviction for specific offence. So for lack of specification of conviction for each offence, it is prayed to quash the entire conviction. It is true that learned trial court has observed that the prosecution has successfully proved the charges for both the offences under the I.P.C. and the P.C. Act, 1947 without specifically mentioning the satisfaction of each such offence. Sub-section (2) of Section 354 of the Cr.P.C. prescribes that, "*when the conviction is under the Indian Penal Code and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative*." Clause-(c) of Sub-section

(1) states that every judgment in every trial shall specify the offence of which and the Section of the Penal Code or other law under which the accused is convicted and the punishment to which he is sentenced. At the same time, Section 465 clarifies that, *"(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby*."

21. It is important here to see the language used by the trial court. Learned trial court have held in the concluding paragraphs of the judgments (before hearing on sentence) in each trial that, *"… ... the prosecution has successfully proved the charges u/s 468/471 I.P.C. and Section 5(1)(d)/5(2) of the P.C. Act. Accordingly, I hold the accused guilty for these offences and convict him thereunder*." Similarly for sentencing, learned trial court said in each case that, *"The convict is accordingly sentenced to undergo R.I. for a period of one year with fine of Rs.5000/-(rupees five thousands) in default to undergo R.I. for three months on each count."*

(emphasis supplied)

22. Therefore, it is clear from the language of learned trial court that the Appellant has been convicted for each of the offences stated so in the judgments and has been sentenced to undergo rigourous imprisonment for a period of one year with fine of Rs.5000/- (rupees five thousand) for each of the offences under the I.P.C. as well as under the P.C. Act, 1947. The words '*on each count'* make it ample sense without any ambiguity. So all such arguments advanced on the part of the Appellant with regard to any confusion in the conviction and sentence by learned trial court are found baseless and meritless. Nevertheless, the Appellant is not found to have suffered with any prejudice thereby and no such occasion of failure of justice is warranted in the opinion of this court to interfere with the same. This Court accordingly clarifies the position and declines to interfere in the order of conviction and sentence by the trial court.

23. On the quantum of sentence, no merit is found in support of the Appellant to interfere with and as such, the appeals being found without merit, as per the discussions made above, the same are dismissed.

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2023 (II) ILR – CUT - 833

B.P. ROUTRAY, J.

MACA NOS. 435 & 517 OF 2018

M/s. ORIENTAL INSURANCE COMPANY LTD., DIVISIONAL MANAGER,BBSR & ANR. .....Appellants

-V-

KABITA PATTANAYAK & ORS. .....Respondents

IN MACA NO.517 OF 2018

KABITA PATTANAYAK & ANR. -V- MAHESH KUMAR MOHANTY & ANR.

COMPENSATION – Motor Accident Claim – Whether principles of preponderance of probability of evidence are applicable in motor accident cases – Held, Yes. – Reason indicated. (Para 7)

Case Law 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 Ltd.& Anr.
5. (2022) SCC On Line SC 994 : Janabai & Ors.Vs. I.C.I.C.I. Lombard Insurance Company Ltd.

For Appellants : Mr. G.P. Dutta (in MACA No.435 of 2018)
Mr. B.B. Singh(in MACA No.517 of 2018)

For Respondents : Mr. B.B. Singh, counsel for Respondents 1 & 2 &
Mr. P.K. Mishra, counsel for Respondent No.3
(in MACA No.435 of 2018)

Mr. G.P. Dutta, counsel for Respondent No.2
(in MACA No.517 of 2018)

JUDGMENT Date of Judgment: 27.06.2023

B.P. ROUTRAY, J.

1. Heard Mr. G.P. Dutta, learned counsel for the insurance company, i.e. Oriental Insurance Co. Ltd., Mr. P.K. Mishra, learned counsel for owner and Mr. B.B. Singh, learned counsel for the claimants.

2. Both the appeals being arise out of same impugned judgment, are heard together and disposed of by this common judgment.

3. The impugned judgment against which the appeals are preferred has been passed by learned 1st MACT, Balasore dated 18th December 2017 in MAC No.168 of 2013, wherein the tribunal has directed for payment of compensation to the tune of Rs.1,07,34,800/- along with interest @ 7.5% per annum from the date of filing of the claim application, i.e. 17th May 2013 on account of death of deceased Saroj Kumar Pattanayak in the motor vehicular accident dated 28th April, 2013.

4. MACA No.435 of 2018 has been filed by the insurance company challenging the award and MACA No.517 of 2018 has been filed by the claimants praying for enhancement of the compensation amount.

5. The negligence aspect on the part of Respondent No.3, the owner – cum – driver of the offending vehicle, i.e. Indica Car bearing registration number OR-02-AR-3444 is seriously challenged by the insurer. It is submitted on behalf of the insurer that the deceased himself was driving the vehicle at the time of accident and the offending vehicle capsized due to his negligence resulting his death. But Respondent No.3, the owner – cum – driver of the vehicle has been implanted subsequently which is clear from the evidence adduced on behalf of the insurance company.

6. Both Mr. Mishra as well as Mr. Singh submit in their reply that the owner–cum–driver (Respondent No.3) was in fact driving the vehicle at the time of accident. But the insurance company to avoid their liability have tried their best by adducing impermissible evidence. It is submitted that police upon completion of investigation has submitted charge-sheet against Respondent No.3 and the same was never objected by anyone. Besides, P.W.2 being the eye witness of the occurrence has categorically deposed about negligence on the part of Respondent No.3.

7. Before delving into the rival contentions it needs to be emphasized here that principles of preponderance of probability of evidence are applicable in motor accident cases and the law has been settled in this regard in several decisions. (See ***Bimal Devi and others v. Satbir Singh and others (2013)14 SCC 345***, ***Bimala Devi and others v. Himachal Road Transport Corporation and others (2009)13 SCC 530, Sunita and others v. Rajasthan State Road Transport Corporation and others (2020) 13 SCC 484, Anita Sharma and others v. New India Assurance Company Limited and another (2021) 1 SCC 171, Janabai and others v. I.C.I.C.I. Lombard Insurance Company Ltd., (2022) SCC On Line SC 994***).

8. In the case at hand, two witnesses have been examined from the side of the claimants along with 15 documents marked in evidence. Similarly the insurance company examined 5 witnesses to support their stand besides adducing 9 documents and 11 photographs (M.Os.). Respondent No.3, the owner-cum-driver also contested the case supporting the stand of the claimants. It is the contention of the claimants that at the time of accident, offending vehicle was driven by Respondent No.3 where the deceased was an occupant on the front seat and P.W.2 was the occupant of rear seat. Due to rash and negligent driving of Respondent No.3 the vehicle capsized and rolled down the road. P.W.3 being an eye witness has completely supported said version of the claimants. He has stated in his evidence that the deceased Saroj Kumar Pattanayak was sitting in the front seat, Respondent No.3 (Mahesh Kumar Mohanty) was driving the vehicle and he was sitting in the rear seat of the car. After the accident they were immediately rescued by local people and the deceased was shifted to the hospital by an ambulance. This P.W.2 has lodged the F.I.R. at Soro

P.S. stating everything what he has said in his evidence. The accident took place at 11.30 pm on 28th April 2013 and the F.I.R. was lodged on next morning at 9.15 am. It is not that the F.I.R. was lodged with substantial delay giving scope for addition in the story. Nothing could be elicited in the cross-examination of P.W.2 to rebut his specific and categorical statement. So it can be safely concluded that the evidence of P.W.2 remains un-impeached and the insurer has failed to get any support from the evidence of P.W.2 for their contention.

9. Next coming to see the evidence adduced from the side of the insurer, none of the witnesses so examined by the insurer was eye witness to the accident. O.P.W.1 is the Fire Station Officer who stated in his examination-in-chief that he was not there on the date of accident but joined on 13th May, 2014, i.e. more than one year after the accident. He has admitted in his cross-examination that as per their official record Mahesh Kumar Mohanty (Respondent No.3) was driving the vehicle at the time of accidence. This statement of O.P.W.1, the evidence brought from the side of the insurer completely supports the case of the claimants. Therefore, what is brought on evidence through the evidence of P.W.2 and supported by Ext.7 as well as by police papers, is also found supported by the evidence of O.P.W.1 to conclude in favour of the claimants that Respondent No.3 was driving the vehicle at the time of accident and the deceased being an occupant of the vehicle died due to rash and negligent driving of Respondent No.3. In view of the categorical evidence of O.P.W.1 no further discussion is required to the materials brought by the insurer. Accordingly, this court confirms the finding of the tribunal that the accident was the result of rash and negligent driving of Respondent No.3 and the deceased died due to such accident being one of the occupants of the offending vehicle.

10. On the question of quantum of compensation, Mr. Dutta, learned counsel submits that the deceased was not in service after 13th February, 2013 since he did not receive any salary after 28th February, 2013 as per his bank account statements under Ext.10. Therefore, counting his monthly income at $ 1800 USD, converted to Indian currency at Rs.95,400/- is erroneous. He further submits that no tax amount has been deducted from his salary.

11. On the other hand Mr. Singh, learned counsel for the claimants prays for enhancement of the compensation amount by addition of future prospect and adequate amount towards general damages.

12. Ext.13 reveals that the deceased received his salary @ $ 1800 USD per month as an employee of RMA Group as Automotive Instructor in Afghanistan. He received his monthly salary from 14th October 2012 till 13th February 2013. The contract of employment under Ext.14 reveals that the employment period was for 12 months, starting from 14th October 2012 on such terms set out in the agreement (Ext.14). According to the terms of agreement, the monthly salary of $ 210 USD will be paid to the deceased while in the country of Afghanistan.

13. Nothing has been brought on record to reveal that, when the deceased had been to India and to his place of residence in Odisha. Further, according to the bank account statement under Ext.10, the deceased did not receive any salary from his employment in RMA Group, Afghanistan after 28th February 2013. Therefore, contention raised by Mr. Dutta is seen with substance that the deceased was not in employment after 13th February, 2013. The contents of Ext.13 also justify the same that the deceased was employed from 14th February, 2012 to 13th February, 2013. As such, acceptance of monthly income of the deceased at $ 1800 USD, converted to Indian Rs.95,400/-, as taken by the tribunal while assessing income of the deceased, is found erroneous and needs review. Since it remains undisputed that the deceased shortly before his death was employed in RMA Group, Afghanistan to earn Rs.95,400/- per month, it would be unfair to assess his income without referring to the same. In the circumstances, the income of the deceased can safely be assessed at Rs.90,000/- per month. This makes the annual income at Rs.10,80,000/-.With necessary tax deductions as per prevailing provisions of Income Tax Act, the annual income of the deceased is ascertained at Rs.9,26,000/- (approximately). Adding future prospect to the extent of 25% thereto, it comes to Rs.11,57,500/-. Then deducting 2/3rd therefrom towards loss of dependency and applying multiplier '14', the total loss of dependency comes to Rs.1,08,03,333/-.Adding further Rs.1,10,000/- towards loss of consortium to the wife and son and loss of estate and funeral expenses, the final compensation amount is determined at Rs.1,09,13,333/-, payable along with interest @ 6% per annum.

14. In the result, both the appeals are disposed of with a direction to the insurance company, i.e. Oriental Insurance Co. Ltd. to deposit an enhanced compensation of Rs.1,09,13,333/- (one crore nine lakhs thirteen thousand three hundred thirty-three) before the tribunal along with interest @ 6% per annum from the date of filing of the claim application, i.e. 17th May 2013, within a period of two months from today; where-after the same shall be disbursed in favour of claimants on such terms and proportion to be decided by learned tribunal.

15. On deposit of the award amount before learned Tribunal and filing of a receipt evidencing the deposit with refund applications before this Court, the statutory deposit made by the insurer – Appellant in MACA No.435 of 2018 before this Court with accrued interest thereon shall be refunded to the Insurance Company.

16. The copies of depositions and exhibits as produced by Mr. Dutta in course of hearing are kept on record.

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2023 (II) ILR – CUT- 837

Dr. S.K. PANIGRAHI, J.

CRLMP NO.789 OF 2020

CHHABIRANI PANDA ……..Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Article 226 – Extra-Ordinary power to transfer the investigation from state investigating agency to any other investigating agency – When warranted? – Held, the court could exercise its constitutional power only in rare and exceptional cases such as where high officials of state authorities are involved, or the accusation itself is against the top officials of the investigating agency thereby allowing them to influence the investigation, and further it is so necessary to do justice and to instill confidence in the investigation where the investigation prima facie found to be tainted/biased.

(Para-21)

Case Laws Relied on and Referred to :-

1. (20100 2 SCC 200 : Rubabbuddin Sheikh Vs. State of Gujarat & Ors.
2. AIR 2010 SC 1476 : State of West Bengal Vs. Committee for Protection of Democratic Rights.
3. (2013) 12 SCC 480 : K.V. Rajendran Vs. Superintendent of Police,CBCID, Chennai & Ors.

For Petitioner : Ms. Sujata Jena

For Opp. Parties : Mr. H. K. Panigrahi, ASC

JUDGMENT Date of Hearing:02.12.2022 : Date of Judgment:05.05.2023

Dr. S.K. PANIGRAHI, J.

1. The Petitioner has filed this Petition seeking a direction for investigation of Baliguda P.S. Case No.188 of 2019 by an independent agency since the State investigating agency has miserably failed to investigate the case in its proper perspective, specifically when the deceased was put to death in front of his house by the miscreants at the behest of some local people who have given threat to the deceased before the incident.

I. FACTUAL MATRIX OF THE CASE:

2. The brief facts of the case are that the Petitioner is the wife of late Abhimanyu Panda (hereinafter "the deceased") who was put to death by some unknown persons by gun in front of his house in her presence. She has filed this Petition for proper investigation of the case by an independent investigating agency since the local police has failed to do it and has filed the charge sheet against some persons although many other persons are involved in the crime. Thus, it smacks a shoddy investigation.

3. On 10th May 2019 at about 7.30 A.M. when the deceased was in his residence, two unknown persons came to his house and called him to come to the gate. At that point in time, the Petitioner was very much present near the gate. Those unknown persons started arguing with the deceased about Jagannath Temple issue and also told him that since he is taking steps against the big sorts they will kill him and immediately fired at him and accordingly fled from the spot. Consequently, the deceased fell on the spot with bullet injury. There was a hue and cry in the locality and he was shifted to the nearby hospital by the locals in an Auto-rickshaw. However, the doctors declared him dead.

4. The F.I.R. was lodged by the cousin brother of the deceased namely Nirmal Kumar Sahu who came to the spot soon after the occurrence on being informed by his domestic help. On the basis of the F.I.R., Baliguda P.S. Case No.188 of 2019 was registered under Sections 302/120B/109/34 of the I.P.C. read with Sections 25 and 27 of Indian Arms Act as against Biswanath Patra, Gopal Krushna Patra, Rama Chandra Patra and Shyamsundar Patra who are four brothers along with two unknown persons. In the F.I.R., it was specifically alleged that the deceased was a non-hereditary member of Shri Jagannath Mandir Trust of Baliguda. After he became the member, there was dispute as against Shyamsundar Patra, the Ex-Secretary of the temple and his brothers with respect to the shop rooms of the temple. Moreover, the deceased was threatened by Shyamsundar Patra due to his proactive role relating to temple administration, eviction from shop rooms of Shri Jagannath Complex, as Shyamsundar Patra was the secretary before the temple was indexed and he refused to hand over the detail charges of the properties of the temple in spite of specific direction of the Endowment Commissioner. All these facts were mentioned by the informant in the F.I.R. That apart, it has also been mentioned about the involvement of the Patra brothers in the crime as they have given the threat to the deceased.

II. PETITIONER'S SUBMISSIONS:

5. Learned counsel for the Petitioner earnestly made the following submissions in support of her contentions:

During investigation, on verification of CCTV footage and mobile data, shooters namely Golaka @ Ramnarayan Nahaka and rider of the motorcycle Kanhu Charan Sahu as well as conspirator K. Biswajit Patra, S. Balaji Achary were forwarded to the Court. Another conspirator namely Babuli Muni was absconding from his village and ultimately charge sheet was submitted as against them under Sections 302/34 of the I.P.C. read with Sections 25 and 27 of the Indian Arms Act. In the charge sheet, the investigating officer has specifically mentioned that the informant mentioned about the involvement of the four brothers of the said Patra family. However, he was not the eye witnesses to the occurrence. Thus, the investigating agency has concluded that Patra brothers are not the perpetrators of the crime.

6. While investigating the matter, the investigating agency has lost sight of the material facts which are also relevant to unearth the crime. As a matter of fact, Shyamsundar Patra was the Secretary of Shri Jagannath Temple of Baligada and misappropriated the funds and also sold away the properties of the deity. His three brothers have taken the shop rooms in the temple campus and were not paying the rent.

7. The deceased was put to death at the instance of Shyamsundar Patra, Gopal Kurshna Patra, Biswanath Patra, Ramchandra Patra who are four brothers and K. Biswajit Patra, Ananda Acharya and others due to his proactive action as against them. In this regard, it is mentioned that the whole issue revolves around the formation of non-hereditary Trust Board of Shri Shri Jagannath Temple, Baliguda. The general public of Baliguda moved the Commissioner Endowment to declare that the Shri Shri Jagannath Temple, Baliguda as public deity as aforementioned Patra brothers i.e. Shyamsundar Patra being the Secretary of the Temple has misappropriated the properties of the deity. Considering the demand of the people at large, the temple was indexed and non-hereditary Trust Board was formed on 26.07.2016 by the State Government. In the said Trust Board, one Madhusuan Dash has been made as Managing Trustee and deceased Abhimanyu Panda as the member of the Trust Board. In spite of the formation of the non-hereditary Trust Board, as Shyamsundar Patra, the Ex-Secretary of the temple did not handover the charges and records of the temple. Consequently, W.P.(C) No.13847 of 2017 was filed and by virtue of the order dated 20.07.2017 of this Court in the said Writ Petition, the non-hereditary Trust Board could enter into the premises of the temple and started looking after the Seva Puja (worshipping) of the deity. However, as on date, the detailed charges have not been handed over by Shyamsundar Patra for which W.P.(C) No.12691 of 2018 has been filed before this Court which is pending for disposal. It may be pointed out here that the Commissioner of Endowments, Odisha has not taken any step in the matter although it has been brought to his notice several times.

8. Shyamsundar Patra, K. Biswajit Patra and others have protested about the formation of the non-hereditary Trust Board and they also did not allow the Trust Board to celebrate the Rathayatra in the year 2017 and with their help the then Sub-Collector, Baliguda, who is one of the member of the Trust Board, forcibly conducted the Rathayatra. Consequently, the matter was brought to the notice of the Additional Assistant Commissioner of Endowment, Berhampur. The matter was inquired into and found to be true and the then Sub-Collector was directed not to interfere with in the day to day management of the temple.

9. Being the member of the non-hereditary Trust Board, deceased Abhimanyu Panda and the Managing Trustee Madhusudan Dash took step for collection of rent from 43 shops of Shri Jagannath Temple Complex. Out of it, about 18 numbers are adjacent to N.H. Prior to the formation of non- hereditary Trust Board the shop room

owners were paying rent to Shyamsundar Patra. Even his brothers namely Gopal Krushna Patra was in occupation of shop room No-9. When the shop owners did not pay rent to the Trust Board, cases were filed before the Additional Assistant Endowment Commissioner for their eviction under Section 68 of OHRE Act and eviction order has been passed, brother of Shyamsundar Patra namely Gopal Krushna Patra was evicted from shop room on 23.10.2019 and K.Biswajit Patra and Ananda Acharya have sublet their shop rooms and are not paying anything to the Trust Board. Against them also cases are pending and both of them have approached this Court challenging the steps taken by the Trust Board for their eviction.

10. In this case, being dissatisfied with the manner in which investigation has been done, some local inhabitants have approached the Governor of Odisha by filing a petition dated 22.06.2020 requesting His Excellency to intervene in the matter and to direct for investigation of the case by Special Investigating Team or by Crime Branch of Odisha. Besides, they have also approached the Hon'ble Chief Justice of this Court to look into the matter and on receipt of the said request, Assistant Secretary, Odisha State Legal Service Authority, Cuttack sent a copy of the grievance petition to the Superintendent of Police, Kandhamal to take step in the matter.

11. Shri Jagannath Temple Complex is situated on the side of National Highway No-59. After extension of N.H No-59, Temple Trust Board was informed by the Sub-Collector and the I.I.C., Baliguda Police Station not to keep the Chariot outside the Temple Complex as it will create problem in smooth movement of the vehicles. Thus, the Managing Trustee and the Trust Board Member Late Abhimanyu Panda along with other Trust Board Member have decided to demolish shop room Nos.6 and 7 of the Market Complex by which there will be enough space to take the Chariot inside the Temple premises. This was intimated to the Additional Assistant Endowment Commissioner, Berhampur by Letter No.65 dated 29.08.2019, Letter No-84 dated 15.11.2019. As per the decision of the Managing Committee, the deceased had also sought for information from the Executive Engineer (R & B Division), Baliguda to provide him the inspection report of the existing structural condition of the surrounding building of the Jagannath Market of the Jagannath Temple from Trivedi Park to N.H.-59. Only after 15 days, the Petitioner's husband Abhimanyu Panda was murdered in front of his house on 10.12.2019.

12. Non-submission of record of the deity and detailed accounts of the money collected from different sources of the temple by Shyamsundar Patra was reported to the Baliguda Police Station on 20.04.2018. However, no steps were taken by the police, as they are hand in glove with him. The said action of Shyamsundar Patra and his fellowmen and the conduct of the police in not taking any step against him and others in-spite of specific allegations made in the F.I.R. dated 10.12.2019 does not create a reasonable doubt in the mind about the manner in which the investigation has been done and charge sheet has been submitted.

13. It is revealed from the F.I.R. that being the member of the Trust Board of Shri Jagannath Temple, Baliguda, the deceased was targeted as he has taken steps for eviction of the shop owners from the temple market complex. But the investigating agency has not examined Madhusudan Dash, the Managing Trustee of the Temple who is a key witness in the matter although he was ready and willing for examination.

14. In the F.I.R itself it has been specifically mentioned that the Ex-Secretary of the previous Managing Committee namely Shyamsundar Patra has taken the shops on rent in his brother's name and relating to the eviction from rented shop rooms the deceased was threatened by the Shyamsundar Patra and his brothers which was also informed to the Police. This has not been taken care of by the investigating officer. While submitting charge sheet, the investigating officer has stated that the F.I.R. was lodged by the brother of the deceased who has no direct or indirect knowledge about the accused person and the F.I.R. was lodged by naming the Patra brothers as there was bitter family rivalry between the Patra brothers and the deceased. In this regard, it is submitted that the conclusion drawn by the investigating agency is a cooked up story, just to shield the Patra brothers who are moneyed and influential people of Baliguda. This fact can be verified from the conduct of the Patra brothers who have forcibly conducted Rathayatra in the year 2017, although by that time the deceased and Shri Mdhusudan Dash have been notified by the State Government/Endowment Department as the Trust Board members. Even at the instance of Shyamsundar Patra and his followers, the effigy of the deceased was burnt at Baliguda, after he became the member of the Trust Board. The C.D. of it is also available and if necessary it will be produced at the time of hearing.

15. Moreover, the statement made in the F.I.R. by the cousin brother of the deceased has not been accepted by the investigating agency as truth because he is not an eye witness to the said occurrence, which is revealed from the narratives of the charge sheet of the investigating agency. While taking up investigation, the investigating officer has not made proper investigation of the case as facts have not been reflected correctly in the charge sheet. In fact, K.Biswajit Patra who has been made as one of the main accused has taken a shop room on rent in Jagannath Market Complex and other accused namely Ananda Prasad Acharya @ Chintu has also taken a shop room on rent in the Jagannath Market Complex. K. Biswajit Patra has been made as the prime accused whereas Chintu @ Ananda Prasad Acharya who has given shelter to the suparee killer in his house has been made an accomplish. This creates a doubt about the proper investigation of the case.

16. In fact, ten days prior to the incident, the deceased was threatened by Patra brothers, K. Biswajit Ananda Acharya and Debendra Panda to kill him. The investigating agency has not done the investigation from all angles and diverted it and confined it to only one angle and very cunningly submitted the charge sheet without involving the Patra brothers and many other who are the master mind of the

crime. The fact speaks for itself, because they are the persons who are being affected due to the proactive action of the deceased who was energetic honest and took active role in managing the affairs of the temple.

17. The Petitioner, thus, getting no other alternative remedy has filed this petition for redressal of her grievances and justice.

III. COURT'S REASONING AND ANALYSIS:

18. The conduct of the police in the investigative process has not been so satisfactory as prima facie appear in the present case. The Supreme Court in ***Rubabbuddin Sheikh v. State of Gujarat & Ors***[1]., dealt with a case where the accusation had been against high officials of the Police Department of the State of Gujarat in respect of killing of persons in a fake encounter and the Gujarat Police after the conclusion of the investigation, submitted charge sheet before the competent criminal court. The Court came to the conclusion that as the allegations of committing murder under the garb of an encounter are not against any third party but against the top police personnel of the State of Gujarat, the investigation concluded by the State investigating agency may not be satisfactorily held. Thus, in order to do justice and instill confidence in the minds of the victims as well as of the public, the State police authority could not be allowed to continue with the investigation when allegations and offences were mostly against top officials. Thus, the Court held that even if a charge-sheet has been filed by the State investigating agency, there is no prohibition for transferring the investigation to any other independent investigating agency.

19. However, in ***State of West Bengal v. Committee for Protection of Democratic Rights***[2], a Constitution Bench of Supreme Court has clarified that extraordinary power to transfer the investigation from State investigating agency to any other investigating agency must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigation or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights.

20. In ***K.V. Rajendran v. Superintendent of Police, CBCID, Chennai & Ors***[3] wherein it was held that transfer of an investigation must be in rare and exceptional cases to do complete justice between the parties and to instill confidence in the public mind. The following may be extracted:

> *"This Court or the High Court has power under Article 136 or Article 226 to order investigation by the CBI. That, however should be done only in some rare and exceptional case, otherwise, the CBI would be flooded with a large number of cases and would find it impossible to properly investigate all of them."* *(Emphasis added)*

1. (20100 2 SCC 200, **2.** AIR 2010 SC 1476, **3**. (2013) 12 SCC 480

21. In view of the above, the law can be summarised to the effect that the Court could exercise its Constitutional powers for transferring an investigation from the State investigating agency to any other independent investigating agency like CB/CID or CBI only in rare and exceptional cases. Such as where high officials of State authorities are involved, or the accusation itself is against the top officials of the investigating agency thereby allowing them to influence the investigation, and further it is so necessary to do justice and to instill confidence in the investigation or where the investigation is prima facie found to be tainted/biased.

22. In the present case, the Petitioner has not been able to prove that the State investigating agency has derailed the course of investigation or if there is a conflict of interest. Moreover, the investigation is currently at an early stage and transferring such cases would lead to opening of floodgate of cases before this Court.

23. In assessing the contention for the transfer of the investigation to CBI, it has been factored into the decision-making system, the averments on the record and submissions urged on behalf of the Petitioner. However, there is no such reason that warrants a transfer of the investigation to CBI. In holding thus, this Court has applied the tests spelt out in the consistent line of precedent of the apex Court. They have not been fulfilled. An individual under investigation has a legitimate expectation of a fair process which accords with law. The displeasure of the Petitioner about the manner in which the investigation proceeds or an unsubstantiated allegation (as in the present case) of a conflict of interest against the police conducting the investigation must not derail the legitimate course of law and warrant the invocation of the extraordinary power of this Court to transfer an investigation to CBI. Courts assume the extraordinary jurisdiction to transfer an investigation in exceptional situations to ensure that the sanctity of the administration of criminal justice is preserved. While no inflexible guidelines are laid down, the notion that such a transfer is an "extraordinary power to be used "sparingly" and "in exceptional circumstances" comports with the idea that routine transfers would belie not just public confidence in the normal course of law but also render meaningless the extraordinary situations that warrant the exercise of the power to transfer the investigation. Having balanced and considered the material on record as well as the averments and submissions urged by the Petitioner, this Court finds that no case of such nature which falls within the ambit of the tests enunciated in the precedents of this Court has been established for the transfer of the investigation.

24. In the light of the aforesaid discussion and having regard to the present position of law, this Court has no hesitation in coming to the conclusion that the Petitioner cannot be granted any relief by way of this petition.

25. Accordingly, the CRLMP is dismissed.

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2023 (II) ILR – CUT- 844

Dr. S.K. PANIGRAHI, J.

ARBA NO.21 OF 2013 & ARBA NO.40 OF 2012

UNION OF INDIA ……Appellant

.V.

M/s. CALCUTTA SPRINGS LTD., KOLKATA …….Respondent

ARBA NO.40 OF 2012

M/s. CALCUTTA SPRINGS LTD, KOLKATA ……Appellant

.V.

EAST COST RAILWAY …….Respondent

ARBITRATION AND CONCILIATION ACT, 1996 – Sections 34, 37 – Scope of Judicial Scrutiny – Explained with reference to case laws.

(Para 17-26)

Case Laws Relied on and Referred to :-

1. (2022) 4 SCC 116 : UHL Power Co. Ltd. Vs. State of H.P.
2.(2020) 12 SCC 539 : K. Sugumar Vs. Hindustan Petroleum Corpn. Ltd.
3. (2021) 9 SCC 1 : NHAI Vs. M. Hakeem.
4. (2006) 11 SCC 181 : Mcdermott International Inc. Vs. Burn Standard Co. Ltd.
5.(2019) 4 SCC 163 : MMTC Ltd. Vs. Vedanta Ltd.
6.(2018) 11 SCC 328 : Kinnari Mullick Vs. Ghanshyam Das Damani.
7. (2021) 7 SCC 657 : Dakshin Haryana Bijli Vitran Nigam Ltd. Vs. Navigant Technologies (P) Ltd.
8. (2012) 1 SCC 594 : P.R. Shah Shares & Stock Broker (P) Ltd. Vs. B.H.H. Securities (P) Ltd.
9. (2015) 5 SCC 739 : Swan Gold Mining Ltd. Vs. Hindustan Copper Ltd.
10. AIR 2009 (SCW) 6217 : K.V. Mohd. Zakir Vs. Regional Sports Center.
11. (1996) 1 SCC 18 : State of U.P. Vs. Ram Nath Constructions.
12. 2021 SCC OnLine Del 3428 : M/s Pragya Electronics Pvt. Ltd. Vs. M/s Cosmo Ferrites Ltd.

ARBA NO.21 OF 2013

For Appellant : Mr. Subrat Mishra
Mr. D.P. Sarangi

For Respondent : Mr. Sidhant Dwibedi

ARBA NO.40 OF 2012

For Appellant : Mr. Sidhant Dwibedi

For Respondent :Mr. Subrat Mishra
Mr. D.P. Sarangi

JUDGMENT Date of Hearing:01.03.2023 : Date of Judgment:19.05.2023

Dr. S.K. PANIGRAHI, J.

1. Since both the ARBAs arose out of the same judgment i.e. the judgment dated 25.09.2012 passed by the learned District Judge, Khurda at Bhubaneswar in

ARBP No.116 of 2010, this Court proposed to hear both the matters together and pass a common order.

2. Both the aforesaid Appeals under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act" for brevity) have been filed seeking setting aside of the judgment dated 25.9.2012 passed by the learned District Judge, Khurda at Bhubaneswar in ARBA No.116 of 2010 arising out of award dated 26.02.2010 passed by the learned Sole Arbitrator Mr. Umesh Singh, Controller of Stores, East Coast Railway, Bhubaneswar.

I. FACTUAL MATRIX OF THE CASES:

3. The Respondent in ARBA No.21 of 2013 who is the Appellant in ARBA No.40 of 2012 (hereinafter referred to as "the Company" for brevity) submitted a quotation in response to the Open Tender No.CS-156 of 20015 floated by the Railway Board. A counter offer was issued on 12.12.2005 which was accepted by the Company on 26.12.2005. A detailed letter of acceptance was issued on 10.01.2006 for the manufacture and supply of 1,69,497 numbers of Pre-stressed Mono-block Concrete (PMBC) Sleepers. Bank guarantee of the requisite amount was furnished by the Respondent. Subsequently, the parties entered into an agreement dated 02.11.2006. The period of commencement of the agreement was stipulated to be 10.01.2006, i.e. the date on which the order was placed and the agreement was stipulated to end on 25.01.2008.

4. The Railway Board vide their letter dated 24.09.2007 increased the quantity of PMBC sleepers to be supplied by 30% i.e. 50489 additional PMBC sleepers were requested to be supplied at the price, terms and conditions of the initial order. It was immediately informed to the Board by the Company that they would deliver the initial ordered quantity by the original due date of delivery, i.e. 25.01.2008. However, they requested that proportionate additional time may be granted to supply the additional quantity ordered. By letter dated 22.11.2007, the Board rejected the request and insisted on the supply of the additional ordered quantity within the original delivery period.

5. Apart from being allegedly left in the lurch by the Board's abovementioned actions, the Company vide letter dated 27.12.2007 also requested extension of the Delivery Period by three months – up to 25.04.2008, without imposition of liquidated damage for supply of the originally ordered quantity. The same was requested on the ground that the item i.e. special cement was not available in the market during the period of supply leading to delay in supply. The Appellant's Railway Board sought production of documents to support the Respondent's request for extension vide their letter dated 24.04.2008. The same was provided to the Board by the Company vide its letter dated 25.06.2008. Vide letter dated 14.07.2008, the Company also brought to the notice of the Board that Clause 19.1. of the Agreement which allows for increase of the quantity ordered by 30% on the same price, terms

and conditions but requires proportionate increase in delivery period. The Clause having been invoked properly, it was contended that the Company was not under any obligation to supply the quantity against the additional ordered quantity without proportionate increase in the delivery period. It was also requested that the contract may be closed with supply of original quantity and to refer the matter to arbitration if the same is not acceptable to the Board. The Board vide letter dated 15.07.2008, intimated the Company that the question of fixing the delivery period proportionately for the additional ordered quantity does not arise. While this was the purported stand of the Board, the Company received a fax from the Board on 15/16.07.2008 intimating the Company of the extension of delivery period for additional ordered quantity is granted up to 25.07.2008. However, no formal extension was communicated to the Company till letter dated 23.07.2008 which was received on 09.08.2008. Furthermore, pertaining to the extension of delivery period for the originally ordered quantity, the Board vide letter dated 26/27.11.2008 intimated the Company that the extension of delivery period has been approved only from 25.01.2008 to 24.02.20008 without liquidated damages.

6. The Company was subsequently asked to withdraw the demand for appointment of arbitrator and vide letter dated 21.08.2008, the Company wrote to the Board in order to document the understanding that the Company would only supply the quantity that was already manufactured against the additional ordered quantity and would not make any further supply against the additional ordered quantity. Subsequently, on 09.09.2008, the Company withdrew its request for appointment of arbitrator.

7. However, after receiving the final bill which included deductions that were not agreeable to the Respondent, the Company renewed its request for appointment of an arbitrator. Shri Umesh Singh, Controller of Stores, East Coast Railway, Bhubaneswar was appointed as sole Arbitrator to adjudicate all the disputes arising out of Agreement dated 02.11.2006.

8. The Company claimed an amount of Rs.2,95,07,818/- under nine different items. *Vide* arbitral award dated 26.02.2010, the learned Sole Arbitrator partially allowed Claim No.3 which pertained to amount recovered from the bills towards 5% liquidated damages for unsupplied quantity as well as the additional ordered quantity. Of the total amount of Rs.32,72,692/- that was claimed under this Claim, the learned Sole Arbitrator awarded Rs.7,97,452/- to the Company.

9. Aggrieved, the Company approached the learned District Judge, Khurda under Section 34 of the Act vide ARBP No.116 of 2010 seeking setting aside of the arbitral award dated 26.02.2010 passed by the sole Arbitrator. After hearing both the parties, the learned District Judge vide order dated 25.09.2012, while upholding the amount awarded under Claim No.3 as aforementioned, remanded the matter back to the learned Sole Arbitrator on the limited question of the Company's entitlements under Claim No.1 (amount recovered as 5% liquidated damages for supply of 9217 sleepers beyond the original ordered quantity).

10. Being aggrieved, the Union of India has filed ARBA No.21 of 2013 under Section 37 of the Act seeking setting aside of the judgment dated 25.09.2012 passed by the learned District Judge, Khurda in Arbitration Petition No.116 of 2010 arising out of arbitration award dated 26.02.2010 passed by the learned Sole Arbitrator.

11. So also, being aggrieved by the said judgment partially setting aside the award dated 26.02.2010 passed by the sole Arbitrator, the Company has filed ARBA No.40 of 2012.

12. Before this Court delves into the submissions of the parties, it is pertinent to mention that the Union of India *vide* two cheques dated 10.08.2010 and 11.08.2010 has released the principal award amount of Rs.7,97,542/- to the Company.

13. Now, the facts leading to the instant Appeals have been laid down, this Court shall make endeavour to summarise the contentions of the Parties and the broad grounds on which they have approached this Court seeking exercise of this Court's limited jurisdiction available under Section 37 of the Act.

II. SUBMISSIONS OF THE UNION OF INDIA:

14. Learned counsel for the Union of India assailed the impugned judgment dated 25.09.2012 passed by the learned District Judge in ARBP No.116 of 2010 mainly on the ground that the learned District Judge has ignored that the claim for liquidated damages falls under the scope of excepted matters and hence was not arbitrable as per the terms of the contract. Furthermore, it is also vehemently alleged that the learned District Judge could not have upheld the award limited to a certain extent while also remanding it for fresh determination of a certain claim. The same purportedly amounts to modification of the award which is not permissible in law. The counsel for the Union of India submitted that the award had to be either set aside in its entirety or upheld entirely. The learned District Judge has, therefore, transgressed the settled position of law.

III. SUBMISSIONS OF THE COMPANY:

15. *Per contra*, learned counsel for the Company contended that the learned District Judge was well within his powers to uphold the award while remanding Claim No.1 pertaining to amount recovered as 5% liquidated damages for supply of 9217 sleepers beyond the original ordered quantity. It was submitted that the learned District Judge has correctly held that Claim No.3 pertaining to amount deducted as 5% liquidated damages for unsupplied quantity as well as the additional ordered quantity is related to Claim No.1 which also deals with liquidated damages. After coming to the conclusion that in order to exercise the option of ordering an additional quantity, it was imperative to obtain the consent and concurrence of the Company, the learned Sole Arbitrator could not have contradicted himself by saying that the imposition of liquidated damages was justified for non-fulfillment of the additional ordered quantity. Furthermore, it was contended that the learned Sole

Arbitrator had not given any reasoning as to why Claim Nos.1, 2, 4, 5, 6, 7, 8 and 9 were not arbitrable and had not provided any justification for the same.

IV. ISSUE FOR CONSIDERATION:

16. Having heard the learned counsel for the parties and perused the materials available on record, this Court has identified the following issue to be determined:

> **A.** Whether the learned District Judge erred in directing the parties to approach the learned Sole Arbitrator to the limited extent that the learned Sole Arbitrator would decide as early as possible after giving due opportunity to the parties as regards the Company's entitlement, if any, on Claim No.1 basing on his own finding as recorded regarding imposition of liquidated damage as at para-11.2 and 11.3 of the award?

V. A. Whether the learned District Judge erred in directing the parties to approach the learned Sole Arbitrator to the limited extent that the learned Sole Arbitrator would decide as early as possible after giving due opportunity to the parties as regards the Company's entitlement, if any, on Claim No.1 basing on his own finding as recorded regarding imposition of liquidated damage as at para-11.2 and 11.3 of the award?

17. In the matters, this Court concerns with Section 37(1)(c) which states that an appeal lies under Section 37 of the Act from an order setting aside or refusing to set aside an arbitral award under Section 34 of the Act. This Court has had the occasion to recently deal with this question in its judgment dated 09.01.2023 in ARBA No.39 of 2018 titled as ***United India Insurance Company Ltd., Bhubaneswar v. Suryo Udyog Ltd.***

18. The Supreme Court has confined the supervisory role of the Courts when it comes to testing the validity of an Arbitration Award. It is trite law that this Court under Section 37 of the Act cannot travel beyond the scope of what is provided under Section 34 of the Act. The Supreme Court in ***UHL Power Co. Ltd. v. State of H.P.***[1], recently held as follows:

> *"16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. ...."*

A similar view, as stated above, has also been taken by the Supreme Court in ***K. Sugumar v. Hindustan Petroleum Corpn. Ltd***[2]**.**

19. It is trite law that a Court cannot modify an award while adjudging its propriety under Section 34 of the Act. The Supreme Court in ***NHAI v. M. Hakeem***[3] has reiterated this as follows:

1. (2022) 4 SCC 116, **2**.(2020) 12 SCC 539, **3.** (2021) 9 SCC 1

> *"31. Thus, there can be no doubt that given the law laid down by this Court, Section 34 of the Arbitration Act, 1996 cannot be held to include within it a power to modify an award. The sheet anchor of the argument of the respondents is the judgment of the learned Single Judge in GayatriBalaswamy v. ISG Novasoft Technologies Ltd. GayatriBalaswamy v. ISG Novasoft Technologies Ltd., 2014 SCC OnLine Mad 6568 : (2015) 1 Mad LJ 5] . This matter arose out of a claim for damages by an employee on account of sexual harassment at the workplace. The learned Single Judge referred to the power to modify or correct an award under Section 15 of the Arbitration Act, 1940 in para 29 of the judgment. Thereafter, a number of judgments of this Court were referred to in which awards were modified by this Court, presumably under the powers of this Court under Article 142 of the Constitution of India. In para 34, the learned Single Judge referred to para 52 in McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] and then concluded that since the observations made in the said para were not given in answer to a pointed question as to whether the court had the power under Section 34 to modify or vary an award, this judgment cannot be said to have settled the answer to the question raised finally."*

20. While the scope of judicial scrutiny under Sections 34 is narrow, it is further restricted under Section 37 of the Act, as it is in the nature of a second appeal. In this regard, in ***Mcdermott International Inc.* v. *Burn Standard Co. Ltd*[4].**, the supervisory role of the Courts has been circumscribed by the Supreme Court in the following manner:

> *"52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."*

21. Further, in ***MMTC Ltd. v. Vedanta Ltd.*[5]**, the following was observed by the Supreme Court:

> *"14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."*

22. It is in the parameters as laid down by the Apex Court *vis-a-vis* the scope of judicial intervention that the appeals impugning the order dated 25.09.2012 passed

4. (2006) 11 SCC 181, **5**.(2019) 4 SCC 163

by the learned District Judge, Khurda in Arbitration Petition No.116 of 2010 arising out of arbitration award dated 26.02.2010 passed by the learned Sole Arbitrator shall be dealt with.

23. The facts of the case indicate that Claim No.1 and Claim No.3, both pertain to the deduction from the final bill and it is related to liquidated damages for supply of sleepers after completion of the original ordered quantity or in simpler terms, the additional ordered quantity. The Claims, therefore, arise out of the same subject matter and are not separable *per se*. If the learned Arbitrator was of the opinion that the Company was entitled to relief pertaining to Claim No.3, it flows as a natural corollary that Claim No.1 should also have been adjudicated upon based on the same reasoning. Instead, the learned Arbitrator has merely held *"…this claim is not within the purview of Arbitral Agreement and not established, therefore, nil amount is awarded.*". This Court agrees with the learned District Judge's conclusion that if the learned Arbitrator felt that upon consideration of the relevant clause of the Agreement, adjudicating on claims of liquidated damages were within his domain, by non-consideration of Claim No.1, the learned Arbitrator has failed to exercise the jurisdiction vested on him, which is an error apparent on the face of the record. The same is also patently illegal.

24. In the considered opinion of this Court, the learned Arbitrator has committed a manifest error in not coming to any finding on Claim No.1. However, the power of the learned District Judge and this Court to interfere with the arbitral award halts at this juncture, considering the limited scope of Sections 34 and 37 of the Act as discussed above.

25. Considering the limited scope of judicial review under Section 34 of the Act, the court exercising power under Section 34 of the Act could not have rendered any decision on Claim No.1 as that would amount to modification of the award which is impermissible keeping the position of law in mind as has been laid down by the Supreme Court in ***NHAI v. M. Hakeem*** (supra) ***and McDermott International Inc. v. Burn Standard Co. Ltd.***(supra), ***Kinnari Mullick v. Ghanshyam Das Damani***[6] and ***Dakshin Haryana BijliVitran Nigam Ltd. v. Navigant Technologies (P) Ltd.***[7]**.**

26. Any attempt to render a decision on Claim No.1 would also necessitate entering into the merits of the dispute as well as reappreciation of evidence, which exercises are also not permissible in law. The Supreme Court in ***P.R. Shah Shares & Stock Broker (P) Ltd. v. B.H.H. Securities (P) Ltd***[8]. has held that a Court does not sit in appeal over the award of an Arbitrator by re-assessing or re-appreciating the evidence. This view was reiterated by the Apex Court in ***Swan Gold Mining Ltd. v. Hindustan Copper Ltd***[9]***., K.V. Mohd. Zakir v. Regional Sports Center***[10] and

6. (2018) 11 SCC 328 , **7**. (2021) 7 SCC 657, **8**. (2012) 1 SCC 594, **9**. (2015) 5 SCC 739
10. AIR 2009 (SCW) 6217

State of U.P. v. Ram Nath Constructions[11] and the High Court of Delhi in ***M/S Pragya Electronics Pvt. Ltd. v. M/s Cosmo Ferrites Ltd***[12]..

VI. CONCLUSION:

27. Therefore, in light of the discussion, keeping the settled principles of law in mind and for the reasons given above, this Court is of the considered view that the learned District Judge has rightly left it open to the parties to pursue legal remedies in accordance with law, and refrained from taking a decision on the claim by itself.

28. The parties are, therefore, at liberty to pursue legal remedies in accordance with law including any remedies available to them under the Act.

29. In light of the aforesaid, both the appeals stands disposed of, along with pending application(s), if any. No order as to costs.

11. (1996) 1 SCC 18, **12**. 2021 SCC OnLine Del 3428

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2023 (II) ILR – CUT - 851

MISS. SAVITRI RATHO, J.

BLAPL NO. 2127 OF 2023

RAMAKANTA PRASAD .....Petitioner

-V-

STATE OF ODISHA .....Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 r/w section 37 of NDPS Act – Commission of offence punishable U/s. 20(b)(11)(c) of the NDPS Act – The petitioner is in custody since 26.03.2017 and out of fourteen charge sheet witnesses only six witnesses had been examined and the petitioner was not responsible for the delay – Held, considering the period of detention of the petitioner in judicial custody and keeping in mind the decision of the Supreme Court, this Court is inclined to allow the application for Bail. (Para 8.1-10)

Case Law Relied on and Referred to :-

1. (1996) 2 SCC 616 AIR 1996 SC 2957 : Shaheen Welfare Association Vs. Union of India.
2. (2011) 1 SCC 784 : State of Kerala Vs. Raneef.
3. 2023 (I) OLR (SC) 959, 2023 SCC Online 352: Mohd. Muslim @ Hussain Vs. State (NCT OF Delhi)
4. (2001) 7 SCC 673 : State of Madhya Pradesh Vs. Kajad.
5. (1994) 6 SCC 731 : Supreme Court Legal Aid Committee Vs. Union of India.
6. (2013) 2 SCC 603 : Thana Singh Vs. Central Bureau of Narcotics.
7. (SLP (Crl.) No. 6690 of 2022 : Dheeraj Kumar Shukla Vs. State of Uttar Pradesh.
8. (SLP (Crl.) No. 3133 of 2022) : Md. Raja and Another Vs. The State of West Bengal.

9. (1981) 3 SCC 671 : Kadra Pahadiya & Ors. Vs. State of Bihar.
10. (2001) 7 SCC 673 : State of Madhya Pradesh Vs. Kajad.
11. (1996) 2 SCC 616 : Shaheen Welfare Association Vs. Union of India.
12. (2021) 3 SCC 713 : Union of India Vs. K.A. Najeeb.
13. (2022) 10 SCC 51 : Satender Kumar Antil Vs. Central Bureau of Investigation.
14. (2009) 2 SCC 624 : Union of India Vs. Rattan Malik.

For Petitioner : Mr. S.R. Pati
For Opp. Party : Mr. D. Nayak, A.G.A

JUDGMENT Date of Judgment : 06.06.2023

MISS. SAVITRI RATHO, J.

1. This is the third successive bail application under section 439 of Cr.P.C. filed by the petitioner for grant of bail in connection with Ulunda P.S. Case No.27 of 2017 corresponding to Special G.R. Case No.14 of 2017 pending in the Court of learned Sessions Judge-cum-Special Judge, Sonepur for commission of offence punishable under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short " the NDPS Act).

2. While dismissing BLAPL No. 11108 of 2019 filed by the petitioner by order dated 25.10.2021, the learned trial court had been directed to expedite the trial. In the second bail application - BLAPL No. 1953 of 2022, I was not inclined to allow the prayer for bail but while disposing of the bail application by order dated 21.07.2022, had requested the learned trial Court to conclude the trial within a period of six months as the petitioner had remained in custody since more than five years.

3. Perusal of the impugned order dated 30.08.2022 reveals that just after expiry of one month, the petitioner had moved the learned trial court for bail and the prayer has been rejected the bail holding that the earlier bail applications had been rejected five times earlier and there was no change in circumstances to take a different view, hearing in the case had commenced and the petitioner was a resident of Sabahi Tarwah, Police Station - Turukpatti, District - Kushinagar in Uttar Pradesh for which there was every chance of his absconding and least chance of apprehending him and the ganja seized was of commercial quantity.

4. When this case had been listed on 27.04.2023, considering the submission of Mr. S.R. Pati, learned counsel for the petitioner that the petitioner was in custody since 26.03.2017 and in spite of order dated 25.10.2021 passed in BLAPL No. 11108 of 2019 and order dated 21.07.2022 passed in BLAPL No. 1953 of 2022 the trial was still lingering and out of fourteen charge sheet witnesses, three witnesses had only been examined, a report had been called for from the learned trial Court regarding the status of the trial. Reports dated 03.05.2023 and 18.05.2023, received from the learned Special Judge -cum- Sessions Judge, Sonepur reveal that charge has been framed in the case i.e. 16.11.2018 under Section 20(b)(ii)(C) of the NDPS Act against the two accused persons in the trial namely the petitioner Ramakanta

Prasad and co-accused Pradeep Kumar. Co-accused Pradeep Kumar has been released on interim bail pursuant to order dated 26.11.2021 passed in BLAPL No. 10737 of 2019 by this Court and he had directed to surrender on 11.03.2022. But as he did not appear on the said date, NBW of arrest had been issued against him and the case has been split up against him. In the present trial out of fourteen charge sheet witnesses, four witnesses had been examined and summons had been issued, fixing 17.05.2023 for hearing. On 17.05.2023, two more witnesses had been examined and summons had been issued against the rest of the charge sheeted witnesses and the case was posted to 27.06.2023 for hearing.

5. Mr. S.R. Pati, learned counsel for the petitioner submits that the petitioner is in custody since 26.03.2017 and out of fourteen charge sheet witnesses, only six witnesses had been examined and the petitioner was not responsible for the delay in the trial. He further submitted that the right of speedy trial is available to the petitioner as held in a catena of decisions by the Supreme Court. Relying on the decisions of the Apex Court in the case of ***Shaheen Welfare Association vs. Union of India : (1996) 2 SCC 616 AIR 1996 SC 2957 ; State of Kerala vs. Raneef : (2011) 1 SCC 784, and the recent decision of the Supreme Court in the case of Mohd. Muslim @ Hussain vs. State (NCT OF Delhi) : 2023 (I) OLR (SC) 959, 2023 SCC Online 352,*** he has submitted that as the petitioner has remained in custody for more than six years and the trial has not been completed in spite of two orders of this Court in BLAPL No. 11108 of 2019 and BLAPL No. 1953 of 2022, he should be released on bail without going into the bar contained in Section 37 of the N.D.P.S Act as held by the Supreme Court in the case of ***Mohd. Muslim*** (supra). He further submits that the petitioner has no criminal antecedents of similar nature.

6. Mr. D. Nayak, learned Addl. Govt. Advocate for the State opposed the prayer for bail stating that 149 kgs. of ganja has been seized in this case for which Section 37 of the N.D.P.S. Act will be a bar for releasing the petitioner on bail. He has also submitted the petitioner is a resident of Uttar Pradesh and the co-accused Pradeep Kumar who is resident of District Kushinagar, Uttar Pradesh had been granted interim bail by order dated 26.11.2021 passed in BLAPL No. 10737 of 2019 by this Court. He had been released on 14.12.2021 and was to surrender on 11.03.2022, but he has not surrendered nor could the NBW of arrest issued against him be executed. As the petitioner is also a resident of Uttar Pradesh, if he is granted bail, it will be difficult to secure his attendance during trial.

STATUTORY PROVISIONS

7. Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985:

> ***"37. Offences to be cognizable and non-bailable.—***
>
> *(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—*
>
> *(a) every offence punishable under this Act shall be cognizable;*

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.

As the allegation in the case is that the petitioner and co-accused Pradeep Kumar were found in possession of 149 kgs. of ganja, which comes within the definition of commercial quantity , the rigours of Section 37 of NDPS Act are attracted.

JUDICIAL PRONOUNCEMENTS

8. For dealing with the contentions of the learned counsels, it would be apposite to refer to some of the decisions relied on by the counsel for the petitioner and some others which are relevant for deciding this application. The earlier view of the Supreme Court in NDPS cases was that in view of the restrictions imposed in Section 37 of the NDPS Act, in cases involving commercial quantity, *"negation of bail is the rule and its grant an exception"*. But this view has undergone a change when it was found that accused persons were detained in custody for long periods without being tried or on account of delay in completion of trial.

8.1 The ***Shaheen Welfare Association*** case (supra) was a PIL, where the petitioner had prayed for certain reliefs to undertrial prisoners charged under the TADA and detained in jails for long periods, the Supreme Court divided the undertrials to four categories and laid down the norms for deciding their prayers for bail , while holding as follows:

"When stringent provisions have been prescribed under an Act such as TADA for grant of bail, a conscious decision has been taken by the legislature to sacrifice to some extent, the personal liberty of an undertrial accused for the sake of protecting the community and the nation against terrorist and disruptive activities or other activities harmful to society, it is all the more necessary that investigation of such crimes is done efficiently and an adequate number of Designated Courts are set up to bring to book persons accused of such serious crimes. This is the only way in which society can be protected against harmful activities. This would also ensure that persons ultimately found innocent are not unnecessarily kept in jail for long periods."

8.2 In the case of ***State of Madhya Pradesh vs. Kajad reported in (2001) 7 SCC 673***, while referring to Section 37 of the NDPS Act, the Supreme Court has held as follows :

> *"The purpose for which the Act was enacted and the menace of drug trafficking which intends to curtail is evident from its scheme. A perusal of Section 37 of the Act leaves no doubt in the mind of the court that a person accused of an offence, punishable for a term of imprisonment of five years or more, shall generally be not released on bail. Negation of bail is the rule and its grant and exception under sub clause (ii) of clause (b) of Section 37(1). For granting the bail the court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section (1) of Section 37 are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail under the Act is uncalled for."*

8.3 The decision rendered in ***Raneef*** (supra) is not strictly applicable to this case. In that case, the State had challenged the order of the Kerala High Court granting bail to the respondent, a dentist who had spent 66 days in custody in connection with a case registered under various provisions of the I.P.C., the Explosive Substances Act, and the Unlawful Activities (Prevention) Act. While dismissing the SLP, the Supreme Court held as follows :

> *"In deciding bail applications an important factor which should certainly be taken into consideration by the Court is the delay in concluding the trial. Often this takes several years, and if the accused is denied bail but is ultimately acquitted, who will restore so many years of his life spent in custody? Is Article 21 of the Constitution, which is the most basic of all the fundamental rights in our Constitution, not violated in such a case? Of course this is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail."…*

8.4 ***Supreme Court Legal Aid Committee vs. Union of India (1994) 6 SCC 731*** had been initially filed by the petitioner under Article 32 of the Constitution on account of the delay in disposal of cases under the NDPS Act involving foreigners. The application was thereafter amended and it was prayed that all under-trials who were in jail for the commission of any offence or offences under the Act for a period exceeding two years on account of the delay in the disposal of cases lodged against them should be released from jail declaring their further detention to be illegal and void and pending decision of this Court on the said larger issue, they should be released on bail. After discussing various provisions of the NDPS Act and the pendency of cases in Mumbai, the Supreme Court observed that since the number of courts constituted to try offences under the Act were not sufficient and the appointments of Judges to man these courts were delayed, cases had piled up and the accused had to languish in jail as the provision for enlarging them on bail was strict. Relevant portion of paragraph 15, paragraph 16 and paragraph 17 of the judgment are extracted below :

> *... "We are conscious of the statutory provision finding place in Section 37 of the Act prescribing the conditions which have to be satisfied before a person accused of an offence under the Act can be released. Indeed we have adverted to this section in the earlier part of the judgment. We have also kept in mind the interpretation placed on a similar provision in Section 20 of the TADA Act by the Constitution Bench in* ***Kartar Singh v. State of Punjab :***

(1994) 3 SCC 569: 1994 SCC (Cri) 899 *.Despite this provision, we have directed as above mainly at the call of Article 21 as the right to speedy trial may even require in some cases quashing of a criminal proceeding altogether, as held by a Constitution Bench of this Court in* ***A.R. Antulay v. R. S. Nayak : (1992) 1 SCC 225 :1992 SCC (Cri) 93 11****, release on bail, which can be taken to be embedded in the right of speedy trial, may, in some cases be the demand of Article 21 As we have not felt inclined to accept the extreme submission of quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness,fairness and reasonableness in procedural matters. What then is the remedy? The offences under the Act are grave and, therefore, we are not inclined to agree with the submission of the learned counsel for the petitioner that we should quash the prosecutions and set free the accused persons whose trials are delayed beyond reasonable time. Alternatively he contended that such accused persons whose trials have been delayed beyond reasonable time and are likely to be further delayed should be released on bail on such terms as this Court considers appropriate to impose. This suggestion commends to us. We were told by the learned counsel for the State of Maharashtra that additional Special Courts have since been constituted but having regard to the large pendency of such cases in the State we are afraid this is not likely to make a significant dent in the huge pile of such cases. We, therefore, direct as under:*

(i) Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.

(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs 50,000 with two sureties for like amount.

(iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.

(iv) Where an undertrial accused is charged for the commission of an offence punishable under Sections 31 and 31-A of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order.

The directives in clauses (i), (ii) and (iii) above shall be subject to the following general conditions:

(i) The undertrial accused entitled to be released on bail shall deposit his passport with the learned Judge of the Special Court concerned and if he does not hold a passport he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In

the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;

(ii) the undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under clause (i), once in a fortnight in the case of those covered under clause (ii) and once in a week in the case of those covered by clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;

(iii) the benefit of the direction in clauses (ii) and (iii) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;

(iv) in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner-accused belongs, that the said accused shall not leave the country and shall appear before the Special Court as and when required;

(v) the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;

(vi) the undertrial accused may furnish bail by depositing cash equal to the bail amount;

(vii) the Special Judge will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out; and

(viii) after the release of the undertrial accused pursuant to this order, the cases of those undertrials who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code.

16. We may state that the above are intended to operate as one-time directions for cases in which the accused persons are in jail and their trials are delayed. They are not intended to interfere with the Special Court's power to grant bail under Section 37 of the Act. The Special Court will be free to exercise that power keeping in view the complaint of inordinate delay in the disposal of the pending cases. The Special Court will, notwithstanding the directions, be free to cancel bail if the accused is found to be misusing it and grounds for cancellation of bail exist. Lastly, we grant liberty to apply in case of any difficulty in the implementation of this order.

17. We are conscious of the fact that the menace of drug trafficking has to be controlled by providing stringent punishments and those who indulge in such nefarious activities do not deserve any sympathy. But at the same time we cannot be oblivious to the fact that many innocent persons may also be languishing in jails if we recall to mind the percentage of acquittals"…..

8.5 In the case of ***Thana Singh vs. Central Bureau of Narcotics, (2013) 2 SCC 603***, the Supreme Court, while granting bail to the petitioner who had been languishing in prison for more than twelve years, in a case under the NDPS Act awaiting the commencement of his trial, observed as follows :

"4. Time and again, this Court has emphasised the need for speedy trial, particularly when the release of an undertrial on bail is restricted under the provisions of the statute,

like in the present case under Section 37 of the NDPS Act. While considering the question of grant of bail to an accused facing trial under the NDPS Act in ***Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India [(1994) 6 SCC 731 : 1995 SCC (Cri) 39]*** *this Court had observed that though some amount of deprivation of personal liberty cannot be avoided in such cases, but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 of the Constitution would receive a jolt. It was further observed that after the accused person has suffered imprisonment, which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21. We regret to note that despite it all, there has not been visible improvement on this front.*

5. Bearing in mind these observations and having regard to the fact that in the present case the appellant has been in custody for more than 12 years and seemingly there being no prospect of the conclusion of trial in the near future, we are of the opinion that it is a fit case where he deserves to be admitted to bail forthwith."

8.6 In ***Satender Kumar Antil*** (supra), the Supreme Court taking note of the continuous supply of cases seeking bail after filing of the final report on a wrong interpretation of Section 170 of the Code of Criminal Procedure (hereinafter referred to as "the Code" for short) issued certain directions for the investigating agencies and also for the courts and referred to a number of decisions of the Supreme Court as well as the High Courts including the case of ***Supreme Court Legal Aid Committee*** (supra).

8.7 In the case of ***Dheeraj Kumar Shukla vs. State of Uttar Pradesh (SLP (Crl.) No. 6690 of 2022*** decided on 30.05.2022), commercial quantity of ganja had been seized from the petitioner accused, and he was is in custody more than two and half years, the Supreme Court held that the provisions of Section 37 may ordinarily be attracted. However in view of absence of criminal antecedents and as the petitioner was in custody for more than two and half years and trial was yet to commence, the condition of Section 37 of the NDPS Act can be dispensed with at that stage and without expressing any view on the merits of the case, the petitioner was directed to be released on bail.

8.8 The Supreme Court in the case of ***Md. Raja and Another vs. The State of West Bengal, (SLP (Crl.) No. 3133 of 2022)***,decided on 22.08.2022, granted bail to the appellants who were facing trial for being in possession of 414 kg. of ganja and had remained in custody for more than four years , due to delay in commencement of trial , without going into the requirements of Section 37 of the NDPS Act.

8.9 In the case of ***Mohd Muslim @ Hussain***, while dealing with the case of an accused who was in custody since more than twelve years , after referring and discussing its earlier decisions in the case of ***Hussainara Khatoon*** (supra) that ***Kadra Pahadiya & Ors. vs. State of Bihar reported in (1981) 3 SCC 671 , State of Madhya Pradesh vs. Kajad*** *reported in (2001) 7 SCC 673,* ***Supreme Court Legal Aid Committee (Representing Under trial Prisoners) vs. Union of India*** *reported*

in (1994) 6 SCC 731, ***Shaheen Welfare Association vs. Union of India*** *reported in (1996) 2 SCC 616,* ***Union of India vs. K.A. Najeeb*** *reported in (2021) 3 SCC 713,* ***Satender Kumar Antil vs. Central Bureau of Investigation*** *reported in (2022) 10 SCC 51 and* ***Union of India vs. Rattan Malik*** *reported in (2009) 2 SCC 624 amongst other decisions, has held as follows:*

> *"18. The conditions which courts have to be cognizant of are that there are reasonable grounds for believing that the accused is "not guilty of such offence" and that he is not likely to commit any offence while on bail. What is meant by "not guilty" when all the evidence is not before the court? It can only be a 18 As per the counter-affidavit dated 21.02.2023 filed by the respondent-state before this court. prima facie determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably. Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice: even in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to - in cases when accused of offences enacted under special laws – be balanced against the public interest.*
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> *19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.*
>
> *20. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India v. Rattan Malik19). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref.* ***Satender Kumar Antil*** *supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.*

21. Before parting, it would be important to reflect that laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in time, the injustice wrecked on the individual is immeasurable. Jails are overcrowded and their living conditions, more often than not, appalling. According to the Union Home Ministry's response to Parliament, the National Crime Records Bureau had recorded that as on 31 st December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country20. Of these 122,852 were convicts; the rest 4,27,165 were undertrials.

23…….. Incarceration has further deleterious effects - where the accused belongs to the weakest economic strata: immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the loss to the accused is irreparable), and ensure that trials – especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily."

8.10 In the recent decision in the case of ***Sebil Elanjimpally vs. State of Orissa (Criminal Appeal No. 1578 of 2023 arising out of SLP (Crl.) No. 3518 of 2023***), decided on 18.05.2023, the Supreme Court has held as follows:

"In the case under Section 20(b)(ii)(C) of the NDPS Act, where the accused was remained in custody for 2 years and 11 months and the prayer for bail had been rejected on the ground that the co-accused who had been released on bail, had not surrendered.

The impugned order shows that what has weighed with the Court is the fact that the co-accused who was released on bail has not surrendered. It is this factor alone which we can discern to be the reason to not entertain the bail application.

After hearing learned counsel for the parties, we are of the view that the fact that the co-accused who was released on bail has not surrendered cannot be a germane factor to decline bail to the co-accused, namely, the appellant.

And set aside the order rejecting the prayer for bail and directed for reconsider the prayer for bail by the High Court."

9. Considering the submissions of the learned counsel for the respective parties, period of detention of the petitioner in judicial custody and keeping in mind the decisions of the Supreme Court referred to above, I am inclined to allow this application for bail.

10. Let the petitioner-Ramakanta Prasad be released on bail on such terms and conditions as would be fixed by the learned trial Court, after verifying that he has not no criminal antecedents of similar nature either in Odisha or in Uttar Pradesh, including the following conditions:

i) He will not indulge in any criminal activity while on bail.

ii) He will not try to influence prosecution witnesses.

iii) He will appear before the learned trial court on each date it is posted for trial.

iv) The petitioner shall furnish his details of his local address and permanent address and active mobile number to the trial court in the form of an affidavit alongwith an attested photocopy of his Aadhaar card and intimate any change to the learned trial court immediately.

v) He shall appear in the Police Station which has jurisdiction over the place of his residence on one day in the first week of every month.

vi) He shall furnish his mobile number to the I.O. and the IIC Ullunda Police Station and maintain contact with the I.O. or the IIC Ullunda Police Station every Monday between 5.00 pm to 7.00 pm preferably through video call. Any change in the mobile number shall be immediately intimated to the I.O or the IIC Ullunda Police Station.

vii) He shall not leave Sonepur District without prior permission of the learned trial court and shall furnish details of his travel alongwith contact number.

Violation of any of the other condition will entail in cancellation of bail.

11. Needless to state, observations in this case have been made for the purposes of deciding the prayer for bail and shall not be construed as an expression on merits of the case.

12. The BLAPL is accordingly disposed of.

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2023 (II) ILR – CUT - 861

MISS. SAVITRI RATHO, J.

CRLMC NO. 2852 OF 2022

BHAKTA PRASAD SWAIN .....Petitioner

-V-

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

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 320, 482 – Whether section 320 of the code put a limit or affects the power under section 482 – Held, No. – In case of matrimonial disputes, in order to enable the parties to settle down in life and live peacefully by terminating their disputes amicably by mutual agreement instead of fighting it out in a court, it has been the view of the court that even if the offences are not compoundable U/s 320 of the Cr.P.C the proceeding should be quashed. (Para 11-15)

Case Laws Relied on and Referred to :-

1. (2003) 4 SCC 675 : B.S. Joshi & Ors. Vs. State of Haryana & Anr.
2. (1977) 2 SCC 699 : State of Karnataka Vs. L. Muniswamy & Ors.
3. (1977) 4 SCC 551 : Madhu Limaye Vs. State of Maharashtra.
4. (1992) Supp (1) SCC 335 : State of Haryana Vs. Bhajan Lal.
5. (1998) 5 SCC 749 : Pepsi Foods Ltd. & Anr. Vs. Special Judicial Magistrate & Ors.
6. (1999) 5 SCC 238 : Surendra Nath Mohanty & Anr. Vs. State of Orissa.
7. (2000) 3 SCC 693 : G.V. Rao Vs. L.H.Vs. Prasad & Ors.

8. (2012) 10 SCC 303: Gian Singh Vs. State of Punjab.
9. (2013) 4 SCC 58 : Jitendra Raghuvanshi Vs. Babita Raghuvanshi.
10. (2003) 4 SCC 675 : B.S. Joshi & Ors. Vs. State of Haryana & Anr.

For Petitioner : Mr. A.K. Sarangi

For Opp. Parties : Ms. S. Patnaik, A.G.A., Mr. A.K. Sahoo

JUDGMENT Date of Judgment : 14.07.2023

MISS. SAVITRI RATHO, J.

1. I have heard Mr. A.K. Sarangi, learned counsel for the petitioner, Ms. S. Patnaik, learned Addl. Govt. Advocate for the State and Mr. A.K. Sahoo, learned counsel for the opposite party no.2.

2. This application under Section 482 of the Code of Criminal Procedure (in short "Cr.P.C") has been filed by the petitioner – husband challenging the order dated 30.01.2017 passed by the learned SDJM, Cuttack in G.R. Case No 1928 of 2015 taking cognizance of offences punishable under Section -498-A, 307, 323 of the Indian Penal Code (in short IPC") against the petitioner.

FACTUAL MATRIX

3. The petitioner is the husband of opposite party No. 2. The prosecution allegations in brief as per the F.I.R. lodged by opposite party no.2, Binodini Swain is that her marriage had been solemnized in the year 2004 with the petitioner, Bhakta Prasad Swain and they led a happy conjugal life for one year. Thereafter, without any justification he started assaulting her , asking her bring Rs.1,00,000/- . When she would say that her brother did not have the capacity to arrange for so much money, he would abuse her brother in filthy language and beat her and their son . When his brother and sister in law tried to stop him, he would abuse them and threaten them . He had beaten her on the head with an iron rod and had made repeated attempts to kill her, but as all her in-laws were supporting her, she survived. She has further alleged that as she did not satisfy his repeated demands to give money to sustain his drinking habits, he had attempted to kill her.

4. After submission of chargesheet, the learned magistrate had taken cognizance of the offences as aforesaid.

5. On the date of admission, considering the submissions of the learned counsel for the petitioner that the dispute between husband and wife had been amicably resolved, while issuing notice to the wife, this Court had directed the parties to appear in person and file a joint affidavit regarding the settlement.

6. Opposite Party no 2 has entered appearance through her counsel Mr. A.K.Sahoo. The joint affidavit of the parties has been filed on 26.06.2023, stating that the dispute between them has been settled and they are living together along

with their two children in their village and leading a happy conjugal life and if the proceedings were not quashed, they would be put to irreparable loss .

7. The petitioner - Bhakta Prasad Swain and opposite party no.2 - Binodini Swain duly identified by their counsel had appeared in Court yesterday i.e. 13.07.2023 and stated that they are staying together with their two children in their village and Opposite Party No.2 submitted that she does not want to proceed against the petitioner.

8. The learned counsel for the petitioner submits that as the dispute between the parties has already been settled through the intervention of family members and other villagers and the petitioner and the opposite party no 2 are living together, invoking the inherent powers of this Court under Section 482 of the Cr.P.C, the criminal proceeding against the petitioner should be quashed to secure the ends of justice.

9. The learned State Counsel has submitted that there is no illegality in the impugned order taking cognizance as the materials in the case diary made out a case under Section – 498-A , 307, 323 IPC against the petitioner . He also submits that the offences – 498-A, 307 IPC are not compoundable under Section 320 of the Cr.P.C.

10. From a perusal of the FIR, it is apparent that the allegations in the FIR are directed against the petitioner only and undoubtedly is a dispute between husband and wife. As they have amicably resolved the dispute and are staying together and opposite party No 2 has submitted that she does not want to proceed against the petitioner, the chances of conviction of the petitioner are bleak. Therefore no useful purpose would be served by keeping the criminal proceedings pending other than burdening the Court with another case which would waste its time and resources.

11. In cases of matrimonial disputes, in order to enable the parties to settle down in life and live peacefully by terminating their disputes amicably by mutual agreement instead of fighting it out in a court, it has been the view of the Courts that even if the offences are not compoundable under Section – 320 of the Cr.P.C , the proceedings should be quashed.

12. After the decision of the Supreme Court in the case of **B.S. Joshi and Others vs. State of Haryana and Another : (2003) 4 SCC 675** where the Supreme Court referred to its decisions in the cases of ***State of Karnataka v. L. Muniswamy & Ors. (1977) 2 SCC 699, Madhu Limaye vs. State of Maharashtra : (1977) 4 SCC 551, State of Haryana vs. Bhajan Lal : (1992) Supp (1) SCC 335 , Pepsi Foods Ltd. & Anr. vs. Special Judicial Magistrate & Ors.: (1998) 5 SCC 749, Surendra Nath Mohanty & Anr. vs. State of Orissa : (1999) 5 SCC 238, and G.V. Rao v. L.H.V. Prasad & Ors. (2000) 3 SCC 693***, and held that that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint

and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code. While doing so it observed as follows :

> *"12. The special features in such matrimonial matters are evident. It becomes the duty of the court to encourage genuine settlements of matrimonial disputes.*
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> *13. The observations made by this Court, though in a slightly different context, in **G.V. Rao v. L.H.V. Prasad & Ors. [(2000) 3 SCC 693]** are very apt for determining the approach required to be kept in view in matrimonial dispute by the courts, it was said that there has been an outburst of matrimonial disputes in recent times. Marriage is a sacred ceremony, the main purpose of which is to enable the young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in commission of heinous crimes in which elders of the family are also involved with the result that those who could have counselled and brought about rapprochement are rendered helpless on their being arrayed as accused in the criminal case. There are many other reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their "young" days in chasing their "cases" in different courts.*
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> *14. There is no doubt that the object of introducing Chapter XX-A containing Section 498A in the Indian Penal Code was to prevent the torture to a woman by her husband or by relatives of her husband. Section 498A was added with a view to punishing a husband and his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. The hyper-technical view would be counter productive and would act against interests of women and against the object for which this provision was added. There is every likelihood that non-exercise of inherent power to quash the proceedings to meet the ends of justice would prevent women from settling earlier. That is not the object of Chapter XXA of Indian Penal Code."*

13. In the case of ***Gian Singh v. State of Punjab, (2012) 10 SCC 303***, a larger Bench of the Supreme Court had been called upon to inter alia decide whether the opinion of the referring Bench which doubted the correctness of the decisions in ***B.S. Joshi, Nikhil Merchant*** and ***Manoj Sharma*** on the premise that "non-compoundable offences cannot be permitted to be compounded by the Court, whether directly or indirectly". The Supreme Court while answering the reference concluded that " it cannot be said that the decisions in ***B.S. Joshi, Nikhil Merchant*** and ***Manoj Sharma*** are not correctly decided" and also held as follows :

> *". The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each*

case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

14. In the case of ***Jitendra Raghuvanshi vs Babita Raghuvanshi*** reported in ***(2013) 4 SCC 58***,the Supreme Court after referring to its decision in the case of ***B.S. Joshi and Others vs. State of Haryana and Another, (2003) 4 SCC 675*** has held as follows :

" 14. The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi (supra), this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.

15. In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.

16. There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order

to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders."

15. As the matrimonial dispute between the parties has been amicably settled, keeping in mind the decisions of the Supreme Court and considering the submissions of the parties, their counsel and their joint affidavit, the order dated 30.01.2017 passed by the learned SDJM, (Sadar) Cuttack in G.R. Case No 1928 of 2015 taking cognisance of offences punishable under Section-498-A, 307, 323 of the Indian Penal Code (in short IPC") against the petitioner and the proceedings in G.R. Case No. 1928 of 2015 arising out of Cuttack Mahila P.S. Case No. 113 of 2015 pending in the court of the learned S.D.J.M., (Sadar), Cuttack are quashed.

16. The CRLMC is accordingly allowed.

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2023 (II) ILR – CUT - 866

M.S. SAHOO, J.

WPC(OA) NO. 399 OF 2014

SRIKANTA NAYAK .....Petitioner

.V.

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

ORISSA MINISTERIAL SERVICE (METHOD OF RECRUITMENT AND CONDITIONS OF SERVICE OF ASSISTANTS AND SECTION OFFICERS IN THE OFFICES OF THE HEADS OF DEPARTMENT) Rules, 1994 – Rule 19(2) – The petitioner was under probation for a period of one year in the promotional post – The authority terminated the probation in promotional post and reverted the petitioner to his previous post – Whether such termination of probation amounts to punishment? – Held, no such termination is found in the 1994 Rules and is not a punishment and does not carry any evil consequences. (Para-11)

Case Laws Relied on and Referred to :-

1. 1993 Supp (2) SCC 732 : 1993 SCC (L&S) 895 : (1993) 24 ATC 831 : Ram Narain Yadav Vs. State of Haryana.
2. 2002) 1 SCC 520 : 2002 SCC (L&S) 170 : 2001 SCC OnLine SC 1322 : Pavanendra Narayan Verma Vs.Sanjay Gandhi PGI of Medical Sciences.

For Petitioner : Mr. M. Pratap

For Opp. Parties : Mr. B.P.Tripathy, AGA
Mr.Nikhil Pratap, ASC

JUDGMENT Date of Hearing & Judgment : 03.07.2023

M.S. SAHOO, J.

1. The writ petition has been registered before this Court on 16.08.2021 upon abolition of the Odisha Administrative Tribunal, Principal Bench, Bhubaneswar.

Brief Facts

2. The Original Application was filed by the petitioner working as Senior Assistant in the office of the Engineer-in-Chief, Public Health, Odisha, Bhubaneswar with the following prayers :

> *"(i) the Hon'ble Tribunal graciously be pleased to quash the Reversion Order dt.07.02.2014, Annexure-5, with all consequential service and financial benefits;*
>
> *(ii) further be pleased to pass any other order(s)/direction(s) as deems fit and proper in the facts and circumstances of the case."*

3. On perusal of the available order-sheets of the learned Tribunal it is indicated that the notices were issued by order dated 14.02.2012 with the following interim order :

> *"So far as the prayer for interim relief is concerned, it is directed that the impugned reversion order dated 07.02.2014 at Annexure-8 shall be subject to final out come of this original application and in case of ultimate success of the applicant in this case, he would be entitled to get all service benefits, as if order dated 7.2.2014 had not been passed."*

Thereafter, the matter was listed on 08.12.2015 and 14.01.2016 but never listed thereafter. By this Court's order dated 13.03.2023 learned counsel for the petitioner was directed to obtain up-to-date instruction regarding the present status of the services of the petitioner under the Government.

Learned counsel for the State was also on several occasions granted time to obtain instruction.

Submissions

4. It is submitted by the learned counsel for the petitioner that he has no up-to-date instruction regarding the present status of the services of the petitioner under the Government. But submits that since no counter has been filed, the prayer of the

petitioner in the petition filed before the learned Tribunal ultimately transferred to this Court, should be granted.

It is contended by the learned counsel for the petitioner that by order dated 13.03.2013 the petitioner was given promotion, therefore, could not have been reverted before the completion.

Analysis

5. Essentially, the challenge in the petition is to the order dated 07.02.2014 (Annexure-8) by which the petitioner while continuing on probation in the promotional post of senior Assistant after being granted promotion on probation for one year by order dated 13.03.2013, was reverted to his former post, i.e., Junior Assistant as his work and conduct was not found to be satisfactory during the probation period in the promotional post. Such order of reversion was as per paragraph-19 (2) of the G.A. Department Notification No.7417 dated 11.04.1994, published in the Orissa Gazette on the 23rd May, 1994.

6. The G.A. Department Notification notified the Orissa Ministerial Services (Method of Recruitment and Conditions of Service of Assistants and Section Officers in the offices of the Heads of Departments) Rules, 1994. The Rule 1994 provides as follows :

Constitution and composition of the cadre. *3. (1) The service shall consist of the following grades, namely :-*

(a) Junior Assistant;

(b) Senior Assistant;

(c) Section Officer, Level – II;

(d) Section Officer, Level – I.

xx xx xx

Probation. *19. (1) All persons appointed to a post in the service shall be on probation for a period of two years in case of direct recruitment and one year in case of promotion which shall be counted from the date of joining the post*

Provided that the period of probation shall not include the following :-

(a) Extra-ordinary leave,

(b) Period of unauthorized leave,

(c) Any other period held to be not being on actual duty.

(2) The appointing authority may extend the period of probation or terminate the services of a person appointed on probation (in case of the direct recruit) or revert a person to his previous post (in case of a promote) during or at the end of his period of probation, if the work and conduct of such person is not found to be satisfactory.

(3) The date of completion of the period of probation in each case shall be notified by an office order and shall also be recorded in the Service Book." \[Emphasis Supplied]

In considered opinion of this Court, Rule 19(2) of the 1994 Rules does provide that the period of probation in the promotional post may be terminated

before completion of the period of probation if the work and conduct of such person is not found to be satisfactory. Rule 19(3) also provides completion of period of probation shall be notified by office order and has to be recorded in the service book.

7. The relevant portion of the order dated 13.03.2013 granting promotion on probation is reproduced for reference :

> *"….Now, therefore, after careful consideration Sri Srikanta Nayak, Jr. Asst. is hereby promoted to the rank of Sr.Asst. with the date of his joining in the scale of pay Rs.9300-34800/- with GP 4200/- against existing vacancy as per recommendation of DPC held on 24.03.2011.*
>
> *The position of Sri Srikanta Nayak, Sr. Asst. is placed below the Sri S.S. Nayak, Sr. Asst & above Sri Tusar Kanta Sahu, Sr. Assistant.*
>
> *The above promotion shall be on probation for a period of one year from the date of his joining in the said post."*

It is not disputed that in terms of Rule 19 of the 1994 Rules the promotion of the petitioner was on probation for a period of one year from the date of joining of the petitioner, i.e., 24.03.2011 and the period of probation would have ended on 23.03.2012.

8. As is evident from the pleadings in the petition (Annexure-5), a disciplinary proceeding against the petitioner was initiated in the form of inquiry against the petitioner under Rule-15 of the OCS (CCA) Rules, 1962 on the ground of (i) unauthorized absence from the Government duties, (ii) misconduct and (iii) negligence of the Government duty.

It has not been indicated in the present petition as to whether the disciplinary proceeding has been completed or the same has been challenged by the petitioner or the petitioner has been exonerated from the charges alleged in the said disciplinary proceeding.

Since the initiation of the D.P. is not a subject matter of the petition, this Court is not a position to deal with the same. But it is referred to in view of the averments made in the petition.

9. The Hon'ble Supreme Court dealt with similar issue of premature termination on probation in ***Ram Narain Yadav v. State of Haryana, 1993 Supp (2) SCC 732 : 1993 SCC (L&S) 895 : (1993) 24 ATC 831*** at page 733. The relevant paragraphs of the said decision are quoted herein :

> ***"2****. The appellant was holding the post of Secretary to the Speaker in the rank of Under Secretary. On the 15th of January, 1991 he was promoted as the Deputy Secretary to the Legislative Assembly and put on probation for a period of one year. On the 8th of November, 1991, the Speaker passed an order under Rule 10(2)(b)(i) of the Haryana Vidhan Sabha Secretariat Service Rules, 1981 reverting him as an Under Secretary.*

This order was challenged before the High Court on the ground of mala fides. By the impugned judgment, the High Court has dismissed the application.

***3**. Mr P.P. Rao, the learned counsel for the appellant has contended that since there was no warning given to the appellant earlier about the allegedly poor quality of his work and as the order of termination of his services came all of a sudden, the same is illegal in view of the observations made in paragraph 4 of the judgment in Dr Sumati P. Shere (Mrs) v. Union of India [(1989) 3 SCC 311 : 1989 SCC (L&S) 471 : (1989) 11 ATC 127] . It is also contended that a perusal of the order of reversion of the appellant indicates that till further orders were later passed he was to continue to perform the same work which he was doing earlier. If that was the position, the argument is, it was not a proper exercise of the authority under Rule 10 in terminating the period of promotion (sic probation) prematurely and reverting the appellant to Under Secretary rank. Lastly, it has been stated that in any event the appellant is entitled to his salary on the scale as admissible to a Deputy Secretary on the ground that he was discharging the same functions.*

***4**. Mr Sibal, the learned counsel on behalf of the respondents has opposed the application mainly on the ground that it was for the authorities to consider the satisfactory nature of the services discharged by the appellant during the probation period and if his work was found unsatisfactory after 10 months, it was open to them to have terminated the probation. With respect to the aspect that the appellant was allowed to discharge the same function even later, it was explained by Mr Sibal that since he was assigned the duty of dealing with the committee of public accounts and since the financial year was coming to a close, it was not practicable to entrust the work to another person immediately, and, therefore, although his work was not found satisfactory he was allowed to work. Having regard to all the facts and circumstances of the case, we are of the view that no interference in the present matter is expedient except issuing a direction to the respondents to pay the appellant his emoluments on the same scale as he was entitled to while holding the rank of Deputy Secretary of Legislative Assembly till he was relieved of that post. It appears from the records that he functioned up to the 7th May and was relieved from his duty from the 8th of May. The appeal is, therefore, dismissed subject to the aforesaid direction about the payment of the further amount by way of emoluments. The amount which has already been paid to him, however, shall be adjusted. The appeal is disposed of, but there will be no orders as to costs.*

10. Hon'ble Supreme Court has dealt with the issue of termination of service during probation in ***Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences, (2002) 1 SCC 520 : 2002 SCC (L&S) 170 : 2001 SCC OnLine SC 1322 at page 524***. The relevant paragraphs thereof are quoted herein :

*"**8**. Since the decision in Parshotam Lal Dhingra v. Union of India [AIR 1958 SC 36] courts have had to perform a balancing act between denying a probationer any right to continue in service while at the same time granting him the right to challenge the termination of his service when the termination is by way of punishment. The law has developed along apparently illogical lines in determining when the termination of a temporary appointee or probationer's services amounts to punishment.*

***9**. In 1974, Krishna Iyer, J. had said:*

"The need, in this branch of jurisprudence, is not so much to reach perfect justice but to lay down a plain test which the administrator and civil servant can understand without subtlety and apply without difficulty." [Samsher Singh v. State of Punjab, (1974) 2 SCC 831 : 1974 SCC (L&S) 550] (SCC p. 889, para 161)

10. *Since "Dhingra [AIR 1958 SC 36] is the Magna Carta of the Indian civil servant, although it has spawned diverse judicial trends, difficult to be disciplined into one single, simple, practical formula applicable to termination of probation of freshers and of the services of temporary employees" [Samsher Singh v. State of Punjab, supra at p. 887, para 158], we have thought it best to refer to the facts of Dhingra case [AIR 1958 SC 36] to understand what exactly was meant when the Court said: (AIR p. 49, para 82)*

"It is true that the misconduct, negligence, inefficiency or other disqualification may be the motive or the inducing factor which influences the Government to take action under the terms of the contract of employment or the specific service rule, nevertheless, if a right exists, under the contract or the rules, to terminate the service the motive operating on the mind of the Government is, as Chagla, C.J., has said in Shrinivas Ganesh v. Union of India [AIR 1956 Bom 455 : 58 Bom LR 673] , wholly irrelevant. In short, if the termination of service is founded on the right flowing from contract or the service rules then prima facie, the termination is not a punishment and carries with it no evil consequences and so Article 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with."

11. *In that case the employee had been reverted back from an officiating post. The records showed that adverse remarks had been made against the employee in his confidential reports while he was officiating. These remarks were placed before the General Manager who said that he was "disappointed" to read them and that he should be reverted as a subordinate "till he makes good the shortcomings noticed …". The order of reversion was passed by the General Manager soon after this. When the issue ultimately came before this Court, this Court upheld the order of reversion, saying: (AIR p. 50, para 29)*

"He had no right to continue in that post and under the general law the implied term of such appointment was that it was terminable at any time on reasonable notice by the Government and, therefore, his reduction did not operate as a forfeiture of any right and could not be described as reduction in rank by way of punishment. Nor did this reduction under Note 1 to Rule 1702 amount to his dismissal or removal. Further it is quite clear from the orders passed by the General Manager that it did not entail the forfeiture of his chances of future promotion or affect his seniority in his substantive post. In these circumstances, there is no escape from the conclusion that the petitioner was not reduced in rank by way of punishment and, therefore, the provisions of Article 311(2) do not come into play at all."

Conclusion

11. In view of the fact that the petitioner was under probation for a period of one year in the promotional post before completion of one year, no right accrued in

favour of the petitioner to continue in promotional post on probation beyond a period of one year as provided in Rule-19(2) of the 1994 Rules. As the period of one year has been completed and no further order has been passed by the authority, the prayer to continue on probation beyond 23.03.2012, i.e., the date of completion of one year cannot be granted.

Applying the principle laid in Ram Narain Yadav (supra) as well as ***Pavanendra Narayan Verma*** (supra) it has to be held that the period of probation in a promotional post can be prematurely terminated if the Rule provides and in the present case, Rule 19(2) does provide termination of the probation in the promotional post. In case of in service promotion, the period of probation is prescribed in the Rules, to be one year and it can be terminated before one year. As held in ***Pavanendra Narayan Verma*** (supra), such termination is founded on the service rules i.e. 1994 Rules in the case at hand and it is not a punishment and does not carry any evil consequence so as to attract Article 311. Further the order as at Annexure-8 dated 7.2.2014 terminating probation in promotional post and reverting the petitioner to his post as held before promotion, did not operate as a forfeiture of his chances of future promotion or affect his seniority in his substantive post.

Therefore, the prayer made in the petition in the present form is untenable since the petitioner seeks continuation of his probation in the promotional post on probation beyond one year. Accordingly, the writ petition is dismissed being devoid of any merit.

12. Before parting with the case, it is clarified that since the present status of the disciplinary proceeding is not known and it is not known whether the petitioner ever challenged the same being aggrieved in any manner, the order in the present petition shall not be in any manner be prejudicial to the petitioner's contention, if any such challenge is laid by the petitioner.

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2023 (II) ILR – CUT - 872

R.K. PATTANAIK, J.

CRLMC NO. 1736 OF 2020

RAJ KISHOR PRADHAN .....Petitioner

.V.

STATE OF ORISSA (VIGILANCE) .....Opp. Party

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – While exercising Jurisdiction under 482, whether court should examine the facts, evidence and materials on record to determine the allegation, if they constitute an offence – Held, No – Reason with reference to case law explained. (Para 8- 9)

(B) PREVENTION OF CORRUPTION ACT, 1988 – Section 13(2),13(1)(d) – The petitioner was the president of Sambalpur District Central Co-operative Bank Ltd – Whether the prosecution for offence U/s 13(2) r/w 13(1)(d) of 1988 Act and 120(b) of IPC is maintainable against him? – Held, Yes – The Bank in question is a co-operative society controlled and aided by the government and not merely a society established under the mutually Aided Co-operative societies Act and therefore, the petitioner is a public servant.

Case Laws Relied on and Referred to :-

1. (2005) 30 OCR(SC) 177 : State of Orissa Vs. Debendranath Padhi.
2. (2009) 43 OCR(SC) : State of M.P. Vs. Birendra Kumar Tripathy.
3. J.T. 1996(1) 601 : State of Bihar Vs. Sri Rajendra Agarwalla.
4. (2017) 68 OCR (SC)409 : CBI Vs. Dr. Anup Kumar Srivastava.
5. (2012) 9 SCC 460 : Amit Kapoor Vs. Ramesh Chander & Anr.
6. 2002 Supp.(SCR) 530 : Government of Andhra Pradesh & Ors. Vs. P. Venku Reddy.

For Petitioner : Mr. Asok Mohanty, Sr. Adv.
Mr. Satyabrata Panda

For Opp. Party : Mr. Niranjan Moharana, ASC for Vigilance Dept.

JUDGMENT Date of Judgment:16.05.2023

R.K. PATTANAIK, J.

1. Instant petition under Section 482 Cr.P.C. is at the behest of the petitioner assailing the impugned order dated 13th November, 2020 passed by the learned Special Judge (Vigilance), Sambalpur in connection with CTR Case No. 13 of 2013 corresponding to Sambalpur Vigilance P.S. Case No. 24 of 2010, whereby, an application under Section 239 Cr.P.C. moved by him for discharge was declined and rejected.

2. According to the petitioner, he is not a public servant as the Sambalpur District Central Cooperative Bank Ltd. (herein referred to as 'SDCCB') does not receive any financial aid from the Government or established under any Central or State Act or any Authority or body or company as defined in Section 17 of the Companies Act and therefore, his prosecution for offences under Section 13(2) read with 13(1) (d) of the Prevention of the Corruption Act and Section 120(b) IPC is not maintainable, the fact which was lost sight of by the learned Special court, while disposing of the application under Section 239 Cr.P.C. With the above and such other grounds, the petitioner claimed for exoneration from the charges levelled against him by the Vigilance Department. However, the learned court below refused to discharge the petitioner and reached at a conclusion that a prima facie case is made out against him for enquiry and trial.

3. Heard Mr. Asok Mohanty, learned Senior Advocate appearing for the petitioner and Mr. Moharana, learned ASC for the State (Vigilance).

4. The F.I.R. was drawn by the informant, namely, DSP, Vigilance Bargarh Unit, Bargarh, consequent upon which, Sambalpur Vigilance P.S. Case No. 24 dated 26th March, 2010 was registered under the alleged offences. As per the allegations in the report, during and in course of enquiry conducted by the informant, it was revealed that the petitioner, who was the President of SDCCB, Bargarh from 26th January, 2008 to 25th October, 2008 and as the Chairperson of the Appointment Committee of the said Bank by Agenda No. 13(M) resolved for appointment of contingent staff in the Bank which was opposed by the Secretary due to the ban order of the Government on appointment and promotion of the staff in CCBs vide letter No. 16312 dated 24th December, 2002. It was also revealed that for such appointment, authorities like Registrar, Cooperative Society, Orissa and NABARD had to be moved for guidelines, however, the petitioner with an evil design and in order to avoid the involvement of the then Secretary relieved the latter on 16th June, 2008 on the plea of poor performance and inducted the other accused as the Secretary in spite of the fact that it was a Class-I post and the appointment was blatantly in violation of Section 28(3-b)(1) of the OCS Act, 1962 as the appointed Secretary did not have the requisite qualification for the said post at the relevant time and it was an clearly a misuse of authority and official position. It is also alleged that in spite of order of the registrar, Cooperative Societies, Orissa dated 9th June, 2008 not to go for any kind of appointment whatsoever in view of the ban of the Government, the petitioner leading the Appointment Committee with a criminal conspiracy hatched not only appointed Secretary but also 39 Junior Assistants/Assistant Supervisors, 5 Peons/Night Watchmen and 2 Computer Engineers as contingent staff of the Bank with consolidated remuneration and furthermore decided to appoint 28 candidates under the rehabilitation scheme of the Bank and at the same time, reinstated the supervisors, who had earlier been dismissed from service on the findings of disciplinary proceedings against them. It is alleged that all such appointments were carried out at the instance of the petitioner being the head of the Appointment Committee and the vacancies were filled up in the establishment without inviting sponsorship of qualified candidates through Employment Exchange which was again in violation of National Employment Service Manual and the Orissa Reservation of vacancies in Posts and Services (for SC& ST) Act, 1975 and Rules made thereunder. Since all the above actions of the petitioner found to be overtly malafide and ill-motivated and detrimental to the financial health of the Bank, the report further alleges that the Registrar, Cooperative Societies, Orissa, Director dated 23rd September, 2008 instructed the President of the Bank to cancel all the illegal and irregular appointments and promotion forthwith, however, the orders were never implemented, as a result of which, the Management Committee was suspended and taken over by the Collector and District Magistrate, Bargarh by order dated 25th October, 2008, who, thereafter, terminated the services of 46 candidates appointed on contingent basis with immediate effect and also sought for clarification of the Registrar, Cooperative Societies, Orissa in respect of termination of 28 appointees under the rehabilitation scheme awaiting approval of

the same by the Government. After the F.I.R. was lodged and Sambalpur Vigilance P.S. Case was registered, the investigation was commenced and finally concluded which resulted in the submission of chargesheet against the petitioner. Thereafter, the petitioner before framing of charge moved the application under Section 239 Cr.P.C. and as mentioned before, it was rejected by the Special court vide Annexure-2 which is currently under challenge.

5. Mr. Mohanty,learned Senior Advocate advanced an argument that petitioner is not a public servant within the definition of the Prevention of Corruption Act, 1988 all the more when he was engaged for a brief period and is an advocate by profession. In other words, according to Mr. Mohanty, the petitioner was appointed in SDCCB not as a wholetime President and hence, not a public servant and furthermore, the Bank is not a public authority as it does not deal with the public in general but confines its activities vis-à-vis its members. As to the engagement of Secretary subsequently appointed, Mr. Mohanty referring to the SDCCB vide letter No. 2329 dated 30th June, 2008 further submits that the petitioner was directed to be engaged as in-charge Secretary to discharge the duties of the Bank as a temporary arrangement till the post was filled up on regular basis and while claiming so, he cites a copy of the letter of the Registrar, Cooperative Society, Orissa, Bhubaneswar as at Annexure-3. So far as the action suspending the Management Committee of the Bank, Mr. Mohanty would submit that after the appointment of the Collector-cum-District Magistrate, Bargarh as the Administrator to manage its affairs of SDCCB, such removal and suspension was challenged on the ground of violation of the rules of natural justice and non-application of mind which was accepted and the order dated 9th June, 2009 of the learned Commissioner-cum-RCS, Odisha was set aside by the Cooperative Tribunal, Odisha, Bhubaneswar vide judgment dated 19th October, 2009 (Anneuxre-4) and hence, when the suspension of the Committee was invalidated, the allegations made against the petitioner could not have been basis for any criminal action much less a Vigilance proceeding before the learned court below and the said aspect was not duly examined and appreciated by the learned Special court, who instead proceeded to rejected the application for discharge. It is also submitted by Mr. Mohanty, learned Senior Advocate that a surcharge proceeding was initiated against the other accused appointed latter on as the Secretary for recovery of Rs. 12, 83,739/- from him on account of illegal appointment and remuneration made in that regard initiated in terms of Section 67 of the OCS Act, 1962 but Assistant Auditor General of Cooperative Societies, Audit Circle, Bargarh set it aside with a direction to refund if any such amount recovered as a result and in that connection, a copy of the said order vide Annexure-5 is placed reliance on. For the alleged illegal appointments on contingent basis in the Bank, in response to the allegation that it was in complete violation of Government ban imposed, Mr. Mohanty contends that the clarification issued by the Government in Cooperation Department to the effect that promotion, recruitment can be effected on the basis of functional needs was not taken into account and as such, there was no any

illegality committed by the petitioner in that regard which was again approved and cleared by the Appointment Committee. Lastly, it is submitted that the continuation of the Vigilance proceeding, especially, when the allegations to be civil in nature and when it stood neutralized by the orders of the Registrar, Corporative Society, Orissa, Bhubaneswar and the Cooperative Tribunal Orissa, would be an abuse of process of law and hence, the impugned order dated 13th November, 2020 deserves to be quashed.

6. On the other hand, Mr. Moharana, learned counsel for the Vigilance Department submits that the petitioner had been a party to the criminal conspiracy and in connivance with the Secretary abused his authority and showed undue official favour and made the illegal appointments in respect of the contingent employees which was in violation the Government order and in view of such appointments, the Bank and also the Government exchequer sustained loss. As to the order of T.A. No. 60 of 2009 of the Cooperative Tribunal, Mr. Moharana submits that the impugned decision was interfered with on the ground that the principle of natural justice had not been followed which has no bearing on the merits of the Vigilance prosecution. With regard to the surcharge proceeding in S.P. No. 18/2009 and order as at Annexure-5, Mr. Moharana, learned ASC further submits on the basis of the audit report such an action was initiated for realization of the amount which was spent towards the remuneration of the appointees engaged illegally and the proceeding attended finality by order dated 16th October, 2020 which against does not absolve the petitioner from the illegalities committed by him and in so far as the Secretary and his exoneration is concerned, it was for the reason that he acted on the orders of superior authority. According to Mr. Moharana, irrespective of the orders under Anenxures-4 & 5, considering the fact that the petitioner made illegal appointments and did such other mischief which was revealed during and in course of investigation leading to the submission of chargesheet, whereupon, the learned Special court took cognizance of the alleged offence and correctly declined to discharge him under Section 239 Cr.P.C. Mr. Moharana further submits that at the stage of framing of charge, a detailed analysis of evidence is to be gone through and justifying the impugned order under Annexure-2 cites the following judgments, such as, ***State of Orissa Vrs. Debendranath Padhi (2005) 30 OCR(SC) 177: State of M.P. Vrs. Birendra Kumar Tripathy (2009) 43 OCR(SC); State of Bihar Vrs. Sri Rajendra Agarwalla J.T. 1996(1) 601; CBI Vrs. Dr. Anup Kumar Srivastava (2017) 68 OCR (SC)409, Amit Kapoor Vrs. Ramesh Chander and Another(2012) 9 SCC 460*** and host of other decisions by contending that jurisdiction under Section 482 Cr.P.C. should not be exercised especially at the initial stage while charges are to be framed. In other words, Mr. Moharana would contend that since a prima facie case is made out against the petitioner, accordingly, he has been chargesheeted and the learned Special court did not err while passing the impugned order under Anneuxre-2 which, therefore, does not call for any interference.

7. There is no denial to the fact that appointments were made by the petitioner during the time when the petitioner was the President of the SDCCB and engaged contingent staff and also re-engaged the dismissed Supervisors, who had been removed after a disciplinary action against them. The other irregularities and illegalities have been revealed during the investigation by the Vigilance Department which led to the lodging of the F.I.R. Nevertheless, the action suspending the Managing Committee was interfered with on the ground that due process was not followed and there was violation of the principles of natural justice. In fact, such a decision was based on the premise that rule of natural justice was dispensed with. In the considered view of the Court, any such order of the Cooperative Tribunal, Odisha, Bhubaneswar vide Annexure-4 cannot entirely obliterate the illegalities with regard to the appointments made during the tenure of petitioner. The legality or otherwise of the alleged appointments of contingent staff, or inclusion of dismissed supervisors and all other actions as against the allegation that there was a ban etc. and due procedure was not followed shall have to be examined by the learned Special court. In other words, any such order of removal and suspension of Managing Committee in T.A. No. 60 of 2009 vide Annexure-4 is not sufficient to avert criminal prosecution vis-à-vis petitioner. Again, in so far as the proceeding in S.P. No. 18 of 2009 and the order vide Anneuxre-5 is concerned, the Secretary from whom recovery was sought for was exonerated as all such appointments had been by the decision of the higher authority. The decisions on suspension of the Managing Committee and removal of the petitioner and surcharge proceeding cannot stand as a bar against the prosecution before the Vigilance court. As to if any the illegalities have been committed or not and in what manner, the President to be responsible and whether he had any such malafide or misconducted himself while carrying out or so to say forcing the way for the appointments of the contingent staff and such other orders and engagement of other officials of the Bank needs a detailed deliberation and it can only be adjudicated upon by the learned Special court and therefore, the Court is of the humble view that merely by referring to the orders under Annexures 4 & 5, the petitioner cannot be fully absolved.

8. In so far as the ground that the petitioner is not a public servant and therefore, the prosecution is not tenable is concerned, it has not been found favour with the learned court below which placed reliance on a decision of the Apex Court in ***Government of Andhra Pradesh & Others Vrs. P. Venku Reddy 2002 Supp.(SCR) 530*** and considering the relevant documents of the SDCCB, Bargarh concluded that the Bank in question is a Cooperative Society controlled and aided by the Government and not merely a society established under the Mutually Aided Cooperative Societies Act and therefore, the petitioner is a public servant, he having been the President from 6th January, 2008 to 25th October, 2008. In the aforesaid decision, the Supreme Court has held that an employee of the Cooperative Bank is a public servant within the definition contained in Section 2 (c)(ix) of the Prevention of Corruption Act, 1988. In other words, it has been held therein that not only the

President, Secretary and other officer bearers of the Cooperative Bank fall within the definition of the public servant but also its employees as in the said case, the Supervisor was involved. In other words, in view of Section 2(c) (ix) of the Prevention of Corruption Act, besides the employees of the Bank, the President, Secretary and other office bearers of a registered co-operative society are included within the meaning of 'public servant'. That being so, when the petitioner was the office bearer of the SDCCB either even for a temporary duration of 9 months not as a full time President, the Court is of the view that the learned court below in view of the ratio in P.Venky ***Reddy*** (supra) did not commit any serious error taking a contrary view treating him as a public servant within the definition of Prevention of Corruption Act. As to the nature of appointment of the petitioner, irrespective of a temporary tenure in the Cooperative Bank yet as its President, the Court is afraid if he can demand immunity against Vigilance prosecution on any such ground. However, having regard to the fact that the charge is yet to be framed, the Court deems it proper to refrain itself from taking a final view leaving it open for the Special court to examine the same during trial. However, prima facie, considering the fact that the petitioner was the President and he was involved in alleged appointments and engagement of staff of the Bank, the Court confirms the view that at the stage of framing of charge, a detailed analysis of evidence should not be resorted to and hence, inevitable conclusion would be that the learned court below has not grossly erred for having declined to discharge him under Section 439 Cr.P.C.

9. Before parting with, the Court considers it to be just and appropriate to outline the legal position while exercising inherent jurisdiction which has been discussed in detail in ***Amit Kapoor*** (supra), wherein, it has been held that while exercising jurisdiction under Section 397 Cr.P.C. or Section 482 Cr.P.C., the Courts are not to examine the facts and evidence and materials on record to determine, whether, there is sufficient material on the basis of which the case would end in conviction; as it would be concerned primarily with the allegations and if they constitute an offence. According to the aforesaid decision, it has been held that at the stage of framing of charge, it is neither necessary nor a court is called upon to hold a full-fledged enquiry to appreciate evidence collected by the investigating agency to find out whether it is a case of acquittal or conviction. The Supreme Court further held that quashing of a charge is an exception and prosecution is the rule and where the offence is broadly satisfied, the Court should be inclined to permit the prosecution to continue rather than quashing it at the initial stage. Without elaborating further and being alive to the limitations while exercising power under Section 482 Cr.P.C., the Court reaches at a logical conclusion that the impugned order under Annexure-2 declining to discharge the petitioner from the levelled charges by the learned court below is not unjustified.

10. Accordingly, it is ordered.

11. In the result, the CRLMC stands dismissed.

2023 (II) ILR – CUT- 879

R.K. PATTANAIK, J.

CRLMC NO. 2653 OF 2022

SMT. ANURADHA SAHOO ……Petitioner

.V.

STATE OF ODISHA (VIGILANCE) …….Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Petitioner's husband acquired the disproportionate assets and he being a public servant could not satisfactorily account it, for which constituted commission of an offence punishable under section 13(2) r/w 13(1)(e) of the P.C Act – The learned trial court has taken cognizance of the offence with the aid of section 109 IPC – FIR was lodged on 2011 and charge sheet was submitted on 2022 – Whether the court can interfere by invoking the inherent jurisdiction? – Held, No. – The court is not inclined to delve into such aspect of the case regarding separate income of the petitioner which would require threadbare examination of evidence – In other words, the said ground be left open for decision of the learned court below.

Case Law Relied on and Referred to :-

1. 1992 (1) SCC 225 : Abdul Rahman Antulay Vs. R.S. Nayak.
2. 1993 AIR SCW 3631 : Biswanath Prasad Singh Vs. State of Bihar.
3. AIR 1994 SC 1229 : Santosh De Vs. Archana Guha and Ors.
4. AIR 2008 SC 3077 : Pankaj Kumar Vs. State of Maharashtra & Ors.
5. 2022(I) OLR 352 : Surendra Nath Mishra Vs. State of Odisha & Anr.
6. CRLMC No.1741 of 2010 : Rama Chandra Behera Vs. State of Orissa & Anr.
7. (2012) 9 SCC 408 : (Mohd Hussain@Julfikar Ali Vs. The State (Govt. of NCT) Delhi).

For Petitioner : Mr. Pravash Ch. Jena
Mr. B.S. Tripathy,

For Opp. Party : Mr. Niranjan Maharana, SC for the Vigilance Department

JUDGMENT Date of Judgment: 03.07.2023

R.K. PATTANAIK, J.

1. Instant petition under Section 482 Cr.P.C. is filed by the petitioner assailing the impugned order of cognizance dated 24th June, 2022 passed in VGR Case No.31 of 2011 (T.R. Case No.7 of 2022) by the learned Special Judge (Vigilance), Cuttack corresponding to Cuttack Vigilance P.S. Case No.31 of 2011 and for quashing of the entire proceeding on the grounds inter alia that the same is not tenable in law, inasmuch as, no prima facie case is made out against her with respect to the alleged offences under Sections 13(2) read with 13(1)(e) of the Prevention of Corruption Act, 1988 and Section 109 IPC and therefore, the same is liable to be interfered with by invoking the inherent jurisdiction of this Court.

2. In fact, the DSP, Vigilance, CD, Cuttack lodged FIR on 31st May, 2011 stating therein the fact that pursuant to an allegation of possession of disproportionate assets beyond the source of income of the petitioner's husband, an enquiry was conducted which revealed the details of the acquisition of immovable and movable assets by the family. It was alleged that the husband accused during his service period between October, 1981 and the date of search on 25th November, 2010 acquired the disproportionate assets and he being a public servant could not satisfactorily account it for which constituted commission of an offence punishable under Section 13(2) read with 13(1)(e) of the PC Act.

3. A copy of the FIR is at Annexure-1 and it is gone through.

4. As earlier stated, the petitioner is the wife of the principal accused, who had earlier approached this Court in CRLMC No.3264 of 2011 which was disposed of with certain directions connected to the investigation as to whether the assets of other family members including the petitioner have been included, as such acquisitions were claimed to be from individual and independent sources of income. According to the petitioner, she is having separate source of income from transport business and diary firm and was regularly filing income tax return during the financial years 1999-2000 to 2010-2011 as against gross total income and such business was intimated to the employer of the accused husband and therefore, the said amount is required to be taken into consideration as her admitted income not being a part of the income shown as disproportionate. That part, the petitioner claimed to have income as an entrepreneur being a member of Jagatsinghpur District Truck Owner Association. Precisely with the above claim, the petitioner challenged the impugned order under Annexure-1 and prays for quashing of the entire proceeding in connection with T.R. No.7 of 2022 pending before the learned Special court.

5. Heard Mr. Jena, learned counsel for the petitioner and Mr. Maharana, learned counsel for the Vigilance Department.

6. While supporting the claim of the petitioner, Mr. Jena refers to a copy of this Courts' order dated 30th January, 2012 passed in CRLMC No.3264 of 2011 and also a copy of the intimation by husband regarding the income of the petitioner during the assessment year-2000-01 to 2011-2012 and acknowledgements of the income tax returns as at Annexure-5 series and also other documents such as loan accounts and loading passport of Jagatsinghpur District Truck Owner Association (Annexure-6 series) to suggest that the petitioner is a business woman having independent source of income and therefore, she could not have been chargesheeted along with the accused husband with the aid of Section 109 IPC. It has been reiterated by Mr. Jena that the petitioner has been filing income tax returns every financial year as per Section 44 AE of the Income Tax Act, however, all such aspects about her income separate from the accused husband were not duly taken cognizance of during investigation despite a specific direction in that regard by this

Court while disposing of CRLMC No.3264 of 2011 and hence, the initiation of the prosecution with the submission of chargesheet followed by Annexure-1 and the entire proceeding corresponding to VGR Case No.31 of 2011 is unsustainable in law as against her.

7. On the other hand, Mr. Maharana, learned counsel for the Vigilance Department referring to the fact that a detailed investigation was held and ultimately, it resulted in submission of chargesheet against the petitioner as well contends that the impugned order of cognizance under Annexure-1 is absolutely justified and according to law. It is further contended that the petitioner's husband is a public servant whose house was searched with other places, later to which, the FIR was lodged with the allegations that he acquired disproportionate assets. It is claimed by Mr. Maharana that during investigation, it was revealed that the petitioner, a house wife but was filing income tax returns showing her income from transport business and dairy firm, however, it also disclosed that there was no supporting evidence with respect to her source of income in managing the dairy firm and running the transport business, inasmuch as, no evidence was found at the time of search except showing ownership in respect of a vehicle. It is alleged that the petitioner, who has been a house wife knowing fully well that she had no sources of income intentionally aided and allowed her accused husband to acquire huge assets in her name to cover up the ill-gotten money thereby abetted in the commission of the offence. At lastly, it is submitted by Mr. Maharana that in the meantime, investigation was concluded and chargesheet since filed with the evidence on record showing the involvement of the petitioner, the learned court below did not commit any error or illegality while taking cognizance of the offence along with Section 109 IPC. It has been brought to the notice of the Court by Mr. Maharana that the petitioner's husband had filed CRLMC No.1111 of 2022 for quashing of the criminal proceeding on the plea of delay and right to speedy trial which was considered and disposed of with a reasoned order dismissing it on 10th August, 2022. In other words, it is contended that a plea of delay on enquiry and investigation cannot be a ground anymore to dismantle the prosecution and that apart, since a prima facie case is made out, the petitioner as against whom the learned court below has taken cognizance of the offence with the aid of Section 109 IPC, all such matters related to her alleged claim of independent and separate income should be left open for a decision during the trial.

8. Apart from merits of the case, Mr. Jena, learned counsel for the petitioner refers to the following decisions, such as, ***Abdul Rahman Antulay Vrs. R.S. Nayak 1992 (1) SCC 225; Biswanath Prasad Singh Vrs. State of Bihar 1993 AIR SCW 3631; Santosh De Vrs. Archana Guha and Others AIR 1994 SC 1229; Pankaj Kumar Vrs. State of Maharashtra and Others AIR 2008 SC 3077; Surendra Nath Mishra Vrs. State of Odisha and Another 2022(I) OLR 352 and Rama Chandra Behera Vrs. State of Orissa and Another decided in CRLMC No.1741 of 2010*** while challenging the continuation of the prosecution on the ground of delay since the chargesheet was submitted after a lapse of 11 years.

9. Admittedly, the FIR was lodged on 31st June 2011 against the husband of the petitioner for having committed offences under Sections 13(2) read with 13(1)(e) of the PC Act in respect of the block period between October, 1981 and 25th November, 2010 and ultimately, chargesheet was submitted on 25th April, 2022. While dealing with under trial prisoners, the Apex Court in ***Hussainara Khatoon and Others Vrs. Home Secretary, Bihar and Others*** held that an accused is entitled to right to speedy trial, however, sympathy for the under trials, who are in jail for long turn on account of pendency of cases would have to be balanced having regard to the effect the crime on the society in a given fact situation. The decision of the Supreme Court in ***Abdul Rahman Antulay*** (supra) is also an authority on the above subject. It has been reiterated by the Apex Court quite often in one of its decisions reported in ***(2012) 9 SCC 408 (Mohd Hussain@Julfikar Ali Vrs. The State (Govt. of NCT) Delhi)*** reiterated the law that it is neither advisable none practicable to fixe any time limit for trial of offence. It has also been observed therein that such rule cannot be invoked merely to shift the burden of proving justification un to the shoulder of the prosecution; in every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay and at the same time, it is also duty of the court to weigh all the circumstances of a given case before taking a decision thereon and highlighted the fact that the Supreme Court of the United State of America too has repeatedly refused to fix any ouster time limit in spite of 6th Amendment nor it is in favour of fixing any such limit while upholding the guarantee of rightful speedy trial. Considering the facts on record, the Court is however not inclined to entertain such a ground of delay defeating justice so raised by the petitioner when similar question was earlier examined and decided. Hence, therefore, the authorities relied on by Mr. Jena, learned counsel for the petitioner on the said point are not elaborately discussed.

10. With regard to the other ground whether the petitioner had independent and separate income is a question to be answered on receiving evidence during trial. In case, such a ground is made out during enquiry, the petitioner may even demand for discharge. The Court is not inclined to delve into such aspect of the case regarding separate income of the petitioner which would require threadbare examination of evidence in exercise of jurisdiction under Section 482 Cr.P.C. In other words, the said ground should be left open for decision of the learned court below.

11. Accordingly, it is ordered.

12. In the result, the CRLMC stands dismissed.

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2023 (II) ILR – CUT - 883

SASHIKANTA MISHRA, J.

W.P.(C) NO. 22660 OF 2016

SUBASHINI PATNAIK .....Petitioner

-V-

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

ODISHA AIDED EDUCATIONAL INSTITUTION EMPLOYEE'S RETIREMENT BENEFIT RULE, 1981 – Rule 8(2)(b) – Prayer for family pension – The benefit of pension was made available to Aided Primary School Teacher w.e.f 01.04.1982 – Benefit of family pension to the family of the teachers was introduced w.e.f 01.09.1988 – Petitioner's husband died in the year 1974 – Whether the petitioner is eligible to family pension – Held,Yes. (Para 8 &10)

Case Laws Relied on and Referred to :-

1.1994 I OLR 439 : 78 (1984) CLT 357: Bhimsen Prusty & Ors.Vs.State of Odisha & Ors.
2. 2005 (1) OLR 168 : Subarna Dibya & Ors. Vs. State of Orissa & Ors.

For Petitioner : M/s. L.K. Mohanty, B. Barik, P. Shagat & P.M. Rao

For Opp. Parties : Mr. N. Pratap, Addl. Standing Counsel

JUDGMENT Date of Judgment: 26.04.2023

SASHIKANTA MISHRA, J.

1. The petitioner has approached this Court with the following prayer:

> *"The petitioner, therefore, most humbly prays that this Hon'ble Court may graciously be pleased to issue a writ in the nature of writ of mandamus or any other appropriate writ(s)/direction(s)/order(s) by directing the opposite party Nos.1 to 4 to release the pensionary benefits in favour of the petitioner as the petitioner is only the legal heir and widow of Late Sarat Chandra Patnaik who was working as a M.E. School teacher, died on 08.01.1974 and to pay the same so as to maintain herself;*
>
> *And further the Hon'ble Court be graciously pleased to direct the opposite party Nos. 3 & 4 to pay the arrear dues/pensionary benefits to the petitioner within a stipulated period as would be deemed fit and proper in the facts and circumstances of this case;*
>
> *And for this act of kindness the petitioner shall as in duty bound ever pray."*

2. The facts of the case are that the husband of the petitioner, late Sarat Chandra Patnaik joined as Assistant Teacher in Loknath M.E. School, Mahagab on 01.08.1948, which is an Aided Educational Institution. He died on 08.01.1974 while continuing in service. As per the Odisha Aided Educational Institutions Employees' Retirement Benefit Rules, 1981, (in short '1981 Rules') the benefit of pension was made available to Aided Primary School Teachers w.e.f. 01.04.1982. Further, benefit of family pension to the family of the teachers was introduced w.e.f. 01.09.1988. By another resolution dated 23.03.1989, pension and pensionary

benefits were granted to Primary School Teachers of Aided Institutions at par with their counter parts in Government Schools. By another notification dated 18.10.2001 the benefit of family pension was extended to the family of teachers who died on or after 01.09.1988. A Single Judge of this Court in the case of **Subarna Dibya and 61 others vs. State of Orissa** and others, reported in 2005 (1) OLR 168 held that family members of teachers dying in harness shall also be entitled to family pension. The petitioner submitted representation for grant of family pension but the same was not considered, for which she approached this Court in W.P.(C) No. 9097 of 2003. This Court, vide order dated 18.01.2005 directed the petitioner to file another representation and also directed the opposite parties to dispose of the same by passing a reasoned order in light of the ratio of the decision in Subarna Dibya (supra). The opposite party authorities did not act upon such order, for which the petitioner filed CONTC No.1135 of 2005 before this Court, wherein the present opposite party No.1 appeared and submitted that the representation of the petitioner had been disposed of on the ground that the judgment in Subarna Dibya (supra) had been challenged before the Supreme Court of India in SLP(C)CC No.5993-6054/2005 (**State of Odisha vs. Subarna Dibya & 61 others**) and that the Supreme Court had stayed operation of the same. The petitioner was thus asked to wait till disposal of the SLP. Ultimately, the SLP was dismissed by order dated 19.02.2015. Despite such dismissal of SLP, as the opposite parties did not grant her family pension, she was constrained to approach this Court in the present writ application.

3. The stand of the opposite parties is that the husband of the petitioner died much prior to coming into force of the 1981 Rules, whereas the said Rules are applicable only to the employees of Aided Educational Institutions under the Direct Payment Scheme receiving full grant-in-aid and retiring on or after 01.04.1982. The benefit of family pension was introduced for the first time vide Notification dated 05.12.1989 amending the 1981 Rules. The same was also applicable to persons who retired or died on or after 01.09.1988. The said Notification was however, quashed by this Court in the case of **Bhimsen Prusty and Others vs. State of Odisha and Others reported in 1994 I OLR 439 : 78 (1984) CLT 357**. As such, there was no provision applicable under the 1981 Rules to grant family pension. By way of an amendment in the year 2001, Rule-8(2)(b) of the 1981 Rules was amended to make the family of a pensioner or the family of an employee, who died on or after 01.09.1988, entitled to family pension.

In Subarna Dibya (supra), this Court has defined the meaning of 'pensioner' which implies pensioner under the Odisha Aided Educational Institutions (Non-Government Fully Aided Primary School Teachers) Retirement Benefit Rules, 1986 (in short '1986 Rules') and also includes pensioners under the 1981 Rules, which was applicable to Primary School Teachers from 01.04.1982 till 01.04.1985, the date on which 1986 Rules came into force. The 1981 Rules therefore, ceased to apply to the persons specified in sub-Rule(1) w.e.f. 01.04.1985. The husband of the petitioner having died much earlier, i.e., in the year 1974 was not eligible as on the date of his

death to receive pension and thus, cannot be treated as pensioner within the meaning of the Rules. Such being the factual position, his family members would also not be eligible to receive family pension.

4. Heard Mr. L.K.Mohanty, learned counsel for the petitioner and Mr. N. Pratap, learned Additional Standing Counsel for the State.

5. Mr. Mohanty has heavily relied upon the observations made in Subarna Dibya (supra) in paragraphs 18 and 19 to buttress his argument that had the husband of the petitioner not died, he would have superannuated in April, 1986, which is after 01.04.1982. As such, he would have been eligible to receive pension as per 1981 Rules. In such view of the matter, the petitioner being his widow cannot be deprived of family pension more so, as the judgment in Subarna Dibya (supra) has been confirmed by the Apex Court in view of the judgment in SLP filed against it by the State.

6. Mr. N. Pratap, on the other hand, submits that since the fact of death of the deceased on 08.01.1974 is not disputed, the question is, was he eligible to receive pension as on that date. According to Mr. Pratap, the answer can only be in the negative. Such being the fact, the petitioner cannot be held eligible to receive family pension.

7. This Court finds that the issue relating to grant of pension and family pension to the employees of recognized non-Government Educational Institutions and their family members was the subject matter in the case of Subarna Dibya (supra).After examining the relevant Rules and Notifications issued by the Government in this regard as also the earlier decisions of this Court and the Apex Court, the Court ultimately held that in view of the amendment of Rule-8(2)(b) in the 1981 Rules in the year 2001, the family of a pensioner and the family of an employee, who died on or after 01.09.1988, would be entitled to family pension. For immediate reference, the relevant paragraph of the judgment is quoted herein below:

> *"16. Heard the learned counsel for the parties patiently, noticed the submissions carefully, perused the materials meticulously and considered the matter diligently. It is well settled rule of interpretation that the Court while interpreting a rule should as far as possible avoid the construction which attributes irrationality and the Court must obviously prefer a construction which renders a statutory provision constitutionally valid, viable and operative rather than that which makes it void and inoperative. The amendment to the 1981 Rules introduced by the impugned Notification dated 18th October, 2001 substituting Rule 8(2)(b) clearly stipulates :-*
>
> *"The family of a pensioner or the family of an employee, who died on or after the 1st September, 1988 shall be entitled to get family pension as admissible to the family of his counterpart in the State Government Service." (Emphasis supplied)*
>
> *Thus, there are two categories of persons who are entitled or eligible to receive family pension. The first category is the family of a pensioner and the second category is the family of an employee, who died on or after 1st of September, 1988. Any person, who*

satisfies either of the above two criteria would be eligible to receive family pension. The word 'pensioner' used in the aforesaid Rule shall mean a primary school teacher of an aided educational institution who was receiving pension and shall also include one who was otherwise eligible to receive pension, but for some reason or other pension was not paid to him. In other words, 'pensioner' shall also bring within its ambit an employee who was entitled and/or in consonance with the Rules was eligible to be covered under the pension scheme. According to the 2001 Amended Rules, the family members of such employees shall be entitled to receive family pension. I, therefore, find no ambiguity in the aforesaid Amended Rules."

8. What is relevant to note from the aforesaid observation is that an extended meaning was given to the word 'pensioner' to include in its ambit an employee who was entitled and/or in consonance with the rules was eligible to be covered in the pension scheme. In the instant case there is no dispute that the husband of the petitioner was not a pensioner as on the date of his death and he died much before, i.e. on 01.09.1988. However, the question is, would he have been eligible to receive pension had he lived. As already stated, the husband of the petitioner joined in service on 01.08.1948. His date of birth is said to be 10.08.1926. As such, had he lived, he would have retired in August 1984, which is after 01.04.1982.

9. In Subarna Dibya (supra) this Court also considered the case of the family members of an employee, who died in harness and observed as follows:

"18. The only other question, which needs to be answered, is as to whether the family members of an employee who died in harness would be eligible to receive family pension or not. In such eventuality, the decision will differ from case to case. It is needless to say that in consonance with the Orissa Pension Rules and other provisions the family of an employee who dies in harness would be entitled to pension or proportionate pension as would be admissible taking into consideration the number of years of service rendered by him and other eventualities. Rule 8 of the 1986 Rules stipulates that an employee shall be eligible for pension, gratuity or death-cum-retirement gratuity as the case may be in certain eventualities; one of the same being retirement before superannuation on medical ground or permanent incapacity for further service. If an employee is entitled to pension having retired prematurely on being permanently incapacitated, there can be no reason to extend the benefit of family pension to an employee who dies in harness. In such cases, the authorities shall first decide as to whether the employee was eligible to receive proportionate pension in consonance with the Rules and if it is found that, in fact, the employee was entitled to receive pension, take a decision with regard to extending the benefit of family pension to the family of such employee, who was otherwise eligible to receive pension if he would have superannuated in usual course, but unfortunately died in harness in the light of Rule 4(3) of the 1986 Rules."

10. This Court has already held that had the petitioner not died in harness, he would have superannuated ordinarily in August 1984. By such time the benefit of family pension granted as per the 1981 Rules w.e.f. 01.04.1982 had already come into force. As such, he would have been eligible to receive pension. As a natural corollary thereof, the petitioner would be entitled to family pension as per the Rules.

11. For the foregoing reasons therefore, this Court holds that the petitioner has made out a good case for grant of the relief claimed.

12. Resultantly, the writ petition is allowed. The opposite party authorities are directed to pass necessary orders extending the benefit of family pension to the petitioner in accordance with the Rules, if there is no other legal impediment. Having regard to the fact the petitioner is an old lady, aged about 80 years necessary orders shall be passed as directed within a period of four weeks.

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2023 (II) ILR – CUT - 887

SASHIKANTA MISHRA, J.

RSA NO. 399 OF 2014

DAMODAR BARIK & ANR. .....Appellants

-V-

MALATI BARIK & ORS. .....Respondents

(A) PARTITION – Suit for partition – Plaintiff no 2 claims to be the adopted son of plaintiff no 1, which is specifically disputed by the defendants – The trial court have not framed any issue in this regard – Neither any deed of adoption was proved nor any oral evidence adduced in support of the claim of adoption – There is nothing on record to show as to how the plaintiff no 2 related to the joint family – Whether the suit for partition at the instance of adopted so (Plaintiff no2) is maintainable? – Held, No. (Para-10)

(B) PARTIAL PARTITION – Suit has been filed without bringing all the joint family property to the hotch potch and without impleading all the necessary parties – Effect of – Held, it is settled position of law that a member of a joint family suing as coparcener for partition of family property is bound to bring the entire property into the hotch potch as a result of which there will be a complete and final partition of all the family properties – The suit must therefore fail on the ground of partial partition. (Para-12)

For Appellants : M/s. S.K. Ray, & S.P. Swain.

For Respondents: M/s. S.C. Samantray,S.K. Das,U.K. Mishra & S.K. Panda

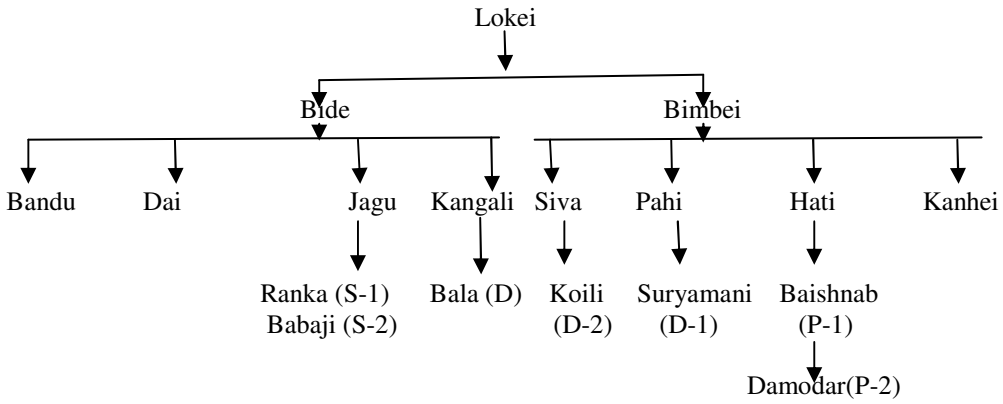
ORDER Date of Order : 22.06.2023

SASHIKANTA MISHRA, J.

1. This appeal has been preferred by the plaintiffs challenging the judgment and decree passed by learned District Judge, Bhadrak on 09.07.2014 and 15.07.2014 respectively in T.A. No.48 of 2001, whereby the judgment and decree passed by Civil Judge (Sr. Division), Bhadrak on 28.02.2001 and 17.03.2001 respectively in T.S. No. 135 of 1989-I was reversed.

2. For convenience, the parties are referred to as per their respective status in the trial Court.

3. Before delving into the facts of the case it would be apposite to refer to the genealogy of the parties as the suit is one for partition of ancestral properties.



The suit was originally filed by one Baishnab Barik as plaintiff No.1 and Damodar Barik as plaintiff No.2. Said Baishnab Barik having expired, was substituted by his surviving daughter Basanti Barik.

4. The appeal is admitted on the following substantial questions of law.

> *"1) In the absence of any issue as to whether plaintiff No.2 is adopted son of plaintiff No.1, which fact has been denied by the defendant in the written statement, whether the learned lower Appellate Court is justified in recording their respective findings on the existence of relationship between plaintiff Nos. 1 and 2?*
>
> *2) Whether the observation of the learned lower Appellate Court that the suit has been filed without bringing all the joint family property to the hotch potch and without impleading all the necessary parties is justified in the eye of law?"*

5. The case of the plaintiffs, briefly stated, is that Damodar claims to be the adopted son of Baishnab. A suit was filed for partition of ancestral properties situated in village Bhagada to the tune of Ac.5.69 dec. under C.S. Khata Nos.138, 270, 250 and 196. Baishnab claimed to have acquired Ac.1.33 ½ dec. by virtue of a gift deed executed by Kanhei in his favour on 11.08.1968 and also inherited the

balance property of Kanhei. Damodar purchased Ac. 0.93 dec. from the original defendant No.2, Koili (since dead), daughter of Siva through a registered sale deed executed on 30.12.1977. Ac.0.80 dec. was recorded exclusively in the name of Baisnab under MS Khata Nos. 233, 231 and 132 leaving balance of Ac.3.01 dec. to their share. Hence, the suit for partition in respect of Ac.4.09 dec. of land recorded jointly in the names of plaintiffs and defendants under MS Khata Nos. 54, 323, 334, 335 and 336.

6. The defendants' case is that the common ancestor, Bimbei had another brother, namely, Bidei and they had around Ac.15.50 dec. of land in village Bhagada and Samsama Daulatpur. The son of Bidei had separated from sons of Bimbei and subsequently Kanhei and Hati separated from Siva and Pahi. Accordingly, Hati and Pahi alienated some property jointly from Bimbei's half share in village Bhagada and Samsama Daulatpur before current settlement for which note of possession was recorded in the name of Hati and Kanhei in the C.S. ROR in respect of the balance property which fell to their share. Similarly, the names of Siva and Pahi have been recorded in the C.S. ROR with separate note of possession in respect of the properties falling into their shares. Hati and Kanhei had alienated properties recorded in their names after current settlement to different persons, who were not parties to the suit. Siva died while living with Pahi jointly and therefore, his daughter Koili had no share in respect of his properties, which Pahi succeeded to by survivorship. The plaintiffs wrongly managed to record the name of Koili in some of the RORs of village Bhagada and also got two sale deeds executed by her only to prove that she had a share in the suit property. The plaintiffs also managed to make separate Khata in the name of Baishnab successfully and taking advantage of the same filed the suit in respect of the balance property recorded jointly. It was specifically pleaded that Damodar was neither the natural nor adopted son of Baishnab and therefore, his claim is not maintainable.

7. On the rival pleadings the trial Court framed eight issues. After examining the oral and documentary evidence adduced by the parties, the trial Court decreed the suit in full primarily by holding that the plaintiffs are entitled to get Ac.3.01 dec. of land and defendant no.1 is entitled to get Ac.1.18 dec. of land. The defendant no.1 carried the matter in appeal to the Court of learned District Judge. After independently scanning the evidence on record in light of settled position of law, the first Appellate Court held that the plaintiff No.1 having failed to step into the witness box and to produce any document of adoption, adverse inference is to be drawn against him. The First Appellate Court further held that the total extent of land belonging to the joint family is to the tune of Ac. 5.69 dec. but the plaintiffs claimed only Ac.3.01 dec. out of Ac.4.19 dec. thereby leaving out the rest property, which amounts to partial partition and not hence, maintainable in law. The first Appellate Court further found that the entire ancestral property situate in village Samsama Daulatpur had been left out in the suit. Finally, on the basis of the evidence on record the first Appellate Court found that Siva, the father of Koili

(original defendant No.2) had died prior to 1956 and therefore, she could not have inherited any share in the property so as to alienate in favour of any person. Thus, the first Appellate Court disagreed with the findings of the trial Court and accordingly allowed the appeal by setting aside the judgment passed by the trial Court.

8. Assailing the judgment of the first Appellate Court, Mr. S.K. Ray, learned counsel appearing for the plaintiff-appellants had contended that no issue having been framed regarding adoption, there was no necessity for the plaintiff No.1 to enter into the witness box and therefore, the first Appellate Court committed an error in drawing adverse inference against him. As regards the other points, the trial Court has answered them entirely basing on the oral and documentary evidence on record and there is no perversity or illegality whatsoever therein for the first Appellate Court to substitute his own findings therewith.

9. Per contra, Mr. S.C.Samantray, learned counsel appearing for the defendants has contended that firstly, no substantial question of law is involved and the second appeal has been preferred only on factual grounds. Secondly, the defendants had specifically disputed the claim of plaintiff No.2 as being the son of plaintiff No.1 and therefore, notwithstanding the fact that a specific issue was not framed to determine the question, it was brought out in the evidence that such claim was not correct. Mr. Samantaray further submits that Koili had no alienable right over the ancestral property to the extent of the share of her father, Siva since he had died prior to 1956. The trial Court was swayed away by the entries made in the RORs which do not confer any title by themselves. Since all the ancestral properties were not brought into the common hotchpot, the suit for partition was rightly held by first Appellate Court to be not maintainable.

10. From the rival contentions noted above and the grounds set out in the memorandum of appeal filed before this Court, it is evident that the status of original plaintiff No.2, Damodar is of seminal importance. In the plaint he claims to be the adopted son of Baishnab, a fact specifically disputed by the defendants. The trial Court should have framed an issue in this regard. Nevertheless, it is borne out from the evidence of Damodar himself that he is the natural son of one Govinda Lenka. Such being his admission, it was up to him to prove his claim of being adopted by Baishnab. As rightly held by the first Appellate Court, neither any deed of adoption was proved nor any oral evidence adduced in support of the claim of adoption. There is otherwise nothing on record to show as to how Damodar is linked/related to the joint family.Therefore, the suit for partition at his instance would not be maintainable. It was therefore, incumbent upon plaintiff no.1-Baishnab to step into the witness box to clarify the actual status of Damodar. Since he chose not to do so, the first Appellate Court rightly drew adverse inference against him.

11. It has come out in the evidence that the common ancestor namely, Lokei had two sons, namely Bidei and Bimbei. The plaintiffs and defendants belong to the

branch of Bimbei. There is also evidence on record to show that both Bidei and Bimbei jointly held land to the extent of 15.56 dec. in two villages namely, Bhagada and Samsama Daulatpur. There is no dispute that the members of the other branch were not impleaded as parties nor the properties situate in mouza- Samsama Daulatpur were included in hotchpot.

12. It is the settled position of law that a member of a joint family suing as coparcener for partition of family property is bound to bring the entire property into the hotchpot in order that there will be a complete and final partition of all the family properties. Article 333 (3) of Mullah's Hindu Law can be referred to in this regard. The suit must therefore fail on the ground of partial partition. Another important aspect that the trial Court overlooked but was rightly noticed by the first Appellate Court is the right of Koili, (original defendant No.2) to alienate the property falling into the share of her father, Siva. As per calculation made by the first Appellate Court, Siva had died prior to 1956. Therefore, his share of the property must be deemed to have devolved on his brother, Pahi with whom he was living jointly. Thus, Koili cannot be said to have acquired any alienable right to execute sale deed much less in favour of plaintiff No.1 or deffendant No.1. This Court fully concurs with the finding of the first Appellate Court that mere entry in the settlement record of the name of the Koili cannot confer any alienable title on her.

13. Thus, from a conspectus of the analysis of contentions raised and the discussions made therein in the background of the oral and documentary evidence on record, this Court finds no reason to disturb the findings of the first Appellate Court.

14. In the result, the appeal fails and is therefore, dismissed but in the circumstances, without any cost.

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2023 (II) ILR – CUT - 891

A.K. MOHAPATRA, J.

W.P.(C) NO. 40093 OF 2021 (WITH BATCH OF CASES)

PRABHANJAN MISHRA & ORS. .....Petitioners

- V -

ODISHA UNIVERSITY OF AGRICULTURE & TECHNOLOGY (OUAT),BHUBANESWAR & ORS. .....Opp. Parties

SCALE OF PAY – Reduction – The petitioner appointed as scientist in horticulture in the scale of pay of Rs.15,600 – 39100 With AGP of Rs.6000/- in the OUAT – The authority relying on a letter issued by ICAR vide order dated 6.11.2021 fixed the pay scale of petitioners corresponding to their scale with Grade pay of Rs.5,400/- – Whether such reduction of scale violating the terms of advertisement and appointment letter is sustainable? – Held, No – The petitioners are entitled to the scale of pay that was promised to them through the advertisement as well as the appointment letter. (Para-23)

For Petitioner : Mr. Manoj Kumar Mishra, Sr. Adv.
M/s. Tanmay Mishra & S.J. Senapati
Mr. Biswabihari Mohanty

For Opp. Parties : Mr. Avijit Pal
M/s. P.M. Pattajoshi,
D.K. Panda & S.N. Rath
M/s. Aurovinda Mohanty,
S.K. Sahue, B.C. Sahoo & P.R. Dash

JUDGMENT Date of Judgment : 19.05.2023 : Date of Hearing : 22/23.03.2023

A.K. MOHAPATRA, J.

1. The above noted batch of writ petition have been filed by the employees of Krishi Vigyan Kendras (KVK) functioning under the Odisha University of Agriculture and Technology (OUAT) with a prayer to quash order dated 06.11.2021 under Annexure-6 fixing the pay scale of the Petitioners corresponding to their scale with the Grade Pay of Rs.5,400/- keeping in view the letter of the ICAR under Annexure-7 Series recommending a Grade Pay of Rs.5,400/- further for a direction to the Opposite Parties to fix and release the revised scale of pay to the Petitioners as per the 7th CPC in corresponding scale of pay of Rs.15,600/--39,100/- plus G.P. Rs.6,000/- w.e.f. 01.01.2016 within a stipulated period of time.

2. Since all the above noted writ petitions involve a common set of fact and a common question of law, the writ petition filed by one Prabhanjan Mishra in W.P.(C) No.40093 of 2021 is being taken up as the lead case in the batch of above noted writ petitions and, accordingly, for the sake of brevity, the facts involved in the case of Prabhanjan Mishra is being taken up for analysis to decide the common question of law involved in the present batch of writ petitions.

3. The factual matrix which was led to filing of the present writ petition, in short, is that pursuant to the advertisement dated 08.12.2011, the OUAT, i.e., the Opposite Party-University inviting applications from eligible candidates for recruitment of vacant posts in different disciplines of Krishi Vigyan Kendras (in

short 'KVSs') functioning under the OUAT including the post of Subject Matter Specialist in Horticulture in the Scale of Pay of Rs.15,600-39,100/- plus AGP of Rs.6,000/- with usual DA and other allowances as applicable under OUAT Rules. The eligibility condition also provided that the candidates must have passed NET Examination.

4. Since the Petitioner had the eligibility for the post of Subject Matter Specialized in Horticulture, he had submitted his candidature of the said post of SMS. On the recommendation by the Standing Selection Committee vide Office Order dated 17.05.2012, the Petitioner was appointed as SMS in Horticulture (which was later re-designated as Scientist), the Petitioner joined immediately pursuant to the aforesaid appointment letter. It has also been stated in the writ petition that at the moment the Petitioner has been posted as Scientist at KVK, Kendrapara and his drawing salary in the Scale of Pay of Rs.15,600-39100/- with AGP of Rs.6,000/-.

5. It is apt to mention here that the KVKs have been set up in various districts in the State of Odisha pursuant to MoUs between India Council of Agriculture Research (ICAR) and the Odisha University of Agriculture and Technology (OUAT). It is further pertinent to mention here that in some State KVKs are functioning under the direct control of ICAR, whereas in some other States, the ICAR has collaborated/entered into an MoU with the State Agriculture Universities for smooth functioning of such KVKs. As per the MoU, the ICAR is to provide the grant and the University is to provide infrastructure such as manpower, land, animals etc. of the KVKs. So far the administrative control of the staff employed in the KVKs, the same shall vest with the State University. It was also stipulated in the MoU that any increase in pay over and above the scale approved by ICAR shall be borne by the University. While this was so, after implementation of recommendation of 7th CPC, when the OUAT revised to the scale of pay of all KVK employees in consonance with the recommendation of 7th CPC, however, the pay of the Petitioner was not revised in terms of recommendation of 7th CPC. Accordingly, the Petitioner submitted a representation on 15.05.2021 to the Registrar of the University requesting him to fix and release his salary in terms of the recommendation of the 7th CPC.

6. Since no action was taken on the representation dated 16.05.2011, the Petitioner earlier approached this Court by filing W.P.(C) No.23038 of 2021 for grant of revised scale of pay in terms of the recommendation of 7th CPC. This Court vide order dated 17.08.2021 disposed of the writ petition directing the Opposite Party No.1 to look into the matter and pass appropriate orders on the representation of the Petitioner by taking into consideration the grounds raised by the Petitioner in his representation within a period of two months.

7. After disposal of the earlier writ petition vide order dated 17.08.2021, the Petitioner approached the Opposite Parties and submitted a copy of order dated 17.08.2021 for their consideration.

8. Heard Mr. Manoj Kumar Mishra, learned Senior Counsel appearing for the Petitioner as well as Mr. A. Pal, learned counsel appearing for the Opposite Parties No.1 and 2 and Mr. A. Mohanty, learned counsel for the Opposite Party No.4. Perused the pleadings of the respective parties as well as the documents annexed thereto.

9. Learned Senior Counsel appearing for the Petitioner, at the outset, by referring to the advertisement, appointment order and the pay slip of the Petitioner, submitted that the Petitioner submitted his application for the post which was advertised and the scale of pay in the advertisement was mentioned, i.e.,which is Rs.15,600-39100/- plus AGP of Rs.6,000/-. He further contended that after due selection, the Petitioner was appointed as SMS/Scientist in Horticulture in the advertisement scale of pay. Thereafter, the Petitioner was drawing the pay scale that was advertised. Further, the appointment letter also reveals the scale of pay. Learned Senior Counsel appearing for the Petitioner submitted that the Opposite Party No.1 relying upon a letter of the ICAR dated 06.11.2011 disposed of the representation of the Petitioner by fixing his pay as per 7th CPC w.e.f. 01.01.2016 taking into account the corresponding scale of pay of Rs.15,600-39,100/- + G.P. of Rs.5,400/- instead of Rs.6,000/-, i.e., the scale in which the Petitioner was selected and appointed and he has been continuing with the aforesaid scale of pay since his initial date of appointment on 17.05.2012. Therefore, it was submitted that the rejection of the Petitioner's representation is highly arbitrary and contrary to the terms of the advertisement as well as the appointment letter issued in favour of the Petitioner. Further referring to the letter dated 06.11.2021 of the OUAT under Annexure-6, it was submitted by the learned Senior Counsel appearing for the Petitioner that the representation was rejected by referring to the letters issued by the ICAR dated 29.03.2011, 09.03.2021, 01.10.2021 and 16.09.2021. He further submitted that the aforesaid letters of the ICAR reveals that the pay scale of SMS in KVKs in 7th CPC is fixed in corresponding scale of pay of Rs.15,600-39,100/- with Grade Pay of Rs.6,000/- in respect of persons, who were recruited before 29.03.2011 and in corresponding scale of pay Rs.15,600-39,100/- with Grade Pay of Rs.5,400/- in respect of the persons recruited after 29.03.2011 and any enhancement will be borne by the post organization.

10. In the aforesaid context, Mr. Mishra, learned Senior Counsel appearing for the Petitioner submitted that sub-classification within a homogeneous class as done by ICAR is highly illegal, arbitrary, unreasonable and discriminatory. He further submitted that such sub-classification has been done without any reasonable nexus with the objects sought to be achieved. Therefore, the same would be hit by the principle contained in Article 14 of the Constitution of India. In the said context, it was also contended that there was no different between persons who had appointed prior or after 29.3.2011. As such, it was argued that both categories of persons appointed prior to or after 29.03.2011 are entitled to the same scale of pay as they are having the same qualification and performing exactly the same nature of work.

In such view of the matter, learned Senior Counsel appearing for the Petitioner also contended that the conduct of the Opposite Parties in reducing the scale of pay after more than 9½ years of service by reducing the Grade Pay from Rs.6,000/- to Rs.5,400/- ignoring the recommendation of 7th CPC is unsustainable in law. Further such reduction in Grade Pay has also disentitled the Petitioner to apply for the next higher post Scientist and Associate Professor. In the said context, it was also argued that such reduction in Grade Pay is in the nature of punishment without following due procedure of law that too without any fault on the part of the Petitioner. Therefore, it was submitted that the order dated 06.11.2021 under Annexure-6 is illegal, arbitrary and unsustainable in law and, accordingly, the same should be quashed.

11. Per contra, the Opposite Parties No.1 to 3 have filed a joint counter affidavit wherein it has not been disputed that the Petitioner was selected an appointed pursuant to Advertisement dated 08.12.2011 under Annexure-1 as SMS in KVK. Further, it has also been admitted that the Petitioner was appointed in the scale of pay of Rs.15,600-39,100/- with Grade Pay of Rs.6,000/- at the time of his appointment. The Opposite Parties have further stated that the ICAR vide letter dated 29.03.2011 has issued a guideline where the pay scale was prescribed at Rs.15,600-39,100/- plus Grade Pay of Rs.5,400/- and pursuant to the said guideline, the Grade Pay of the Petitioner has been reduced from Rs.6,000/- to Rs.5,400/- w.e.f. 29.03.2011. It has also been stated in the counter affidavit that the aforesaid letter was received on 28.05.2021 and, accordingly, the Grade Pay of Rs.5,400/- has been implemented in KVKs of ICAR.

12. Learned counsel for the Opposite Parties referring to the MoU contended before this Court that execution of such MoU between ICAR and OUAT was within the knowledge of Government of Odisha. It was further contended before this Court that one of the important conditions of MoU is that the ICAR is to provide funds for running of KVKs in the state and the OUAT as host institution will have the administration control over the staff in the KVKs.

13. In course of time and through several discussions and deliberations with the Government of Odisha, the status of KVK employees under OUAT has been clarified vide letter dated 27.08.2014. As per the conditions contained in the clarification, the KVK employees are to be treated as contractual project staff and to be allowed regular scale of pay with annual increment and other benefits as per the ICAR guidelines, till funding of ICAR continues. Further, the KVK employees are not entitled to terminal benefits and their service is coterminous with the project. The State Government and OUAT will not shoulder any kind of liability pertaining to KVKs and the transfer of KVK employees will be within the KVKs only.

14. Learned counsel for the Opposite Parties further submitted that before this Court that at the time of appointment of the Petitioner in the year 2011, the letter of the ICAR for appointment of KVK Scientists in the scale of pay as mentioned

hereinabove with Grade Pay of Rs.5,400/- w.e.f. 29.03.2011 had not reached the OUAT, therefore, the selection and posting of Scientists in KVKs continued in the scale of pay as per the existing provision of Rules. However, after receiving a clear guideline from the ICAR vide latter dated 04.09.2017, the recruitment to the post of SMS is being made in the scale of pay with Grade Pay of Rs.5,400/-. It was also contended by the learned counsel for the Petitioner that this defect was detected when the case of the Petitioner was being considered of revision of 7th UGC pay w.e.f. 01.01.2016 and by that time they have received letter dated 09.03.2011 of the ICAR. Therefore, the pay of the Scientists including the Petitioner having Grade Pay of Rs.6,000/- who have been recruited on or before 29.03.2011 have not been fixed in their corresponding 7th CPC scale of pay w.e.f. 01.01.2016. Further, it was submitted that considering the discontentment among the Scientists, the OUAT sought for a clarification from the ICAR vide letter dated 30.06.2021 with a request to allow Grade Pay of Rs.6,600/- to the Scientists of KVKs under OUAT, who have been recruited after 29.03.20211. In response to the said letter, the ICAR vide its letter dated 01.10.2021 gave a clarification to follow the guidelines received from ICAR vide letter dated 16.09.2021. Learned counsel for the Opposite Parties further submitted that the clarification letter dated 16.09.2021 of the ICAR provides that the liability of the ICAR will be limited to pay the salary benefit for Rs.5,400/- Grade Pay only for SMS. Learned counsel for the Opposite Parties also submitted that for funding of the projects like KVK, the OUAT depends on the 100% funding by ICAR. The OUAT also depends on such funds for payment of salary to the employees engaged in KVK projects. Since the OUAT does not have its own source of fund, it cannot pay the benefit to the KVK employees. In such view of the matter and keeping in view the fact that the clarification of the ICAR, the OUAT decided to pay the Petitioner the 7th CPC recommendation w.e.f. 01.01.2016 by allowing a Grade Pay of Rs.5,400/-.

15. A counter affidavit has also been filed on behalf of the Opposite Party No.4, i.e., ICAR. In its counter affidavit, the Opposite Party No.4 has given a detailed description of the organization and the projects undertaken by it. They have narrated in detail about the establishment of KVKs in different modes. They have also admitted that the project is 100% funded by the ICAR through a scheme. In the counter affidavit, further the Opposite Party No.4 has stated that on the basis of the MoU, the KVKs have floated advertisement for appointment as SMS and other technical staff and that the Opposite Party No.4 is to provide 100% funding as per the stigmatic demand and all other responsibilities were cast on Opposite Parties No.1 to 3 and, accordingly, it was submitted that since the order dated 06.11.2021 under Annexure-11, which is impugned in the present writ petition, has been passed by Opposite Party No.1 to 3, the Opposite Party No.4 has no role at all in the same.

16. In the counter affidavit of the Opposite Party No.4, it has also been stated that with regard to the claim of revised scale of pay by the staff of KVKs in terms of the recommendation of 6th CPC, it has been mentioned in the letter dated

29.03.2011 that the SMS has been described as "Technical Staff" and not a 'Scientist'. Therefore, the pay scale assigned to the said post in the 6th CPC was with a Grade Pay of Rs.5,400/-. In the said letter, it has also been clarified that the liability of ICAR towards payment of pay and allowances will however be limited to pay scales as per the KVKs under ICAR institutes or actual whichever is less. It was further submitted by the learned counsel appearing for the Opposite Party No.4 that with regard to guideline for recruitment and placement of KVK staff, the ICAR provides 100% financial assistance to the KVKs under the 'Salary', 'Capital' and 'General' heads of the annual budget and the service condition of the employees of the KVKs are to be governed by the rules and guidelines of the host organization, i.e., OUAT in the present case. Further, the recruitment of staff is to be done by the host organization. The Opposite Party No.4 has appended the pay structure of different employees of KVKs as well as the KVKs which are functioning under the administrative control of the OUAT in the State of Odisha. It has also been stated in the counter affidavit that Zonal Office of ICAR to which funds are transferred to OUAT is ICAR–Agricultural Technology Application Research Institute (ATARI), Kolkata. In the counter affidavit of the Opposite Party No.4, it has been categorically stated that ICAR is liable to pay only the salary as per the shame/guidelines of the ICAR in respect of the staff required for running a scheme and the salary structure shall be as provided in the guidelines and approved by the Government of India. Furthermore, it has also been stated that the employees working in the KVKs are not the employees of ICAR rather they are employees of the host institution and under the administrative control of such host institutions.

17. It has also been stated in the counter affidavit filed by the Opposite Party No.4 that since the scheme which has been floated by the ICAR in which the financial assistance and approval of the Government of India, the same is strictly as per the financial out claim of the Government of India. Therefore, no changes can be made to be esteemed by the ICAR. It is further contended that any appointment to any of the post under the scheme are to be made strictly as provided under the Scheme that too in the scale of pay which is applicable to such approved staffing pattern. It was further contended that the ICAR has not issued any executive order for re-designation of SMS as Scientist. It was also contended that there is no clause in the MoU which supports providing of differential amount toward salary cost from ICAR funds, if the pay scales given by the host organization are higher than those approved for KVK. On the contrary, the MoU specifically says that the additional financial liability is to be borne by the host organization.

18. The Petitioners have also filed rejoinder affidavit rebutting the assertion of the Opposite Parties in their counter affidavit. Therefore, on perusal of such rejoinder affidavit, this Court found that most of the pleading in the rejoinder are repetition of the assertions made in the writ petition itself. Therefore, this Court did not feel necessity of discussing contents of such rejoinder affidavit in details in this order.

19. Having heard the learned counsels for the respective parties and upon a careful consideration of the documents placed on record by way of annexures to the pleadings, this Court to resolve the dispute is required to find out to what was the terms and conditions under which the Petitioners were appointed and such appointment was by whom. In reply to the aforesaid questions, this Court had glance on the advertisement dated 8th December, 2011 under Annexure-1. On perusal of the said advertisement, it appears that the same was issued by the OUAT-Opposite Party No.1 to the writ petition. The advertisement reveals that the applications were invited from eligible candidates for recruitment to the vacant posts in KVKs with a clear stipulation that the services will be co-terminus with the funding of ICAR and that no terminal benefit shall be allowed as per ICAR norms. So far the post of SMS is concerned, a scale of pay of Rs.15,600-39,100/- plus AGP of Rs.6,000/- has been prescribed in the advertisement. Moreover, on being selected by the Standing Selection Committee, the Petitioner was issued with an appointment letter dated 17.5.2012 under Annexure-2. A close scrutiny of the said appointment letter also reveals that the scale of pay as advertised has been specifically mentioned in such appointment letter. Thereafter, the Petitioner joined in service and was drawing the scale of pay as advertised and in which he was appointed to the post of SMS. While the Petitioner was continuing in service, the Petitioner submitted a representation on 16.05.2021 claiming 7th CPC recommended scale of pay. Since the same was not considered by the authorities, the Petitioner approached this Court in the earlier writ petition, which was disposed of vide order dated 17.08.2021 directing the authorities to consider the representation of the Petitioner.

20. Pursuant to the order dated 17.01.2021 passed by this Court in the earlier writ petition, the Opposite Parties No.1 consider the representation of the Petitioner and vide order dated 06.11.2021, the representation of the Petitioner with a claim of scale of pay with Grade Pay of Rs.6,000/- was rejected by relying upon a letter of the ICAR dated 29.03.2011. Further, pursuant to such clarification of ICAR dated 29.03.2011, the Petitioner was granted the scale of pay with Grade Pay of Rs.5,400/- and, accordingly, his representation was disposed of. Since the clarification of ICAR vide letter dated 29.03.2011 creating two different sub-classes within one class and prescribing two different pay scales with the cut-off date of 29.03.2011 has not been challenged by the Petitioner in the present writ application. Therefore, this Court has no occasion to examine the validity of letter dated 29.03.2021 under Annexuer-7 Series.

21. On a careful analysis of the aforesaid facts, this Court is of the considered view that in view of the MoU executed between ICAR and OUAT, the ICAR shall provide 100% funding, however, the host institution, i.e., OUAT has to appoint the employees and such appointed employees shall be under the administrative control of OUAT. Indisputably, there is no statutory rule governing the selection and appointed of the staffs/officers in KVKs under the OUAT. Such appointments being under a scheme/guideline, this Court has to examine by keeping in view the MoU

and the advertisement issued for such appointment. Admittedly, the advertisement was issued by the OUAT by prescribing the scale of pay with a Grade Pay of Rs.6,000/- for the post of SMS under Annexure-1.On being duly selected by Standing Selection Committee, the Petitioners were appointed and were being paid the scale of pay which was advertised and in which they were appointed. Therefore, the contractual relationship between the Opposite Party No.1 and the present Petitioner is to be governed by the terms of advertisement and the appointment as contained under Annexure-1 and 2 in the absence of any statutory rules. So to say, the relationship is purely contractual and the same is to be governed by the terms of contract under which the Petitioners were appointed.

22. Keeping in view the aforesaid position of law, this Court has no hesitation in coming to a conclusion that the Petitioners were appointed by OUAT in a prescribed scale of pay with a Grade Pay of Rs.6,600/-. No doubt, the project undertaken by the OUAT is being 100% financed by ICAR, the OUAT is independently liable to the employees, who were engaged by them including the Petitioners. Therefore, the OUAT is legally liable to pay the scale of pay with Grade Pay that was advertised and the appointment was made subject to such scale of pay with Grade Pay. With regard to the fact that the scale of pay with Grade Pay, which is in excess of the guidelines or clarification of the ICAR, the same is to be resolved between OUAT and the ICAR in terms of the MoU. The Petitioner not being a party to the MoU is only to bound by the advertisement and the appointment letter. As has been stated earlier that since the decision of the ICAR dated 29.03.2011 has not been challenged in the present writ petitions, this Court had no occasion to consider the validity of the same. Therefore, it is upto the Opposite Parties No.1 to 3 to raise the same before the ICAR and resolve the same amicably with ICAR.

23. So far present Petitioners are concerned, this Court is of the considered view that they are entitled to the scale of pay that was promised to them through the advertisement as well as the appointment letter under Annexure-1 and 2 and, accordingly, it is directed that the Opposite Party No.1 shall pay the scale of pay of Rs.15,600/-39,100/- plus AGP of Rs.6,000/- to the Petitioners w.e.f. 01.01.2016, as a consequence of such direction, the impugned order rejecting the representation of the Petitioner vide order dated 06.11.2021 under Annexure-6 is hereby quashed. The Opposite Parties No.1 to 3 are further directed to calculate and sanction the differential arrear taking into consideration the pay scale prescribed under Annexure-1 and 2 and shall do well to pay the arrear differential amount within a period of two months from the date of communication of this judgment.

24. With the aforesaid observation and direction, the Writ Petitions are allowed. However, there shall be no order as to cost.

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2023 (II) ILR – CUT - 900

A.K. MOHAPATRA, J.

W.P.(C) NO. 27484 OF 2022

BISWAJIT PANIGRAHI …….Petitioner

-V-

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

(A) DISCIPLINARY PROCEEDING – Double Jeopardy – Odisha Police manual – Rule 824(e)(f) r/w Rule 836,837 – The petitioner has already suffered the punishment under 824(e) and (f) which amounts to two black mark – The authority initiated proceeding under Rule 836 by including the above two black mark in calculating nine black mark and imposed punishment of compulsory retirement – Whether calculating punishment suffered under 824(e)(f) for the purpose of Rule 836 is amounts to double Jeopardy? – Held, Yes – The authorities have committed an error in calculating nine black marks for initiation of a proceeding against the petitioner under Rule 836, the same would amount to imposing of double punishment for the self-offence. (Para 30-31)

(B) PRINCIPLE OF NATURAL JUSTICE – Petitioner filed time petition to file reply to second show cause notice issued by the authorities – The Disciplinary authority rejected the time petition and imposed the major punishment – Effect of – Held, the authority have not fully complied with the principle of natural justice by rejecting the time petition and not allowing the petitioner to file reply to the second show cause notice considering the seriousness and gravity of the punishment, as such the consequential imposition of punishment would not be sustainable in law. (Para-31)

Case Law Relied on and Referred to :-

1. O.A.No.2723(C) of 2008:Sankarsan Dalai Vs. Director General of Police, Odisha & Ors.

For Petitioner : M/s. S.K. Sarangi & A.K. Nayak

For Opp. Parties : Mr. Saswat Das.AGA

JUDGMENT Date of Hearing : 21.03.2023:Date of Judgment : 19.05.2023

A.K. MOHAPATRA, J.

1. The above noted Writ Petition has been filed by the Petitioner assailing the order of dismissal dated 27.05.2021 under Annexure-7 as well as order dated 20.09.2021 under Annexure-8 converting the order of dismissal to one of compulsory retirement from service by the appellate authority. Further, a prayer has also been made to provide an opportunity of hearing before passing any final order against the Petitioner in District Proceeding No.31 of 2020.

2. The factual background of the preset case in brief is that the Petitioner joined in Police service on 12.12.1991. While discharging his duties, the Petitioner was promoted to the post of A.S.I. of Police. When the Petitioner was posted at Jharsuguda, on the basis of m allegation, Jharsuguda District Proceeding No.16 of 2016 was initiated against him for violation of norms and conditions contained in Rule 3(b) of Odisha Government Servant's Conduct Rule, 1959. However, the proceeding was concluded finding the Petitioner guilty of misconduct and black marks were awarded vide order dated 05.11.2020.

3. Prior to the aforesaid Jharsuguda District Proceeding No.16 of 2016 the Petitioner was being proceeded against another Jharsuguda Proceeding No.12 of 2015 on the allegation of negligence and dereliction in his duty. The aforesaid Jharsuguda District Proceeding No.12 of 2015 was terminated by holding the Petitioner guilty of dereliction in duty and accordingly awarded punishment of withholding of increment for a period of six months without cumulative effect equivalent to one black mark vide order dated 04.04.2018.

4. Similarly while the Petitioner was posted at Kisinda Police Station, Sambalpur on some allegation Sambalpur District Proceeding No.11 dated 12.07.2019 was initiated against the Petitioner. Eventually the Petitioner was found guilty of the charges alleged against him and accordingly he was awarded with punishment of one black mark with the suspension period to be treated as such vide order dated 05.11.2020.

5. While the matter stood thus on 04.04.2018 another order was passed by the Superintendent of Police, Jharsuguda in Distict Proceeding No.13 of 2015 on the allegation that he had managed to refer a case directly to the V.S.S.Medical College & Hospital, Burla instead of District H.Qrs Hospital, Jharsuguda. Accordingly, he was also found guilty by the Superintendent of Police, Jharsuguda and a punishment of withholding of increment of six months without cumulative effect equivalent tone black mark was imposed on the Petitioner.

6. While the Petitioner was posted at Kisinda Police Station, another proceeding was initiated against him on the allegation of demanding money from the complainant to resolve a pending dispute. After enquiry the Petitioner was also found guilty in the said District Proceeding and was awarded one black mark vide order dated 19.03.2020 as a result the order dated 19.03.2020 reveals that the total black mark came to six as against the Petitioner.

7. On perusal of the Writ Petition, it was also observed that while the Petitioner was posted at Jharsuguda Outpost, near Gandhi Chowk an allegation was made that he fell down from the motorcycle due to excess consumption of alcohol. After due enquiry, the Petitioner was awarded with two black marks vide order dated 10.09.2020. As such the total black marks against the Petitioner came to eight. Finally, while the Petitioner was facing a proceeding, Sambalpur Police H.Qrs

directed to proceed to Dhenkanal for law and order duty in connection with Gaja Laxmi Puja. However, the Petitioner willfully challenged the said order stating that he is not getting his salary. Thus, treating the same as disobedience, the Petitioner once again awarded one black mark taking his total black mark nine vide order dated 15.09.2020 with accumulation of nine black mark to his discredit, the Petitioner was proceeded against in Sambalpur District Proceeding No.31 of 2020. The said District Proceeding was terminated with the recommendation of the Superintendent of Police, Sambalpur to one punishment of dismissal from service vide order dated 05.11.2020.

8. During the pendency of Sambalpur District Proceeding No.31 of 2020, the Petitioner was issued with a second show cause notice for imposition of punishment. However, the Petitioner sought for 15 days time for filing of show cause. The Disciplinary Authority rejected the prayer of the Petitioner and without considering the views/stand of the Petitioner to the second show cause notice, the proceeding was disposed of imposing the punishment of dismissal from service. Such imposition of dismissal from service was affirmed by the Superintendent of Police vide order dated 27.05.2021.

9. Being aggrieved by the order passed by the Disciplinary Authority in Sambalpur district Proceeding No.31 of 2020 the Petitioner preferred an appeal before the I.G. of Prisons and the appellate authority after considering the case of the Petitioner, converted the punishment of dismissal from service to one of compulsory retirement from service.

10. It has also been pleaded in the Writ Petition that the Sambalpur District Proceeding No.31 dated 05.11.020 was initiated on the ground that the Petitioner has accumulated nine black marks and accordingly, he is liable to be dismissed from service. Pursuant to such allegation the enquiry was held. However, from the enquiry report it would reveal that the order which was passed against the Petitioner was washed out by virtue of the fact that the award of black mark was not permanent in nature, rather was conditional to the extent that the punishment of withholding of increment for a period of six months without cumulative effect which is equivalent to one black mark. Similarly, punishments were imposed in Jharsuguda District Proceeding Nos. 12 of 2015 and 13 of 2015. Thus, on expiry of six months from the date of imposition of such punishment i.e. 04.04.2018. Both the black marks awarded against the Petitioner have lost their relevance and not to be taken into consideration while initiating the proceeding No.31 of 05.11.2020. Therefore, it has been stated in the Writ Petition that the initiation of Sambalpur District Proceeding No.31 of 2020 is unsustainable in law and as consequence thereof, the order of punishment of dismissal from service is completely arbitrary, erroneous and illegal as at the time of proceeding No.31 of 2020 was initiated, the Petitioner had effectively 7 (seven) black marks against him. In such view of the matter the imposition of penalty of dismissal from service is unsustainable in law in view of the provisions contained in Odisha Police Rule 834 and 835.

11. On the contrary, a Counter Affidavit has been filed on behalf of the State-Opposite Parties. At the outset, the Opposite Parties have denied every averments and contentions of the Petitioner in the Writ Petition and they have also questioned the maintainability of the Writ Petition. In the Counter Affidavit, it has been stated that in view of the provisions contained in P.M.Rule-836, whenever any members of the Police service below the rank of Deputy Superintendent of Police, have been awarded nine black marks, proceeding shall be drawn up against him to impose a punishment like reduction in rank or compulsory retirement or removal/dismissal from service. Accordingly, it was submitted that in obedience to the aforesaid Rule and since the Petitioner has nine black marks to his discredit, Sambalpur District Proceeding No.31 of 2020 was rightly and legally initiated against the Petitioner.

12. It has also been contended in the Counter Affidavit that after acquiring six black marks to his discredit, the Petitioner was given a warning vide letter dated 19.03.2020 to the extent that on his earning three more black marks, he shall be dismissed as per PMR Rule 837. It has also been stated that after acquiring nine black marks with the termination of Sambalpur Distric10t Proceeding No.1 dated 23.01.2020 the total number of black mark earned by the Petitioner went up to nine. Accordingly, Sambalpur Proceeding No.31 of 2020 was initiated against the Petitioner. It has also been stated in the Counter Affidavit, that a due enquiry was conducted by the Enquiry Officer, namely Amaresh Panda, the then Additional S.P., Sambalpur. After completion of enquiry, the Enquiry Officer submitted his finding holding that the Petitioner is guilty of the charges. Thereafter, after observance of the principle of natural justice, the Petitioner was awarded with punishment of dismissal from service vide order dated 27.05.2021. As such, it has been stated that there is no irregularities in counting of black marks. In support of their contentions that the Petitioner has acquired nine black marks the opposite Parties have annexed the punishment order under Annexure-A/3 to G/3.

13. It has also been stated in the Counter Affidavit that black marks are permanently on record and shall be taken into consideration in deciding the nature and extent of subsequent punishment as contemplated in PMR 837(1). Further, by referring to PMR-837(2), it has been stated in the Counter Affidavit that the order awarding black marks shall specify the number of black marks outstanding against the delinquent and when the imposition of two more black marks may result in reduction in rank of compulsory retirement or removal or dismissal or one more black mark may result in his reduction in rank or loss of increment under those Rules, the order shall contain one warning to that effect.

14. The Counter Affidavit further reveals that the Petitioner was given due warning as per PMR-837 vide letter dated 19.03.2020 which was received and acknowledged by the Petitioner on 20.03.2020, but he failed to mend his attitude and further displayed his indiscipline attitude. It has also been stated that the Petitioner did not prefer any appeal regarding violation of PMR- 834 and 835 nor did he

approach the competent authority in this regard. It has also been stated that the black marks are permanent in nature and shall remain in service record permanently till the same is set aside by the appellate authority.

15. With regard to observance of the principle of natural justice, it has been stated in the Counter Affidavit that the Enquiry Officer while conducting enquiry in the Sambalpur district Proceeding No.31 of 2020 has given adequate opportunity to the Petitioner to defend himself. Further, the Petitioner has been given two show cause notices to explain his position. So far as second show cause notice is concerned, it has been stated in the Counter affidavit that the Petitioner asked for some time which was rejected as the ground taken in the time petition was not logical. Accordingly, the Petitioner was awarded the punishment of dismissal from service for his grave misconduct and unsatisfactory work. However, on an appeal filed by the Petitioner, the punishment of dismissal from service has been converted to one of compulsory retirement from service by the appellate authority. It has also been stated that although the Petitioner challenged the Jharsuguda District Proceeding No.04 of 2016, Sambalpur District Proceeding No.11 of 2019 Prog. No.12 of 2019 and Prog. No.01 of 2020 by preferring an appeal before the appellate authority. However, the appellate authority has rejected the appeal on the ground that the same are devoid of merit. In such view of the matter, it has been pleaded by the Opposite Parties that the Writ Petition is devoid of merit and accordingly the same should be dismissed.

16. Heard Mr.S.K.Sarangi, learned senior Advocate for the Petitioner as well Sri Das, learned Additional Government Advocate. Perused the pleadings of the parties as well as the documents annexed to the Writ Petition.

17. Mr.S.K.Sarangi, learned senior counsel appearing for the Petitioner at the outset submitted that in view of the provisions contained in Rule-836 of the Police Manual accumulation of nine black marks shall entail reduction in rank or compulsory retirement or removed or dismissal. The same also provides that whenever any member of the Police below the rank of Deputy Superintendent of Police, has been awarded nine black marks, proceeding shall be drawn up against him with a view to awarding any of the above punishments. By referring to the aforesaid Rule-836, it is further contended by the learned counsel for the Petitioner that the Petitioner has been awarded nine back marks, however two black marks had already been washed out after lapse of six months from the date of passing of the orders on 04.04.2018.Therefore, Mr.Sarangi,learned senior counsel for the Petitioner contended that in effect only seven black marks are left out against the Petitioner. In such view of the matter,learned senior counsel appearing for the Petitioner submitted that drawing proceeding bearing Sambalpur District Proceeding No.31 of 2020 on the basis of Rule-836 is illegal and arbitrary.

18. In course of his argument, learned senior counsel appearing for the Petitioner referring to the order of the learned Orissa Administrative Tribunal dated

18.05.2012 in **Sankarsan Dalai-Vs.-Director General of Police, Odisha and others in O.A.No.2723(C) of 2008** submitted before this Court that the Full Bench of the Tribunal was required to interpret the Rule-835(1) which does not have the effect after expiry of period for which the reduction or forfeiture or withholding of increment has been imposed In such case the black mark shall not remain permanently under Rule 837(1). Further, it has been held that the black mark shall remain permanently under Rule 837 if the same is awarded separately as punishment provided in Clause (f) of Rue 824. The aforesaid order of the learned Tribunal dated 18.05.2012 in O.A.No.2733(C) of 2008 was challenged before this Court in W.P.(C) No.13624 of 2014 by the State. A Division bench of this Court vide order dated 01.03.2017 dismissed the Writ Petition and the order passed by the learned Tribunal referred to herein above was affirmed.

19. While dismissing the Writ Petition preferred by the State-Opposite Parties, A division Bench of this Court has observed that pursuant to the pursuant to the divergent orders passed in different Original Applications, the matter was referred to the larger Bench of the Orissa Administrative Tribunal in O.A.No.2723 (C) of 2008 to answer the reference *"as to whether in case of penalty of reduction, ,forfeiture or withholding of increments having value of black mark as prescribed in Rule-835 of Orissa Police Rules shall remain permanently in accordance with Rule 837(1) or shall cease after expiry of period of reduction, forfeiture or withholding of increments."*

The Division Bench of this Court while considering the aforesaid issue has also taken note of the observation of the Tribunal to the effect that black mark value which is in Rule 835(1) does not have effect after expiry of period for which the reduction, forfeiture or withholding of increment has been imposed. In such case, the black mark shall not remain permanently under Rule 837(1). Further the black mark shall be permanently under Rule 837 if it is awarded separately as punishment prescribed in clause (f) of Rule-824.

The order dated 01.03.2017 passed in W.P(C) No.13624 of 2014 was assailed before the Hon'ble Supreme Court by filing SLP Diary No.23651 of 2018 by the State-Opposite Parties vide order dated 13.09.2019 the aforesaid SLP was dismissed on the ground of delay. Thus, the order passed by the learned Tribunal has attained finality in the meantime.

20. To analyze the provisions contained in Rules 834, 835 836 and 837 the same has been quoted herein below:

> **834.(a) Imposition of black marks**: Black marks may be awarded alone or in addition to other punishments enumerated alone or in addition to other punishment enumerated in Rule 824 except dismissal or removal, to al officers of and below the rank of Inspector

No more than one black mark shall be awarded or any one offence except when moral turpitude can reasonably be inferred.

(b) Three black marks shall ordinarily entail reduction or forfeiture or withholding of an increment, the period of which shall be specified in the order and, after the period is over the officer will be restored to his former position. Such reduction or forfeiture or withholding of increment shall not carry any black mark value.

(c) It shall be left to the discretion of the Officer awarding the third black mark to waive the penalty noted in Clause (b) in exercising this option, he shall consider-

i) The officers for which the previous back marks were awarded.

ii) The length of time that has elapsed since they were awarded,

iii) Any good service the defaulter may have to his credit.

835. (i) Effect of black marks:- A reduction or forfeiture or withholding of increment for specific offence shall carry the following black mark value

	Black marks
A reduction etc. up to six months	1
Ditto twelve months	2
Ditto for longer than twelve months	3

836. Effect of nine black marks – Nine black marks shall entail reduction in rank or compulsory retirement or removed or dismissal. Whenever any Member of the Police below the rank of Deputy Superintendent of Police, has been awarded nine black marks, proceedings shall be drawn up against him with a view to awarding any of the above punishments.

837. (1) General Rules as to black marks – (1) Black marks shall remain permanently on record and be taken into consideration in deciding the nature and extent of subsequent punishments:

Provided that the due allowances shall be made for good service marks and any other recognition of good work on record in the delinquent's favour.

(2) The order awarding black marks shall specify the number of black marks outstanding against the delinquent, and when the imposition of two more blank marks may result in reduction in rank or compulsory retirement or removal or dismissal, or one more black mark may result in his reduction in rank or loss of increment under these rules, the order shall contain a warning to that effect."

21. A perusal of the aforesaid Rule Chapter XXV of Orissa Police Rule deals with punishments so far Rule 824 is concerned. The same provides for punishment that can be inflicted in a Disciplinary Proceeding on a police Officer below the rank of Deputy Superintendent of Police. Clause(f) of Rule 824 provides black mark or marks is a majour punishment. Further, such major punishment and censure shall be entered in the Service Book and other minor punishment may be entered if the officer awarding punishment so directs. Similarly Rule 834 provides imposition of black mark. Rule 834 (a) enumerates that the black marks may be awarded alone or

in addition to other punishments enumerated in Rule 824 except dismissal or removal. Such provision qualifies by the condition that no more than one black mark shall be awarded or any one offence except when moral turpitude can reasonably be inferred. Clause(b) of Rule 834 provides three black marks shall ordinarily entail reduction or forfeiture or withholding of an increment. The period of which shall be specified in order and if the period is over the answer will be restored to his former position. Such reduction, forfeiture or withholding of increment shall not carry any black mark value Clause(c) of Rule 834 further provides that it is left to the discretion of the officer awarding the third black mark to waive the penalty referred to in Clause(b) in exercise of his option under three contingencies which have been mentioned in the said sub-clause.

22. On a careful reading of Rule 835 which deals with effect of black marks, it appears that reduction or forfeiture or withholding of increment for subsequent offence shall carry the following black mark value.

	Black marks
Reduction etc upto six months	1
Reduction etc. upto 12 months	2
Reduction etc. upto more than 12 months	3

Similarly Rule 836 provides for effect of nine black marks. It lays down if a Police officer acquired nine black marks then proceeding shall be drawn up against him with a view to award punishment of reduction in rank/compulsory retirement/removal/dismissal from service.

23. Mr.Sarangi, learned counsel for the Petitioner appearing for the Petitioner referring to the order of the Tribunal in O.A. No.2723(C) of 2008 submitted that on a conjoint reading of Rule 824 and 835 reveals that three black marks shall entail reduction or forfeiture or withholding of an increment whereas, contrary thereto Rule 835 says that for withholding of increment for 12 months will carry value of two black marks and more than 12 months will carry value of three black marks. He further submitted that the note appended to Rule-832 provides that in giving effect to an order of punishment, care must be taken to prevent the officer being doubly punished. Therefore, he submitted that as provided in Rue-834 that punishment of black mark can be awarded or in addition to other penalties. Thus, he submitted that withholding of increment for a particular period having value of black mark, if the black mark would remain as black mark permanently under Rule-837, then the same would amount to imposing two punishments (1) withholding of increment as prescribed punishment under clause (e) of Rule 824 and (ii) black mark prescribed in Clause (f) of Rule 824. In this context, learned senior counsel further submitted before this Court that at least in two proceedings i.e. Jharsuguda District Proceeding No.13 of 2015 and Jharsuguda District Proceeding No.12 of 2015. The punishment awarded vide order dated 04.04.2018 was withholding of increment for a period of six months without cumulative effect which is equivalent to one black mark. He

further submitted that since the increment has been withheld for a period of six months in both the proceedings the authorities should not have taken into consideration the punishment, which is equivalent to one black mark. Accordingly, he further submitted that the imposition of one black mark which was in aforesaid two proceedings which have been specifically stated in the punishment would equivalent to the punishment which the Petitioner has already suffered, if given effect to, would amount to double punishment, so far as the present Petitioner is concerned. Accordingly, it was contended before this Court that the Petitioner having seven black marks to his discredit, the Sambalpur District Proceeding No.31 of 2020 under Rule 836 is unsustainable in law.

24. Mr.Sarangi, learned Senior counsel appearing for the Petitioner challenged the impugned order of dismissal from service which was subsequently modified and converted to one compulsory retirement by the appellate authority on the ground that the original r of punishment was passed without following the principle of natural justice. So far the observance of the principle of natural justice is concerned, it is submitted that in a case where a major punishment is being imposed the authorities are bound to follow the principle of natural justice, which is otherwise also a mandates of the Rules. With regard to violation of natural justice, learned counsel for the Petitioner submitted that the second show cause notice was issued to the petitioner. The Petitioner sought for 15 days time to submit his reply. However, the Disciplinary Authority rejected the application seeking time and passed the impugned order. He also assailed the impugned order on the ground that the punishment imposed under Rule-836 is equally disproportionate which is although Rule 836 provides for punishment for reduction in rank, the Disciplinary Authority imposed the harsh punishment of dismissal from service. Although the appellate authority subsequently modified the same and converted it to a compulsory retirement, the same is also disproportionate considering the serious allegations against the Petitioner. Accordingly, it was prayed that the impugned order under Annexures-7 and 8 are unsustainable in law and therefore the same should be quashed.

25. Learned Additional Government Advocate per contra, supported the impugned order under Annexure-7 and 8. It was submitted by the learned Additional Government Advocate that since the Petitioner had acquired seven black marks, the authorities have rightly initiated a proceeding under Rule-836 in the shape of Sambalpur District Proceeding No.31 of 2020. Accordingly, by following the due procedure of law, orders have been passed by the Disciplinary Authority in consonance with the Orissa Police Rules. Therefore, no fault can be found with the Opposite Parties in passing the impugned order under Annexure-7 and 8.

26. In reply to the argument advanced by Mr.Sarangi, learned Senior Counsel for the Petitioner with regard to double punishment imposed on the Petitioner i.e., stoppage of increment for six months without cumulative effect in two D.Ps as well

as imposition of one black mark, it was submitted that while imposing such punishment the authorities have acted in terms of the Rule. Since the Rule provides that imposition of punishment in the shape of reduction etc. to a particular period would have equivalent to certain number of black marks as has been enumerated in Rule 835, the authorities while imposing such punishment have taken into consideration the black marks which are equivalent to such punishment. Accordingly, the total number of black marks have been calculated and a proceeding shall be initiated under Rule 836 for dismissal of Petitioner from service. In such view of the matter, learned Additional Government Advocate submitted that the authorities have not committed any mistake in calculation of nine black marks to initiate a proceeding under the Rule-836 of the Orissa Police Rule against the Petitioner. In such view of the matter, learned Additional Government Advocate submitted that the Writ Petition is devoid of merit and accordingly the same should be dismissed.

27. Having heard learned counsel for the respective parties and upon a careful consideration of the respective pleadings, this Court is of the view that the question that falls for determination in the present Writ Petition is similar to that one which was being considered by the Tribunal i.e., as to whether in case of penalty of reduction, forfeiture or withholding of increment having value of black mark as prescribed in Rule 835 of Orissa Police Rules shall remain permanent in accordance with Rule 837(1) or shall ceased after penalty of reduction, forfeiture or withholding of increment is answered to the aforesaid question by the Full Bench of the Orissa Administrative Tribunal having been confirmed by a Division Bench of this Court and the SLP preferred by the State-Opposite Parties having been dismissed on the ground of delay, this Court has no hesitation to come to a conclusion that the finding of the Tribunal that the black mark value contained in Rule 835(1) does not have effect after expiry of period for which reduction, forfeiture or withholding has been imposed, has attained finality. On an analysis of legal position, this Court is also of the same view that has been expressed by the Tribunal which was upheld by the Division Bench of this Court otherwise in other interpretation of Rule 835 would amount to double punishment for the same offence which has been prohibited in note appended to Rue-832.

28. Applying the aforesaid legal position to the fact of the present case, this Court on a careful scrutiny of the orders passed in the District Proceeding Nos.12 of 2015 and 13 of 2015 of Jharsuguda district by the S.P. of Jharusugda found that punishment of withholding of increment for a period of six months without cumulative effect equivalent to one black mark has been imposed. Further, the petitioner having suffered punishment of withholding of increment for a period of six months without cumulative effect on both the occasions, equivalency thereof of one black mark if taken into consideration shall amount to imposing double punishment on the Petitioner. Therefore, while calculating nine black marks for the purpose of Rule 836, the Opposite parties should not have included the imposition

of black marks in District Proceeding No.12 of 2015 and 13 of 2015 of Jharsuguda district. Moreover, the imposition of black mark it is being a punishment under 824(f), the same cannot be equated with a punishment under Rule 824(e). So Clause (f) is to be taken into consideration.

29. Since the Petitioner has already suffered the punishment under 824(e) the imposition of punishment under Clause (f) of Rule 824 would be in addition to the punishment in Clause (e) of Rule 824. Therefore, this Court is of the considered view that the same would amount to imposing of double punishment for the self same offence. Accordingly, this Court is of the firm view that the two black marks should not have been taken into consideration for the purpose of a proceeding under Rule 836. The argument advanced by the leaned Additional Government Advocate renders contrary to the findings of the Tribunal which was confirmed by a Division Bench of this Court. Therefore, the contentions raised to the contrary by the learned Additional Government Advocate is hereby rejected.

30. In view of the aforesaid analysis of law as well as the facts, this Court has no hesitation in holding that the authorities have committed an error in calculating nine black marks for initiation of a proceeding against the Petitioner under Rule-836. In fact the Petitioner had accumulated seven black marks to his discredit. Moreover, this Court is of the view that the authorities have not fully complied with the principle of natural justice by rejecting the time petition and not allowing the Petitioner to file reply to the second show cause notice considering the seriousness and gravity of the punishment, as such the consequential imposition of punishment would not be unsustainable in law. On both the counts the impugned order under Annexure-7 and 8 are unsustainable in law. Accordingly, the same are hereby quashed. It is further directed that the Petitioner be reinstated in service with all consequential and service benefits.

31. Accordingly, the Writ Petition is allowed. There shall no order as to cost.

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2023 (II) ILR – CUT- 910

V. NARASINGH, J.

W.P.(C) NO.14714 OF 2012

RABI NARAYAN NANDA .....Petitioner

-V-

UTKAL GRAMYA BANK & ANR. .....Opp. Parties

(A) DISCIPLINARY PROCEEDING – The appellate authority rejected the appeal without assigning any reason – Effect of – Held, the impugned order set aside and the matter is relegated to the Appellate authority to pass a reasoned order. (Para 15-18)

(B) REASON – Necessity of – The reasons have to be cogent, clear and succinct and deprecated "Pretence" of recording such reasons on "Rubber – Stamp Reasons" Since the same cannot confirm to the norms of a just decision making process. (Para 13)

Case Laws Relied on and Referred to :-

1. (2021) 2 SCC 612 : Deputy General Manager & Ors. Vs. Ajai Kumar Srivastava
2. (2010) 9 SCC 496 : Kranti Associates Vs.Masood Ahmed Khan.

For Petitioner : Mr. A. Mishra
For Opp. Parties : Mr. P.V. Balakrishna

JUDGMENT Date of Hearing &Judgment: 03.07.2023

V. NARASINGH , J.

1. Heard learned counsel for the petitioner and learned counsel for the Opposite Parties.

2. The petitioner while working as Branch Manager of Utkal Gramya Bank, Boudh Branch instituted an FIR against one Ajay Kumar Praharaj Clerk-cum-Cashier for defalcation to the tune of Rs.25,40,586/-(Rupees twenty five lakhs forty thousand five hundred eight six only) and soon thereafter the petitioner was placed under suspension for dereliction of duty in connection with misappropriation of the Bank money by Mr. Ajay Kumar Praharaj Clerk-cum-Cashier and also on account of other irregularities, such as AGL. Gold loan accounts, other loans and advances and after enquiry show cause was issued seeking an explanation regarding proposed punishment and on receipt of the same, the following punishment was imposed vide Annexure-16.

xxx xxx xxx

> *2. After careful consideration of your above representation/ submission, as well as your submission, in the personal hearing on dt.27.08.2011, it has been decided by the undersigned in terms of Regulation No.39 (I) of Utkal Gramya Bank (Officers & Employees) Service Regulations, 2010 to impose penalty of "**Reduction of basic pay to Rs/-16,900/- for a period of one year with cumulative effect, (ii) The period of suspension will be treated as such i.e. not spent on duty and you will not earn any increment for the said period, (iii) Bank reserves the right to proceed further in the case based upon the outcome of the police/court case**."*
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> *xxx xxx xxx*

3. In terms of regulations of the Bank, the petitioner preferred an appeal against the punishment so awarded and the same was disposed of by order dated 04.04.2012 at Annexure-18.

4. Assailing the order of punishment dated 16.08.2011 and the order of Appellate Authority dated 04.04.2012 at Annexure-16 & 18 respectively, the present Writ Petition has been filed.

4-(A). It is apt to note here that inadvertently Annexure-15, show cause against proposed punishment has been assailed instead of Annexure-16, the order of punishment.

5. It is borne out from the affidavit filed by the Opposite Party-Bank that during the pendency of the Writ Petition, the Opposite Party-Bank instituted a Civil Suit in the Court of Civil Judge (Senior Division), Boudh numbered as Civil Suit No.82/2009 in which one Ajay Kumar Praharaj who was the Cashier-cum-Clerk was arrayed as defendant and the alleged pecuniary loss which was also ascribed to the present petitioner i.e Rs.25,40,586/-(Rupees twenty five lakhs forty thousand five hundred eight six only) was the subject matter of the said suit and the issues framed therein are extracted hereunder for convenience of ready reference.

4. xxx xxx xxx

1. Whether the suit is maintainable?

2. Whether the plaintiff has any cause of action to bring the suit against the defendant?

3. Whether the suit is barred by law of limitation?

4. Whether the defendant Ajaya Kumar Praharaj received case of Rs.25,33,125 on 7.1.2008 after signing in the vault register of the bank for transactions in the cash counter?

5. Whether the defendant received cash of Rs.5.41,430/- from different customers in the cash counter?

6. Whether the defendant received Rs.7400/- from the customers and he did not show the same in the receipt cum payment register?

7. Whether the defendant is liable to pay Rs.25,40586/- with Interest @ 18% P.A. to the bank?

8. Whether the properties of the defendant as per the schedule F is liable to be attached towards the satisfaction of the decreetal amount?

9. What other relief(s), the parties are entitled?

xxx xxx xxx

6. After detailed examination of materials on record, the learned Trial Court passed a judgment whereby it was held that the plaintiff Bank is entitled for a decree of Rs.25,40,586/-(Rupees twenty five lakhs forty thousand five hundred eight six only) along with an interest at the rate of 4% per annum from the defendant who is the Cashier-cum-Clerk and it is the categorical finding of the learned Trial Court that it is the defendant, who is responsible for the said loss.

7. It is on record that the Bank has filed Execution Case numbered as EP Case No.4/2015 before the learned Civil Judge (Senior Division), Boudh for execution.

8. It is the contention of the learned counsel for the petitioner, Mr. A. Mishra that the impugned order of Disciplinary Authority at Annexure-16 suffers from the vices of violation of principle of natural justice inasmuch as documents, which have

a bearing on the point at issue, were not provided to the petitioner and adequate opportunity to cross-examine the witnesses was also not afforded. The order is also assailed on the count of proportionality.

9. Per contra, learned counsel for the Opposite Party-Bank, Mr. Balakrishna submits that there are no materials on record to substantiate the allegation of violation of natural justice and it is his submission that taking into account that the petitioner was working in a financial institution in the given facts the Disciplinary Authority as well as the Appellate Authority have taken liberal view and as such keeping in view the limited jurisdiction of the Courts in the matter of interference in Disciplinary Proceeding, the Writ Petition is liable to be rejected and in this context learned counsel for the Opposite Party-Bank relies on the judgment of the apex Court in the case of **Deputy General Manager and Others vs. Ajai Kumar Srivastava reported in (2021) 2 SCC 612**.

10. Assailing the said order of the Disciplinary Authority, the petitioner preferred an appeal and the memorandum of appeal is also on record at Annexure-17. The relevant paragraphs of the appeal is quoted hereunder for convenience of ready reference.

> *"A-(1)- xxx xxx xxx*
>
> *(2)- The vital documents on which I intend to rely for my defense was not provided to me intentionally on the ground that those are not relevant to the charges, the details of which was conveyed to the Chairman & D.A. vide my letter Dt.10.12.2010.a copy of which is enclosed here with for your kind reference & perusal.*
>
> *(3)- xxx xxx xxx*
>
> *(4)- xxx xxx xxx*
>
> *(5)- xxx xxx xxx*
>
> *(6)- xxx xxx xxx*
>
> *B-(1)- xxx xxx xxx*
>
> *(2)- The incident of Misappropriation of cash by Sri A.K. Praharaj C.C. was an event of a particular day i.e. on dt.07.01.08 as per all available records including the F.I.R.. lodged by the Bank at Boudh Police Station. Incidentally, at no point of time or no where Sri Praharaj had ventilated/stated my involvement in any manner what so ever in the misappropriation of Rs.2540586/-on Dt. 07.01.08. Besides, I have also not been charge sheeted for misappropriation for the said amount nor any involvement in that misappropriation.*
>
> *Thus when Bank has not suffered any financial loss, it is an arbitrary decision of the D.A to put me in to financial loss by reducing my basic to Rs.16900/- which is almost the initial basic pay of a scale -1 officer at the verge of my service tenure at the bank.*
>
> *C- xxx xxx xxx*

10. The Appellate Authority passed the order at Annexure-18, which is extracted hereunder.

> *xxx xxx xxx*
>
> *<u>BANK'S BOUDH BRANCH DISCIPLINARY PROCEEDINGS APPEAL AGAINST THE IMPOSED PENALTY</u>*

Please refer to your appeal dated 18th November 2011.

2. The Appellate Authority i.e. the Bank's Board of Directors thoroughly examined your appeal and upheld the penalty imposed on you by the Competent Authority and Chairman 3.4.12 vide Head Office letter No. VIGIL/356(A) dt.28.09.2011.

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

11. Referring to the aforesaid order passed by the Appellate Authority, it is submitted by the learned counsel for the petitioner Mr. Mishra that ex-facie, the same suffers from the vice of lack of reasoning and on that account alone the appellate order is liable to be set aside and in this context he relies on the judgment of the apex Court ***Kranti Associates vs. Masood Ahmed Khan reported in (2010) 9 SCC 496.***

12. After taking note of all the judgments, the apex Court in the case of Kranti Associates (Supra) reiterated the seminal importance of recording of reasons even while taking an administrative decision, if such decision affects anyone prejudicially. Paragraph-47 of the said judgment summarizing the decision of the Court is extracted hereunder:-

xxx xxx xxx

47. Summarising the above discussion this Court holds;

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the sole of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been

objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support decisions must be cogent, clear and succinct. A pretence of reasons "rubber-stamp reasons" is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor)

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain EHRR, at 562 para 29 and Anya v. University of Oxford, wherein the Court referred to Article 6 of the European Convention of Human Rights which requires,

"adequate and intelligent reasons must be given for judicial decisions."

(0) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".

xxx xxx xxx

13. In Paragraph-L of the above summary, the apex Court has been categorical that the reasons have to be cogent, clear and succinct and deprecated "pretence" of recording such reasons or "rubber-stamp reasons" since the same cannot conform to the norms of a just decision making process.

14. Examined on the touch stone of the said judgment of **Kranti Associates (Supra)**, this Court find force in the submission of the learned counsel for the petitioner Mr. Mishra that the appellate order is liable to be set aside on the ground of lack of reasoning.

15. Relating to the quashing of the order passed by the Disciplinary Authority, it is worth noting that the charges faced by the petitioner admittedly not confined only to misappropriation of Bank's money worthy Rs.25,40,586/- alone and hence the plea for quashing the Disciplinary Proceeding and the punishment imposed vide Annexure-16 (wrongly stated as Annexure-15 as noted) on the ground of violation of natural justice and proportionality is untenable and does not merit consideration in view of the law laid down by the apex Court in the case of **Deputy General Manager (Supra)**, wherein the contours of exercise of power by constitutional Courts while dealing with Disciplinary Proceeding has been dealt with.

16. Paragraph-28 thereof is extracted hereunder for convenience of ready reference:-

xxx xxx xxx

> *"The constitutional court while exercising its jurisdiction of judicial review under Article 226 or Article 136 of the Constitution would not interfere with the findings of fact arrived at in the departmental enquiry proceedings except in a case of mala fides or perversity i.e. where there is no evidence to support a finding or where a finding is such that no man acting reasonably and with objectivity could have arrived at those findings and so long as there is some evidence to support the conclusion arrived at by the departmental authority, the same has to be sustained."*

xxx xxx xxx

17. On close scrutiny of materials on record and keeping in view the law laid down by the apex Court in the case of ***Deputy General Manager (Supra)*** and paragraph-28 thereof, extracted hereinabove, this Court is not persuaded to hold that the order of Disciplinary Authority is liable to be quashed.

18. On a conspectus of materials on record, this Court is of the considered view that ends of justice would be sub served, if the matter is relegated to the Appellate Authority, to pass a reasoned order.

18-(A). It shall be open to the petitioner to file additional memorandum of appeal if so advised to bring on record the relevant materials which would enable the Appellate Authority to come to a cogent finding.

19. While rehearing the appeal of the petitioner, the Appellate Authority shall also take into account the judgment passed by the learned Civil Judge adverted to hereinabove, directing for recovery from the defendant Ajay Kumar Praharaj in the light of categorical finding that the financial irregularity is solely attributed to him in as much as, it is now on record that in the process of the delinquency committed by the said Praharaj, the Bank suffered the pecuniary loss. As such, prima facie the petitioner cannot be attributed with any negligence in the matter of causing any pecuniary loss. And, as noted execution case has already been initiated for recovering the said loss.

20. This Court has no iota of doubt that the Appellate Authority shall apply its mind and give due weightage to such finding of the Civil Court, pass reasoned order on examination of the statement of witnesses and through scrutiny of documents by providing personal hearing to the petitioner or his authorized representative and also taking into account other contentions in the memorandum of Appeal and the additional memorandum of Appeal, if petitioner chooses to file the same.

21. Since it is stated that the petitioner has retired since 2018, the Appellate Authority shall do well to dispose of the appeal within a period of six months from the date of receipt/production of the copy of this order.

22. For the reasons recorded above, the order of the Appellate Authority at Annexure-18 is hereby set aside.

23. Accordingly, the Writ Petition stands disposed of. No costs.

2023 (II) ILR – CUT - 917

V. NARASINGH, J.

BLAPL NO.468 OF 2023

VIKASH KUMAR …….Petitioner

-V-

STATE OF ODISHA …….Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Bail – Offences under sections 420/336/483/486/34/326/465/467/471/120-B of IPC – Whether detention of an accused in respect of whom the investigation has prima facie attained finality as a virtual bait to arrest other co-accused is justified? – Held, No – There is no further justification for the petitioner to be in custody – Hence it is directed that the petitioner shall be released on bail. (Para-18)

Case Law Relied on and Referred to :-

1. 2022 (10) SCC 51: Satender Kumar Antil Vs. Central Bureau of Investigation & Anr.

For Petitioner : Mr. Milan Kanungo, Sr. Adv.
Mr. S. Das

For Opp. Party : Mr. S.K. Nayak, AGA

JUDGMENT Date of Hearing:13.07.2023 & Date of Judgment: 17.07.2023

V. NARASINGH , J.

1. Heard Mr. M. Kanungo, learned Senior Counsel for the petitioner and Mr. S.K. Nayak, learned Additional Government Advocate for the State.

2. The petitioner is an accused in connection with G.R. Case No.1168 of 2022, pending in the file of the learned S.D.J.M.(S), Cuttack, arising out of Purighat P.S. Case No.221 of 2022 for alleged commission of offences under Sections 420/336/483/486/34/326/465/467/471/120-B of IPC.

3. Being aggrieved by the rejection of his application for bail U/s.439 Cr.P.C. by the learned Additional Sessions Judge-cum-Special Judge, Cuttack, by order dated 10.01.2023 in the aforementioned case, the present BLAPL has been filed.

4. Petitioner was taken into custody from Patna, Bihar on 06.12.2022 on the accusation that he supplied spurious drugs "TELMA-40" and "TELMA-AM" to one Rahul Ku. Kyal of M/s.V.R. Drug Agencies and others.

5. It is the submission of Mr. Kanungo, learned Senior counsel that the implication of the petitioner is primarily on account of the statement made by the co-accused Rahul Kumar Kyal and he having been released on bail by this Court by order dated 02.11.2022 in BLAPL No.9798 of 2022, the petitioner is entitled to be released inter alia on the ground of parity and more so as charge sheet has already

been submitted on 09.03.2023. And, further continuance of the petitioner in custody is punitive.

6. Mr. Nayak, learned Additional Government Advocate submits that though preliminary charge sheet has been filed, further investigation has been kept open under Section 173(8) of Cr.P.C. since larger conspiracy to unearth the nexus between the manufacturers, the stockist and retailers are yet to be unearthed. And, primarily because of non-cooperation of the present petitioner and other co-accused, the investigation has hit a road block and if the petitioner is released at this stage, it would be almost impossible to lay hands on the manufacturer and in the process well being of the patients using the drugs in question would be at peril.

7. The case at hand was instituted at the instance of one Mr. Tusar Ranjan Panigrahi, Drugs Inspector, Odisha, Cuttack-I Range, Cuttack on the accusation that spurious medicines with the brand name "TELMA-40" and "TELMA-AM" supposed to have been manufactured by M/s. Glenmark Pharmaceuticals Ltd. have been seized from the custody of one co-accused Rahul Ku. Kyal from M/s.V.R. Drug Agencies.

8. Taking into account that the drugs in question are normally taken by patients with chronic cardiovascular diseases and can be life threatening. Investigation was taken up in right earnest.

9. During the course of such investigation, the retailer who sold the drugs across the counter, co-accused was taken into custody and has since been released on bail by this Court, as noted above.

10. The allegation against the present petitioner is that the co-accused Kyal had deposited amounts against purchase of the said spurious drugs in the account of the petitioner bearing No.030705009117 of ICICI Bank, Patna,Bihar which stands in the name of the present petitioner.

10.A. And, that the present petitioner connived with other co-accused Alok Kumar Mishra (BLAPL No. 11263 and 11666 of 2022), Regional Sales Manager of M/s. Wallace Pharmaceuticals Ltd. and one Harish Ku. Mishra (BLAPL No.11345 and 11714 of 2022) who initially had a drug licence bearing No.BR-GYU-106861 issued by the Drugs Controller, Bihar which though was valid from 31.01.2019 to 29.01.2024 which, he surrendered in February 2022, sold drugs knowing them to be spurious to the co-accused Kyal, Damodar Choudhury and Sanjay Jalan.

11 It is apt to note here that said Damodar Choudhury and Sanjay Jalan have since been released on bail by orders dated 12.04.2023 and 02.11.2022 in BLAPL No.2298 of 2023 and 9548 of 2022 respectively.

12. The case at hand was listed on 12.04.2023 and was adjourned to facilitate further investigation, keeping in view the inter-state ramifications and taking into account the submission of the learned Public Prosecutor that because of non-

corporation of the petitioner there is no progress to identify the manufacturer. In the meanwhile, three months has elapsed.

13. During the course of submission,Mr.Nayak, learned Additional Government Advocate for the State reiterated his submission that the offence in the case at hand has three stages that is preparation of the spurious drugs, procurement thereof and supply. According to him unless the manufacturer is identified and taken to custody the circulation of spurious drugs cannot be arrested.

14. Learned senior counsel appearing for the petitioner on the other hand states that primarily the accusation against the present petitioner is on the basis of statement made by the co-accused and the transactions inter se between the petitioner and the co-accused. And, the said co-accused having been released on bail, the petitioner is entitled to be released.

It is further submitted that petitioner is the first offender.

15. It is on record that the petitioner was taken on remand twice. But unfortunately, the investigating agencies have not been able to identify the manufacturer.

16. The detention of an accused in respect of whom the investigation has prima facie attained finality as a virtual bait to arrest other accused who is at large can never be countenanced. It militates against the cardinal principle of bail being the right and negation of the same being the exception in case of this nature in which accusation is under the penal code and there is no inherent embargo to consider bail, as in certain given circumstance under the special acts like NDPS etc.

17. The assessment of parity recently engaged the attention of the Apex Court in the case of ***Satender Kumar Antil vrs. Central Bureau of Investigation & Another, reported in 2022 (10) SCC 51***. The relevant Para is extracted hereunder;

> "**General right to bail of accused persons and others**.
>
> 4.-(I) xxx xxx xxx
>
> 70. xxx xxx xxx
>
> 71. Uniformity and certainty in the decisions of the court are the foundations of judicial dispensation. Persons accused with same offense shall never be treated differently either by the same court or by the same or different courts. Such an action though by an exercise of discretion despite being a judicial one would be a grave affront to Articles 14 and 15 of the Constitution of India."

18. In the considered view of this Court and keeping in view constitutional guarantee against self incrimination, keeping in view the dictum of the Apex Court in ***Satender Kumar Antil (Supra)*** there is no further justification for the petitioner to be in custody notwithstanding that the investigation has been kept open under Section 173(8) of Cr.P.C., only to facilitate the arrest of the elusive manufacturer and more so, when the co-accused persons have since been released on bail. The

petitioner can be put to terms to allay the legitimate concern of the learned AGA for the State, Mr. Nayak.

19. Hence, it is directed that the petitioner shall be released on bail on terms to be fixed by the learned Court in seisin so as to ensure his presence during trial subject to verification of criminal antecedent of any nature save and except Purighat P.S. Case No.222 of 2022. One of the sureties shall be immediate member of the family who in addition to the sureties so fixed shall execute a P.R. bond.

20. Keeping in view the nature of allegation and the petitioner not being a permanent resident within the territorial jurisdiction of the Court in seisin, balancing the societal interest represented by the investigating agency vis-à-vis individual right to freedom, additionally, it is directed that the petitioner shall not leave the jurisdiction of the learned Court in seisin for next three months and thereafter, only with the express permission of the learned Court in seisin. Further

i. petitioner shall surrender his passport, if any.

ii. shall appear once every two weeks before the I.O. in the ongoing investigation for the next three months and

iii. thereafter as and when summoned.

The I.O. shall intimate the Court in seisin the date on which the petitioner's presence is being sought.

21. Accordingly, the BLAPL stands disposed of.

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2023 (II) ILR – CUT- 920

BIRAJA PRASANNA SATAPATHY, J.

W.P.(C) NO.15246 OF 2009
WITH
W.P.(C) NO.31115 OF 2022

BIKRAM KUMAR PATTNAIK .....Petitioner

-V-

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

SERVICE LAW – Termination from service without giving reasonable opportunity of hearing – Effect of – Held, on the ground of non-compliance of the principle of natural justice, the findings of the enquiry and consequential direction issued by the authority for termination of service of petitioner is not sustainable in the eyes of law.
(Para-10.1)

For Petitioner : M/s. Sadashiv Patra

For Opp. Parties : M/s. B. Dash
Mr. A.K.Swain
Mr. S.K. Samal, Addl. Govt. Adv.

ORDER Date of Hearing: 09.05.2023 : Date of Order: 27.06.2023

BIRAJA PRASANNA SATAPATHY, J.

1. Since the issue involves the Writ Petitions relates to appointment and continuance of Lecturer in English in Garh Banikilo College, both the matters were heard analogously and disposed of by the present common order.

2. While W.P.(C) No.15246 of 2009 has been filed by the Petitioner Bikram Kumar Pattanaik challenging the order of termination terminating the Petitioner from his service w.e.f 09.10.2009 vide office order dt.09.10.2009 issued by the Opp. Party No.4 under Annexure-4, W.P.(C) No.31115 of 2022 was filed by Shri Rajanikanta Sethi challenging the order passed by the self-same Opp. Party No.4 on 28.10.2022, wherein the Petitioner in W.P.(C) No.15246 of 2009 was allowed to join in his previous post i.e. Lecturer in English in the College in question.

3. The factual matrix giving rise to filing of the Writ Petition in W.P.(C) No.15246 of 2009 is that the Petitioner on being duly selected was appointed as a Lecturer in English in Garh Banikilo College vide Officer order dt.11.09.1996 so issued under Annexure-1. Pursuant to the order issued under Annexure-1, the Petitioner joined as a Lecturer in English on the very same date. While so continuing vide letter dt.29.09.2009 under Annexure-2, Opp. Party No.3 directed the President of the Governing body of the College to terminate the services of the Petitioner and basing on the said direction, the Petitioner was terminated vide the impugned office order dt.09.10.2009 under Annexure-4.

4. Learned counsel appearing for the Petitioner in W.P.(C) 15246 of 2009 contended that the Petitioner was earlier continuing as a Lecturer in English in S.L.A. College, Godipada w.e.f 11.03.1996. But on being selected for his appointment as a Lecturer in English in Garh Banikilo College, the Petitioner submitted his resignation from S.L.A College on 09.09.1996 vide Annexure-6. The Petitioner after submitting his resignation vide Annexure-6 joined in the College on 11.09.1996 in terms of the Office order issued under Annexure-1.

4.1. It is contended that while continuing as such w.e.f 11.09.1996 when one student committed suicide, initially UD Case No.03 of 2007 was registered. But subsequently, when on 04.12.2007, an FIR was lodged by implicating the Petitioner with regard to the said crime, Nayagarh P.S. Case No.391 of 2007 was registered against the Petitioner for the offences under Sections 302/306/380 & 404 of the Indian Penal Code. But in the said matter, charge-sheet was submitted for the offences under Sections 306/380/404 of the I.P.C and the Petitioner faced the trial

before the learned Adhoc Additional District and Sessions Judge, Nayagarh in S.T. Case No.16/132 of 2009/08.

4.2. It is contended that because of his implication in Nayagarh P.S. Case No.391 of 2007 basing on the F.I.R lodged on 04.12.2007, the Petitioner when remained on leave, the Petitioner vide Office order dt.12.02.2008 was placed under suspension. After being placed under suspension, an enquiry was conducted with regard to the continuance of the Petitioner on unauthorized leave w.e.f 07.11.2007 and one Dr. N.C.Patra, Principal, Women's College, Khurda conducted the enquiry and submitted the enquiry report on 04.09.2008. But on the face of such enquiry report submitted on 04.09.2008, the Governing body of the College in its proceeding dt.08.03.2009 resolved to re-instate the Petitioner by withdrawing the order of suspension. In terms of such decision of the Governing body, the Petitioner vide letter dt.13.03.2009 under Annexure-5 was allowed to join in his work. In terms of the letter issued under Annexure-5, the Petitioner though submitted his joining report on 14.03.2009 before Opp. Party No.5, but the same was not accepted and accordingly the Petitioner submitted the said joining before the Secretary of the Governing body with due acceptance.

4.3. It is also contended that subsequently vide letter dt.18.03.2009, the Governing body of the College while submitting the proposal of the employees of the College for the purpose of release of Block Grant, also submitted the name of the Petitioner as against the post of Lecturer in English by showing his date of joining as 11.09.1996.

4.4. It is submitted that while the matter stood thus, Opp. Party No.3 vide letter dt.29.09.2009 under Annexure-2 when on the one hand directed the President of the Governing body to terminate the services of the Petitioner, but on the other hand, vide another letter issued on 29.09.2009 under Annexure-3 appointed Sub-Collector, Nayagarh as the Special Officer of the College in terms of the provision contained under Section 7-A (3) of the Orissa Education Act, 1969. On being so appointed to discharge the function of the Governing body and taking into account, the direction contained in Annexure-2, the Petitioner was terminated from his service vide Office Order dt.09.10.2009 under Annexure-4. The Petitioner challenging the direction contained in Annexure-2 and the order of termination issued under Annexure-4 approached this Court in W.P(C) No.15246 of 2009.

4.5. Learned counsel for the Petitioner contended that since the Petitioner was duly appointed as a Lecturer in English where he joined on 11.10.1996, the Petitioner should not have been terminated vide order under Annexure-4 without following the principle of natural justice and without giving reasonable opportunity of hearing to the Petitioner. Since the same was not followed and the Petitioner was straightaway terminated from his service basing on the direction issued under Annexure-2 by the Opp. Party No.3, the order of termination so issued under Annexure-4 is not sustainable in the eye of law.

5. On being noticed, while Opp. Party No.3 filed his counter affidavit supporting the action with regard to issuance of Annuexres-2 to 4. Opp. Party Nos.4 & 5 filed a joint counter affidavit inter alia stating therein that the Petitioner was rightly terminated from his service basing on the enquiry conducted by Opp. Party No.3 to the complaint made by the villagers under Annexure-A/3 to the counter so filed by Opp. Party No.3.

6. Learned Additional Government Advocate while supporting the action of the Opp. Party No.3 made his submission basing on the stand taken in the counter affidavit so filed by the Opp. Party No.3.

6.1. It is contended that basing on a public petition received by Opp. Party No.3 on 01.08.2009 vide Annexures-A/3, Opp. Party No.3 conducted an enquiry and in the said enquiry it was found that the appointment of the Petitioner is not legal as on the date of his appointment on 11.09.1996, he was serving as a Lecturer in English in S.L.A College, Godipada as reflected vide Annexure-B/3.

6.2. It is also contended that since the Governing body of the College neglected to perform his duty, Opp. Party No.3 in view of the provision contained under Section 7A(3) of the Act appointed the Sub-Collector as the Special Officer to discharge the duty of the Governing body vide Annexure-3 and vide Annexure-2 since a direction was already issued to the Governing body to terminate the services of the Petitioner, the Special Officer-Opp. Party No.4 basing on the said direction terminated the Petitioner from his service vide Office Order dt.09.10.2009 under Annexure-4.

6.3. It is also contended that not only by the time the Petitioner was appointed in Garh Banikilo College on 11.09.1996, he was serving as a lecturer in English in S.L.A College, Godipada with the date of joining as 11.03.1996 and he continued in the said College till 01.07.2004 as reflected in Annexure-B/3, but also the Petitioner had not the required percentage of mark in M.A. Since during enquiry conducted by the Opp. Party No.3, all these things came to light, Opp. Party No.3 vide Annexure-2 directed for termination of the services of the Petitioner. It is also contended that the continuance of the Petitioner in S.L.A College, Godipada beyond 11.09.1996 is also reflected vide different communications issued under Annexure-B/3 series.

6.4. It is also contended that since the Secretary of the Governing Body of the College did not comply the direction issued by the Opp. Party No.3 in his letter dt.21.08.2009 as reflected in Annexure-C/3, Opp. Party No.3 in view of the provisions contained under Seciton-7A(3) of the Act while superseding the Governing body, appointed the Sub-Collector-Opp. Party No.4 as the Special Officer to discharge the powers and functions of the Governing body. It is accordingly, contended that since the very appointment of the Petitioner on 11.09.1996 is not just and proper and the Petitioner was not having the required percentage of mark which was found by the Opp. Party No.3 while causing the

enquiry on Annexure-A/3, the direction issued under Annexure-2 is not liable for interference and so also the order of termination issued under Annexure-4.

7. Mr. B. Dash, learned counsel appearing for Opp. Party Nos.4 & 5 on the other hand made his submission basing on the stand taken in the counter.

7.1. It is contended that by the time, the Petitioner was appointed as a Lecturer in English in Garh Banikilo College on 11.09.1996 under Annexure-1, the Petitioner was continuing as such in SLA College, Godipada w.e.f 11.03.1996 till 01.07.2004. Therefore, the very appointment of the Petitioner in Garh Banikilo College on 11.09.1996 is not a valid appointment as the Petitioner by then was in service in S.L.A College, Godipada.

7.2. Mr. Dash further contended that since the Governing body of the College did not follow the direction of the Opp. Party No.3 to comply with the direction issued under Annexure-2, the said Opp. Party No.3 in view of the specific provision contained under Section 7A(3) of the Act superseded the Governing body by appointing Opp. Party No.4 as the Special Officer to discharge the powers and functions of the Governing body vide Annexure-3.

7.3. On assuming such charge of the Governing body, Opp. Party No.4 in view of the direction issued to the Governing Body under Annexure-2 rightly terminated the Petitioner vide order under Annexure-4. It is also contended that the order of termination so passed under Annexure-4 being an appealable one, the Petitioner should not have approached this Court in the Writ Petition instead of availing the alternative remedy of appeal.

7.4. Mr. Dash, further contended that the student of the College also made a complaint before the Principal on 25.01.2008 under Annexure-B/4 seeking the termination of the Petitioner from his service. It is also contended that prior to submission of Annexure-B/4, since the Petitioner remained on unauthorized leave w.e.f 07.11.2007, one Dr. Nrusingh Charan Patra, Principal Women's College, Khurda was directed to cause an enquiry on the affairs of the Petitioner. The said Nrusingha Charan Patra after conducting due enquiry, submitted his report on 04.09.2008 under Annexure-C/4. In the said report, he found that the Petitioner has not secured the required percentage of mark in his M.A and he also is not attending the college. Mr. Dash, accordingly contended that taking into account the complaint made by the students of the College under Annexure-B/4 and the report submitted under Annexure-C/4, Opp. Party No.3 rightly directed the Governing body to terminate the Petitioner from his service and it requires no interference.

8. Mr. Ashok Kumar Swain, learned counsel appearing for the Petitioner in W.P.(C) No.31115 of 2022 on the other hand contended that the Petitioner in W.P.(C) No.15246 of 2009 after being terminated from his service vide order under Annexure-4, the Petitioner in W.P.(C) No.31115 of 2022 was duly selected and

appointed as a Lecturer in English vide order of appointment issued by the Principal of the College on 07.05.2010 under Annexure-6 series. The Petitioner in terms of the said order joined in the College on 07.05.2010. It is also contended that while continuing as such w.e.f 07.05.2010, when the Petitioner came across the order dt.28.10.2022 so passed by the Sub-Collector-cum-Special Officer under Annexure-9 permitting the petitioner in W.P.(C) No.15246 of 2009 to join in his post, the Petitioner being aggrieved by such order is before this Court challenging the same.

8.1. Mr. A.K. Swain, learned counsel appearing for the Petitioner contended that since the Petitioner in W.P.(C) No.15246 of 2009 was continuing as a Lecturer in English in S.L.A College, Godipada by the time he was appointed vide order under Annexure-1, the said order is not legal and justified. In support of the continuance of the Petitioner in other college in S.L.A College, Godipada, the Petitioner has submitted various documents under Annexure-1 series as well as the letter issued by the Principal, S.L.A College, Godipada wherein the date of termination has been shown as 1.07.2004 with date of appointment as 11.03.1996. It is also contended that on being so terminated, the Petitioner after facing due recruitment process since was appointed vide order dt.07.05.2010 and is continuing as such till date, the Petitioner will be seriously prejudiced, if the Petitioner in the other case in terms of the impugned order under Annexure-9 is allowed to join in the College as Lecturer in English. Mr. Swain also contended that the order under Annexure-9 has been passed by Opp. Party No.4 on being influenced by the Petitioner in the other case. It is accordingly contended that in view of such continuance of the Petitioner w.e.f 07.05.2010, the Petitioner in the other case is not required to be allowed to join in terms of the order under Annexure-9 and the said order is not sustainable in the eye of law.

9. I have heard Mr. Sadashiv Patra, learned counsel appearing for the Petitioner in W.P.(C) No.15246 of 2009, Mr. B. Dash, learned counsel appearing for Opp. Party Nos.4 & 5, Mr. Ashok Kumar Swain, learned counsel appearing for the Petitioner in W.P.(C) No.31115 of 2022 and Mr. S.K. Samal, learned Additional Government Advocate appearing for the State-Opp. Party.

On the consent of the learned counsel appearing for the parties, the matter was finally heard at the stage of admission and disposed of by the present order.

10. Having heard learned counsel for the parties and after going through the materials available on record, this Court finds that the Petitioner in W.P.(C) No.15246 of 2009 was appointed as a Lecturer in English in Garh Banikilo College vide Order dt.11.09.1996 under Annexure-1.Pursuant to the said order, the Petitioner in the said case was not only allowed to join as a Lecturer in English, but also he was allowed to continue as such. The dispute arose only when the Petitioner in the said case was implicated in Nayagarh P.S. Case No.391 of 2007 basing on the FIR lodged against the Petitioner on 04.12.2007. The complaint made by the students under Annexure-B/4 to the counter as well as by the villagers under Annexure-A/3

to the counter are all made after the Petitioner was implicated in the aforesaid police case.

10.1. This Court further finds that basing on the compliant made under Annexure-A/3, the Opp. Party No.3 though conducted the enquiry and accordingly issued the direction directing for termination of the Petitioner on various grounds, vide letter dt.29.10.2009 under Annexure-2 but no document is filed either by Opp. Party No.3 or by Opp. Party Nos.4 & 5 showing that the Petitioner in W.P.(C) No.15246 of 2009 was show-caused and was given an opportunity of hearing in the enquiry so conducted by Opp. Party No.3 basing on Annexure-A/3. Since the Petitioner in W.P.(C) No.15246 of 2009 was never afforded an opportunity of hearing by the Opp. Party No.3, on the ground of non-compliance of the principle of natural justice, the finding of the said enquiry and consequential direction issued by the Opp. Party No.3 on 29.09.2009 under Annexure-2, as per the considered view of this Court, is not sustainable in the eye of law.

10.2. This Court further finds that while directing the Governing body of the College to terminate the Petitioner vide letter dt.29.09.2009 under Annexure-2, Opp. Party No.3 on the self same date dissolved the Governing body of the College by appointing the Sub-Collector as the Special Officer to discharge the function of the Governing Body vide letter dt.29.09.2009 under Annexure-3. Such action of the Opp. Party No.3 in issuing Annexure-3, as per considered view of this Court is not a judicious one as both Annexure-2 and Annexure-3 were issued on a particular day. The Governing Body of the College should have been given reasonable time to comply with Annexure-2, prior to taking action under Section 7-A(3) with issuance of Annexure-3. Since the same was not followed by Opp. Party NO.3, the action of the Opp. Party No.3 in issuing Annexure-3 on the very same day Annexure-2 was issued, is not legal and justified.

10.3. It is also found from the record that since the Petitioner was terminated basing on the direction issued by the Opp. Party No.3 under Annexure-2 and as per the provisions contained under the Act, the appeal also lies to the said Opp. Party No.3, no fruitful purpose will be served by directing the Petitioner to prefer an appeal against the order of termination before the authority who had directed for such termination of the Petitioner.

Not only that, in view of the long pendency of the Writ Petition before this Court, for the last 14 years, this Court is of the opinion that after keeping the matter pending for so many years, it is not just and proper to relegate the Petitioner to the appellate authority at this point of time.

10.4. It is also found from the record that after being placed under suspension vide order dt.12.02.2008, the Governing Body of the College in its proceeding dt.08.03.2009 though resolved to allow the Petitioner to join in his duty and accordingly the Secretary of the College vide Annexure-5 permitted the Petitioner to

join, but the Petitioner was not allowed to join by the Principal of the College even though he submitted his joining on 14.03.2009. Not only that, the order passed by the Opp. Party No.4 on 28.10.2022 was also not acted upon by the Principal of the College by allowing the Petitioner to join in his duty. Even though the Petitioner in W.P.(C)No.31115 of 2022 has challenged the order dt.28.10.2022 so issued by the Sub-Collector, but this Court finds that the Writ Petition in W.P.(C) No.31115 of 2022 was never admitted with issuance of notice and no interim order is also there.

10.5. It is also found from the record that the Petitioner in W.P.(C) No.31115 of 2022 though contends that basing on letter dt.25.03.2010 so issued by Opp. Party No.3, under Annexure-5, the Petitioner was appointed vide order dt.07.05.2010 but from the documents filed by the said Petitioner pursuant to the order passed by this Court on 06.04.2023, it is found that much prior to issuance of Annexure-5 in W.P.(C) No.31115 of 2022, the Principal of the College issued an advertisement on 11.11.2009 and the Petitioner in terms of the said advertisement appeared the interview for the post of Lecturer in English and was appointed vide order dt.07.05.2010. Therefore, it is the view of this Court that prior to receipt of Annexure-5, since the Principal of the College suo motu issued the advertisement and conducted the interview, the said selection process is not sustainable in the eye of law. No document has also been filed by the Petitioner in W.P.(C) No. 31115 of 2022 showing the permission accorded to the Principal by the Governing body of the college permitting him to issue such an advertisement on 11.11.2009. Since the Petitioner in W.P.(C) No.31115 of 2022 has been appointed without facing due selection process, the appointment of the Petitioner as per the considered view of this Court is also not legal and justified. Basing on such an order of appointment, the Petitioner in W.P(C) No.31115 of 2022 is not entitled to get any relief.

10.6. Since the Petitioner in W.P.(C) No.15246 of 2009, in complete violation of the Principle of natural justice was terminated from his service vide order under Annexure-4 basing on the direction issued under Annexure-2, this Court is inclined to quash the order under Annexures-2 & 4 and quash the same accordingly. This Court while allowing the allowing the prayer made in W.P.(C) No.15246 of 2009, dismiss the Writ Petition in W.P.(C) No.31115 of 2022.

It is needless to mention that in view of the order passed by the Sub-Collector-cum-Special Officer on 28.10.2022, the Principal of the College is directed to allow the Petitioner in W.P.(C) No.15246 of 2009 to join in his work within a period of fifteen(15) days from the date of receipt of this order.

Both the Writ Petitions are accordingly disposed of.

The photocopy of this order be placed in the connected case i.e. W.P.(C) No.3115 of 2022.

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2023 (II) ILR – CUT - 928

BIRAJA PRASANNA SATAPATHY, J.

W.P.(C) NO.2808 OF 2022

Dr. SUBAS CHANDRA PARIJA .....Petitioner

-V-

CHANCELLOR, OUAT, BBSR & ORS .....Opp. Parties

SERVICE LAW – Appointment – Petitioner applied for the post of Dean, faculty of Veterinary Science and Animal Husbandry, OUAT as per the circular 22.06.2021 – The petitioner was also appear before the standing selection committee and participate in the selection process – Whether the petitioner is permitted to challenge the circular issued by the authority as well as the selection process? – Held, No. – Since the petitioner in terms of the circular made his application and participated in the selection process, is not permitted to challenge the stipulation contained in the circulars. (Para 8-8.3)

Case Laws Relied on and Referred to :-

1. 2016 (1) SCC 454 : Madras Institute of Development Studies & Anr. Vs. Dr. K. Sivasubramaniyan & Ors.
2. 2010 (Suppl. II)OLR 437 : Kunilata Dutta Vs. State of Orissa & Ors.

For Petitioner : M/s.D.P. Nanda, Sr.Adv.

For Opp. Parties : M/s.P.M. Pattajoshi
Mr. M.K. Balabantaray, AGA
Mr. K.P. Mishra, Sr.Adv.

JUDGMENT Date of Hearing:12.05.2023 : Date of Judgment: 27.06.2023

BIRAJA PRASANNA SATAPATHY, J.

The present Writ Petition has been filed inter alia with the following prayer.

"The Petitioner, therefore, prays that the Hon'ble Court be pleased to admit this Writ Petition, issue notice to the Opp. Parties and after hearing the counsel for the Opp. Parties, issue a writ in the nature of mandamus or any other suitable writ quashing:

A. The impugned circulars dated 22.06.2021 and 08.10.2021 at Annexures-3 & 4.

B. The impugned notification dated 30.10.2021 at Annexure-8

C. The interview call letter dated 24.01.2022 at Annexure-9 series to attend the meeting of the Standing Selection Committee; AND

D. Further direct the Opp. Parties to initiate a fresh the selection process for selection to the post of Dean of the College of Veterinary Science and Animal Husbandry, Odisha University of Agriculture & Technology (OUAT), Bhubaneswar by issuing advertisement/circulars in accordance with the provisions of the statute

of OUAT and the judgment dated 27.04.2021 in W.P.(C) No.10625 of 2019 within a stipulated period fixed by the Hon'ble Court.

And may pass such other order as deemed fit and proper in the interest of justice.

And for which act of kindness and the petitioner is in duty bound shall ever pray."

2. It is the case of the Petitioner that while continuing as the senior most Professor and Head of the Department of Pharmacology and Toxicology in the College of Veterinary Science and Animal Husbandry, OUAT, Bhubaneswar, when the University initially issued an advertisement on 11.06.2019 inviting applications from amongst the Professor and persons of equivalent rank of the University for the post of Dean, faculty of Veterinary Science and Animal Husbandry, OUAT, Bhubaneswar, the Petitioner challenging the said Circular approached this Court in W.P.(C) No.10625 of 2019.

3. Prior to such filing of the Writ Petition, the Petitioner challenging the order dt.07.03.2019 wherein one Dr. Laxman Kumar Babu was appointed as the interim Dean of the College, had approached this Court in W.P.(C) No.7084 of 2019. This Court vide its judgment dt.27.04.2021 while disposing both the Writ Petitions inter alia in Paragraph 26 of the judgment held as follows:

26. In view of the settled position of law, as discussed above, this Court is of the considered view that appointment of opposite party No.5 as in-charge interim Dean, College of Veterinary Science and Animal Husbandry, OUAT, pursuant to office order dated 07.03.2019 under Annexure-7 to the W.P.(C) NO.7084 of 2019 cannot sustain in the eye of law. Consequentially, the circular dated 11.06.2019 under Annexre-8 to the W.P.(C) No.10625 of 209 for recruitment of regular Dean by putting a condition that the candidates should furnish, holding administrative posts with supporting documents also cannot sustain. Thereby, the same are liable to be quashed and are hereby quashed. The opposite party-University is directed to issue a fresh advertisement to fill up the post of regular Dean, Faculty of Veterinary Science and Animal Husbandry, OUAT, as expeditiously as possible, preferably within a period of two months from the date of communication of this judgment in consonance with the observations made hereinbefore and in conformity with statutory provisions governing the field."

3.1. It is contended that due to quashing of the circular issued on 11.06.2019 by this Court in W.P.(C) No.10625 of 2019, the University issued another circular on 22.06.2021 under Annexure-3 inviting applications from amongst the Professor and persons of equivalent rank for the post of Dean, Faculty of Veterinary Science and Animal Husbandry, OUAT, Bhubaneswar.

3.2. In the said circular, the last date of receipt of application was fixed to 19.07.2021. But it is contended that even though the conditions stipulated in circular dt.11.06.2019 was quashed by this Court in W.P.(C) No.10625 of 2019, but the University once again while issuing Annexure-3, imposed similar condition i.e. RMP experience vide Sl. No.5 of Annexure-A1 to the circular dt.22.06.2021. It is

contended that for having such experience, a candidate will be entitled to get "10" marks. It is contended that the prescription of such an experience in Annexure-3 is similar to the condition as indicated in the Circular dt.11.06.2019, and quashed by this Court in its judgment as cited (*supra*).

3.3. It is also contended that even though the last date of making the application in Annexure-3 was 19.07.2021, but while issuing another circular on 08.10.2021 under Annexure-4, the last date for receipt of such application was extended to 22.10.2021 without any reason or basis. Not only that, after issuance of Annexures-3 & 4, the University also issued the impugned notification on 30.10.2021 under Annexure-8, prescribing the criteria for selection to the post of Dean, which is not permissible in the eye of law.

3.4. Mr. Nanda, learned Senior Counsel appearing for the Petitioner vehemently contended that since the condition imposed in the circular dt.11.06.2019 regarding furnishing of the information with regard to holding of administrative post which is the supporting document was quashed by this Court in W.P.(C) No.10625 of 2019 in its judgment under Annexure-1, similar nature of condition i.e. RMP experience should not have been prescribed while issuing the fresh circular on dt.22.06.2021 under Annexure-3. It is also contended that since in the Circular issued under Annexure-3, the last date of receipt of application was 19.7.2021, while issuing Annexure-4 on 08.10.2021, the last date of application should not have been extended to 22.10.2021 unilaterally.

3.5. Learned Sr. Counsel further contended that after issuance of the Circular under Annexures-3 & 4, the University after due approval of the Government issued the impugned notification on 30.10.2021 under Annexure-8 by prescribing the criteria for selection to the post of Dean. It is contended that such belated action by the University in prescribing the selection criteria under Annexure-8, since has been issued much after the issuance of the Circular under Annexure-3 as well as Annexure-4, the selection process initiated under Annexures-3 and 4 is vitiated.

3.6. Learned Sr. Counsel further contended that even though the Petitioner made his application basing on the Circular issued under Annexure-3 and he was directed to appear before the Standing Selection Committee vide letter dt.24.01.2022 under Annexure-9, but since the condition imposed in the Circular under Annexure-3 with regard to RMP experience is of similar implication, as was earlier reflected in the Circular dt.11.06.2019 under Annexure-2 which was quashed by this Court, the selection process so initiated in terms of Annexure-3 is not sustainable in the eye of law. Accordingly the Petitioner challenging the Circular issued under Annexures-3 & 4 and the notification issued under Annexure-8 is before this Court.

3.7. Learned Senior Counsel further contended that the guidelines prescribed in the impugned circular under Annexures-3 & 4 as well as the impugned notification under Annexure-8 since is not in confirmity with the Statutes of Orissa University of

Agriculture And Technology, the selection process so initiated under Annexures-3 & 4 is liable for interference of this Court.

4. Mr. P.M. Pattajoshi, learned counsel appearing for the University on the other hand made his submission basing on the stand taken in the counter affidavit.

It is contended that since the condition imposed in the earlier Circular on 11.06.2019 which was challenged by the Petitioner before this Court in W.P.(C) No.10625 of 2019 was interfered with, the University on receipt of the said order issued a fresh circular on 22.06.2021 under Annexure-3. The said Circular under Annexure-3 was issued with due approval of the Hon'ble Governer/Chancellor of the University.

4.1. Subsequent to issuance of Annexure-3, the Board of Management of the University approved the selection criteria for the post of Dean vide its resolution dt.28.07.2021 under Annexure-E/2 and after due approval of the same by the Government vide letter dt.05.10.2021 under Annexure-F/2, the University issued the criteria for selection under Annexure-8 to the Writ Petition.

4.2. Mr. Pattajoshi further contended that the condition indicated in the Circular dt.11.06.2019 which was interfered with by this Court in the earlier Writ Petition was never inserted in the Circular issued on 22.06.2021 under Annexure-3 as well as on 08.10.2021 under Annexure-4.

Subsequently with due approval of the Government, the selection criteria for the post of Dean was finalised with issuance of notification on 30.10.2021 under Annexure-8. After fixation of such criteria for selection, all the candidates who had made their applications pursuant to Annexure-3 were issued with the call letter to appear before the Standing Selection Committee.

4.3. Mr. Pattajoshi, learned counsel contended that the petitioner since pursuant to Annexure-3 made his application for the post of Dean and also participated in the interview in terms of Annexure-9, the Petitioner after such participation in the selection process, is not permitted to challenge the stipulations contained under Annexures-3 & 4 as well as the selection criteria issued under Annexure-8.

4.4. It is also contended that prior to conducting the interview in terms of Annexure-9 so issued on 24.01.2022, since the selection criteria was already fixed, no illegality can be found with the action of the University.However,it is vehemently contended that since the Petitioner in terms of Annexure-3 participated in the selection process, in view of the law laid down by the Hon'ble Apex Court as well as by this Court, the Petitioner is not permitted to turn back by challenging the stipulation contained in Annexures-3 & 4 as well as the criteria fixed under Annexure-8.

4.5. Mr. Pattajoshi also contended that even though vide Annexure-4, the last date for making the application was extended to 22.10.2021, but no further

application was made in terms of the said Circular issued on 08.10.2021 under Annexure-4. All the candidates who had made their applications in terms of Annexure-3 including the Petitioner of the present case were only called to appear before the Standing Selection Committee vide Annexure-9 series. Accordingly, it is contended that the Writ Petition at the instance of the Petitioner is not maintainable.

5. Mr. M.K. Balabantaray, learned Additional Government Advocate on the other hand made his submission basing on the stand taken in the counter affidavit so filed by Opp. Party No.5.

It is contended that while issuing the earlier circular on 11.06.2019 under Annexure-2, the condition "Holding of administrative post with the supporting documents" was challenged by the present Petitioner in W.P.(C) No.10625 of 2019. This Court when quashed the said condition while disposing of the matter vide its judgment under Annexure-1. the fresh circular was issued on 22.06.2021 under Annexure-3.

5.1. Subsequent to issuance of Annexure-3 and in continuation therein, Annexure-4 was issued by extending the last date of application. In the meantime, the criteria for selection to the post of Dean was approved by the Government on 05.10.2021 and after such approval by the Government, the criteria for selection was notified on 30.10.2021 under Annexure-8. It is contended that prior to conducting the selection in terms of Annexure-9 series, the selection criteria since was already published; no illegality can be found with the said selection process.

5.2. Mr. Balabantaray, learned A.G.A further contended that since the petitioner in terms of Annexure-3 made his application and also participated in the interview basing on Annexure-9, in view of the settled law of this Court as well as of the Hon'ble Apex Court, the Petitioner is not supposed to challenge the criteria for selection so indicated in Annexures-3,4 & 8. Accordingly, it is contended that the Writ Petition at the instance of the Petitioner is not entertainable.

6. Mr. K.P. Mishra, learned counsel appearing for Opp. Party No.7 on the other hand made his submission basing on the stand taken in the counter affidavit so filed by the said Opp. Party.

Mr. Mishra, contended that basing on the call letters issued under Annexure-9 series not only the Petitioner but also all the candidates appeared before the Standing Selection Committee and participated in the selection process. Opp. Party No.7 on being found suitable was appointed as Dean, College of Veterinary Science and Animal Husbandry,OUAT, Bhubaneswar vide notification issued on 15.02.2022 under Annexure-A/7.

6.1. It is contended by Mr. Mishra, learned Sr. Counsel that since the Petitioner in terms of Annexure-3 made his application and also participated in the selection process in terms of Annexure-9, in view of the decision of the Hon'ble Apex Court

rendered in the case of ***Madras Institute of Development Studies and Another Vs. Dr. K. Sivasubramaniyan and others, reported in 2016 (1) SCC 454***, as well as the decision of this Court rendered in the case of ***Kunilata Dutta Vs. State of Orissa and Others, reported in 2010 (Suppl. II)OLR 437***, the Petitioner cannot be permitted to challenge the circular issued under Annexures-3 & 4 as well as the selection criteria fixed under Annexure-8.

Hon'ble Apex Court in the case of ***Madras Institute of Development Studies***, in Paragraphs 13 to 18 has held as follows:

> *13. Be that as it may, the respondent, without raising any objection to the alleged variations in the contents of the advertisement and the Rules, submitted his application and participated in the selection process by appearing before the Committee of Experts. It was only after he was not selected for appointment that he turned around and challenged the very selection process. Curiously enough, in the writ petition the only relief sought for is to quash the order of appointment without seeking any relief as regards his candidature and entitlement to the said post.*
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> *14. The question as to whether a person who consciously takes part in the process of selection can turn around and question the method of selection is no longer res integra.*
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> *15. In G. Sarana v. University of Lucknow [(1976) 3 SCC 585 : 1976 SCC (L&S) 474] , a similar question came up for consideration before a three-Judge Bench of this Court where the fact was that the petitioner had applied to the post of Professor of Anthropology in the University of Lucknow. After having appeared before the Selection Committee but on his failure to get appointed, the petitioner rushed to the High Court pleading bias against him of the three experts in the Selection Committee consisting of five members. He also alleged doubt in the constitution of the Committee. Rejecting the contention, the Court held: (SCC p. 591, para 15)*
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> *"**15**. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the Committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the Committee. This view gains strength from a decision of this Court in Manak Lal case [Manak Lal v. Prem Chand Singhvi, AIR 1957 SC 425] where in more or less similar circumstances, it was held that the failure of the appellant to take the identical plea at the earlier stage of the proceedings created an effective bar of waiver against him. The following observations made therein are worth quoting: (AIR p. 432, para 9)*
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> *'9. … It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.'"*

16. *In Madan Lal v. State of J & K, similar view has been reiterated by the Bench which held that :SCC p.493, para 9)*

"9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus, the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In Om Prakash Shukla v. Akhilesh Kumar Shukla [1986 Supp SCC 285 : 1986 SCC (L&S) 644] it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."

17. *In Manish Kumar Shahi v. State of Bihar [(2010) 12 SCC 576 : (2011) 1 SCC (L&S) 256] , this Court reiterated the principle laid down in the earlier judgments and observed: (SCC p. 584, para 16)*

"16. We also agree with the High Court [Manish Kumar Shahi v. State of Bihar, 2008 SCC OnLine Pat 321 : (2009) 1 AIR Jhar R 1015] that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."

18. *In Ramesh Chandra Shah v. Anil Joshi [(2013) 11 SCC 309 : (2013) 3 SCC (L&S) 129] , recently a Bench of this Court following the earlier decisions held as under: (SCC p. 320, para 24)*

"24. In view of the propositions laid down in the abovenoted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge [Anil Joshi v. State of Uttarakhand, 2012 SCC OnLine Utt 521] and the Division Bench [Ravi Shankar

Joshi v. Anil Joshi, 2012 SCC OnLine Utt 766] of the High Court committed grave error by entertaining the grievance made by the respondents."

Similarly, this Court in the case of ***Kunilata Dutta***, in Paragraph 12 has held has follows.

"12. Additionally, it is seen that the Petitioner has applied to be selected in the second advertisement also. Now after being unsuccessful in her attempt to get selected, the Petitioner has filed this writ petition challenging the advertisement dated 09.07.2007. In ***Dhananjay Malik and others v. State of Utteranchal and Others,*** *(2008) 4 SCC 171 = 2009 AIR SCW 3265; the Apex Court held that when the petitioner took a chance by appearing in the selection process and only after they did not find themselves as successful candidates, they cannot challenge the selection process. In other words, when the Petitioner has applied for being selected and took part in the selection process without any demur, she cannot later on challenge the issuance of the second advertisement. She is stopped and precluded the questioning the said selection process."*

7. I have heard Mr. D.P. Nanda, learned Sr. Counsel appearing for the Petitioner, Mr. P.M. Pattajoshi, learned counsel appearing for Opp. Party Nos.2 & 3, Mr. M.K. Balabantaray, learned Additional Government Advocate appearing for Opp. Party No.5 and Mr. K.P. Mishra, learned Sr. Counsel appearing for Opp. Party No.7.

On the consent of the learned counsel appearing for the parties, the matter was finally heard at the stage of admission and disposed of by the present order.

8. Having heard learned counsel for the parties and after going through the materials available on record, it is found that challenging the stipulation contained in the Circular dt.11.06.2019 so issued by the University under Annexure-2, the petitioner had earlier approached this Court in W.P.(C) No.10625 of 2019. This Court vide its judgment dt.27.04.2021 under Annexure-1 quashed the condition under challenge with a direction to issue a fresh advertisement to fill up the post of regular Dean, faculty of the College of Veterinary Science and Animal Husbandry, OUAT, Bhubaneswar as expeditiously as possible, preferably within a period of two (2) months from the date of communication of the judgment.

8.1. After receipt of judgment so rendered under Annexure-1, the University issued a fresh circular on 22.06.2021 under Annexure-3 inviting applications for the post of Dean. It is found that in terms of the circular issued on 22.06.2021 under Annexure-3, the Petitioner made his application for the post of Dean.It is also found that after issuance of Annexure-3 vide circular dt.08.10.2021 under Annexure-4, though the last date of application was extended to 22.10.2021, but the same was never challenged by the Petitioner at any point of time. Not only that, the selection criteria for the post of Dean so issued vide notification dt.30.10.2021 under Annexure-8 was also never challenged by the Petitioner. Only when the Petitioner was issued with the letter dt.24.01.2022 under Annexure-9 directing him to appear

before the Standing Selection Committee for selection to the post of Dean fixing 29.01.2022 for such appearance the present Writ Petition was filed challenging the stipulation contained under Annexures-3,4 & 8 on 27.01.2022.

8.2. It is also found from the record and not disputed by the learned Senior Counsel appearing for the Petitioner that pursuant to Annexure-3, the Petitioner not only made his application but also pursuant to Annexure-9, he participated in the selection process. In view of the decision of the Hon'ble Apex Court as well as this Court as cited (supra), the Petitioner after such participation in the selection process is not permitted to challenge the stipulation contained in Annexures-3 & 4 as well as in Annexure-8. This Court also is of the view that since prior to conducting the selection process in terms of Annexure-9 issued on 24.01.2022, the selection criteria was already fixed vide notification dt.30.10.2021 under Annexure-8, no illegality is also there with the University in fixing such criteria for selection prior to proceeding with the selection process.

8.3. Be that as it may, since the Petitioner in terms of Annexure-3 made his application and participated in the selection process, the Petitioner in view of the decision as cited (supra) is not permitted to challenge the stipulation contained in Annexures-3,4 & 8.

9. Therefore, this Court is not inclined to entertain the Writ Petition with the prayer as indicated here-in-above and dismiss the Writ Petition.

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2023 (II) ILR – CUT - 936

SANJAY KUMAR MISHRA, J.

W.P.(C) NO.12848 OF 2016

KALPATARU PATI .....Petitioner

-V-

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

INTERPRETATION OF STATUTE – Whether the employees of an autonomous bodies can gain the same benefits at par with the government employees – Held, No. – The employees cannot claim the benefits as a matter of right and more particularly, when the employee of such autonomous bodies are governed by their own service Rule, and the conditions – The employees of state Government and the autonomous board/body cannot be put on par. (Para-24)

Case Law Relied on and Referred to :-

1. 2022 Live Law (SC) 28: State of Maharashtra & Anr. Vs. Bhagwan & Ors.

For Petitioner : Mr.J.K. Mohapatra

For Opp. Parties : Mr.S.N.Pattnaik,AGA
Mr.R. Acharya

JUDGMENT Date of Hearing & Judgment: 22.06.2023

SANJAY KUMAR MISHRA, J.

1. The Petitioner has preferred the Writ Petition with a prayer to set aside decision dated 04.04.2016 of the Principal Secretary to Government, P.G & P.A Department and to direct the Opposite Party Nos.2 to 4 to extend all the benefits as per law, taking into consideration his age of retirement to be 60 years and to extend all other retiral benefits accordingly within a stipulated period.

2. The factual matrix, which laid to filing the present Writ Petition is that the Petitioner was serving as an employee under the category of Clerk-B in erstwhile Orissa State Electricity Board (OSEB), GRIDCO and finally, under the administrative control of newly created reform Company namely, NESCO. After completion of 33 years of service, he was directed to retire on 31.07.2003 at the age of 58 years, though he should have been retired at the age of 60 years being a workman. Challenging the said retirement, the Petitioner filed an application before Principal Secretary to Government, P.G & P.A Department (O.P.No.1) on 23.10.2003, with a prayer to extend the benefits under Rule-42 of OCS (Pension) Rules, read with Rule-71 of Odisha Service Code in terms of amendment made by the Government of Orissa vide FDR No.4481 dated 29.01.2003 and to extend other retiral benefits, including exgratia, as admissible under the provisions, considering his premature retirement as VRS. Because of the inaction of the Opposite Party No.1, the Petitioner was constrained to approach this court in W.P.(C) No.10258 of 2005.

3. After hearing the parties, this Court was pleased to dispose of the said Writ Petition on 09.12.2015 directing the Opposite Party No.1 to decide the claim of the Petitioner, as raised in the grievance petition dated 23.10.2003, in accordance with law after giving opportunity of hearing to the Petitioner within a reasonable period, preferably within six weeks from the date of receipt of certified copy of the said order.

4. The said order was communicated to the Opposite Party No.1 on 16.12.2015. Being noticed, the Petitioner appeared before the Opposite Party No.1 on 22.01.2016 and filed the relevant documents in support of his claims and put forth the arguments. It is further case of the Petitioner that out of the said documents filed before the Opposite Party No.1, Office Order dated 26.05.1997 and the counter affidavit filed by the Opposite Parties-NESCO in W.P.(C) No. 10258 of 2005 before this Court show that the Petitioner is a workman. But the opposite party no.1 failed to consider the said two documents along with other documents while disposing of the grievance petition of the petitioner and rejected the same vide order dated

04.04.2016 with some baseless grounds and communicated the said order on 29.04.2016, only recording the submissions of the Opposite Parties i.e. NESCO.

5. It has further been averred in the writ petition that the Opposite Party No.1, while passing the impugned order of rejection, has not given any reason to the said effect and the said order is a product of non-application of mind and the sole basis of rejection of the representation of the Petitioner is relying on the provisions in Regulation-3 (a) of OSEB Employees' age of Retirement Regulation, 1979, which is silent about the retirement age of a workman.

6. It is further case of the Petitioner that the submissions made by the NESCO Authority were recorded without any documents to the said effect, to substantiate the said submissions made before the Opposite Party No.1. The Order of rejection has been passed without giving any specific findings only on the plea that the Petitioner has not refuted the submissions of NESCO Authority, which is not only false but also a premature statement by such a responsible officer like Opposite Party No.1. So far as the grievance of the Petitioner to sanction the unutilized leave and Gratuity etc., it has been averred that the Opposite Party No.1 has not considered the said aspect in the impugned order dated 04.04.2016 while disposing of the grievance petition of the Petitioner. It has also been averred that the authority concerned has failed to consider the grievance of the Petitioner as per law and passed an order without any reason and the same is not acceptable in the eye of law.

7. Being noticed, the contesting Opposite Party Nos.2 to 4 have filed Counter Affidavit taking a stand therein that the Petitioner was working as Clerk-B under Bhadrak South Electrical Division (BSED), Bhadrak under NESCO. As per rules and regulation adopted by NESCO, the age of retirement of its employees has been fixed to 58 years so far as the post of Clerk-B is concerned. Accordingly, prior to completion of 58 years of age, a retirement notice was given to the petitioner after observing all formalities and he was superannuated on 31.07.2003 on attaining the age of 58 years being a Clerk-B.

8. It has further been stated that as per the direction of this Court vide order dated 09.12.2015, in W.P.(C) No.10258 of 2005, representation of the Petitioner dated 23.10.2003 was duly examined by the Opposite Party No.1 and the order was passed on 04.04.2016, wherein the grievance of the Petitioner was thoroughly examined and disposed of with a finding that the retirement age of the Petitioner is 58 years as per Regulation-3 (a) of OSEB Employees Age of Retirement Regulations, 1979 and further, the NESCO authorities have taken necessary action with regard to his further claims. Hence, no grievance remained unattended as alleged in the Writ Petition.

9. It has also been stated that OSEB Employees' Age of Retirement Regulations, 1979 clearly prescribes that the age of retirement of an employee other than an employee in Category IV, is 58 years. The age of retirement of employees

under Category IV is 60 years and as per Schedule-III of the said Regulation, Clerk-B comes under Category III services. Since the petitioner was working as Clerk-B under erstwhile OSEB/GRIDCO as admitted by him, he was retired from his service on attaining the age of 58 years as per Regulation-3(a) of OSEB Employees Age of Retirement Regulation, 1979.

10. It has further been averred that the Petitioner was granted provisional pension vide office order dated 22.01.2004 pending regularization of his service records and in the meantime the Petitioner has been sanctioned the death-cum-retirement gratuity vide office order dated 23.11.2004. A stand has also been taken in the counter affidavit, as per existing Rules and Regulation, benefits of unutilized leave has already been given. That apart, with regard to allegation of delay of one year two months in payment of provisional pension to the Petitioner, it has been averred that due to non-submission of the pension papers and other required documents in time by the Petitioner, some delay was caused for which the Petitioner himself is responsible and the authority concerned cannot be blamed for such alleged delay. So far as 3rd TBAPS, it has been stated that there was no such provision for payment of such time bound advancement of pay during the service period of the Petitioner.

11. During hearing, learned Counsel for the Petitioner fairly concedes before this Court that the grievance of the Petitioner as to nonpayment of various after retiral dues, after superannuating him at the age of 58 years, have already been disbursed as detailed in the impugned Order dated 04.04.2016. Mr. Mohapatra submits, such a prayer has been made in the Writ Petition based on the claim of the Petitioner to consider his age of retirement as 60 years and to extend the financial benefits accordingly.

12. From the pleading made in the Writ Petition, it is well revealed that the sole basis of praying to set aside the impugned order dated 04.04.2016 and to treat the age of retirement of the Petitioner as 60 years is the averments made by the erstwhile NESCO Authority in its Counter Affidavit filed in W.P.(C) No.10258 of 2005, wherein, interalia, a stand had been taken by the said authority that the Petitioner being a workman under Industrial Disputes Act, 1947, shortly, I.D.Act,1947, alternative remedy is available for redressal of his grievances under the said Act and the writ petition is not maintainable. That apart, the prayer of the Petitioner for treating his age of retirement as 60 years is also based on an Office Order dated 26.05.1997 made by the GRIDCO Authority, vide which he and similarly placed other Union office bearer were declared as protected workmen in terms of Section-33 (3) of the I D Act, 1947 read with Rule-68 of the Orissa Industrial Disputes Rules, 1959.

13. Learned Counsel for the Petitioner submits, though the Petitioner was working as Clerk-B at the time of his superannuation, since in the Counter Affidavit

filed before this Court in earlier Writ Petition, the Opposite Party specifically averred that the Petitioner is a workman under the I..D. Act, 1947 and also declared him to be a protected workman in terms of the provisions enshrined under the I.D. Act, 1947, instead of OSEB Employees' Age of Retirement Regulation, 1979, the Petitioner ought to have been superannuated at the age of 60 years in terms of the proviso in Rule-71 of Odisha Service Code, which prescribes that a workman, who is governed by the said Rules, shall be retained in service up to the age of 60 years.

14. Mr.Acharya, learned Counsel for the Opposite Party Nos.2 to 4, submits that the Petitioner was working as Clerk-B at the time of his superannuation and he is governed by the OSEB Employees' Age of Retirement Regulation, 1979. There is no such averment in the Writ Petition that the said Regulations, 1979 is not applicable to the Petitioner and rather, he is guided by the Rule-71 of the Odisha Service Code. Further, the Petitioner has also not challenged the said Regulations, 1979 as to its applicability, as has been rightly detailed in the Order dated 04.04.2016, as at Annexure-2.

15. He further submits that in terms of Regulation-3 (a) of the Orissa State Electricity Board Employees' Age of Retirement Regulations, 1979, the age of retirement of an employee, other than an employee in Category IV, is 58 years. He further submits that as per Schedule-III of the said Regulation, Clerk-B comes under Category III services. As the Petitioner was working as Clerk-B under the earstwhile OSEB/GRIDCO, which has been admitted by him in his grievance petition dated 23rd October, 2003, he has been rightly superannuated at the age of 58 years in terms of the said Regulations, 1979.

16. Mr. Acharya, learned Counsel for the Opposite Party Nos.2 to 4 files a photocopy of the said Regulations, 1979 and submits, the word "Employee" has been defined under Regulation 2(d). More particularly, Clause (iii) under Regulation 2(d) read with the Schedule, well demonstrates that Clerk-B post belongs to Category III.

17. He further submits that even though the Petitioner, being a Clerk, is a workman as defined under the Section-2 (s) of the Industrial Disputes Act, 1947, but for the purpose of regulating the service conditions of the Petitioner, he is abided by the Employees' Age of Retirement Regulations, 1979. Admittedly the Petitioner belongs to Category III as defined under the said Regulations, 1979. Hence, he was rightly superannuated at the age of 58 years and such a stand of the Petitioner to treat him as a workman and retire him at the age of 60 years in terms of Odisha Service Code is misconceived.

18. Mr.Pattnaik, learned AGA for the State-Opposite Parties also reiterates the said submissions made by Mr.Acharya and submits that the Petitioner being an employee under the earstwhile NESCO/GRIDCO, is guided by the Employees' Age

of Retirement Regulations, 1979 and the provision with regard to age of retirement in terms of the Odisha Service Code is inapplicable to the case of the Petitioner.

19. The averments made in the Counter Affidavit filed by the contesting Opposite Party Nos.2 to 4 is not disputed by the learned Counsel for the Petitioner to the effect that the Petitioner was working as a Clerk-B at the time of his retirement. Further, there is no such averment in the Writ Petition as to inapplicability of Employees' Age of Retirement Regulations, 1979 to the Petitioner and applicability of Rule-71 of Odisha Service Code with regard to age of retirement. Further, the Petitioner has not challenged the said Regulations, 1979 on the ground that the same is inapplicable to the Petitioner on the basis of alleged admission by the contesting Opposite Parties that he is a workman under the I.D. Act, 1947. Rather, it has been alleged in the paragraph 8 of the Writ Petition that OSEB Employees Age of Retirement Regulation, 1979 is silent about the retirement age of a workman, while admitting that the Petitioner was working as Clerk-B.

20. At this juncture, it is apt to reproduce below Regulation-2 (d) with relevant portion from schedule, so also Regulation-3 in Regulation, 1979:

> "2. (d) "**Employee" means any person employed under the Board, in any of the following categories** whether borne in regular or work-charged Establishment and includes the State Government Servants permanently transferred to and opted or deemed to have opted for service under the Board;
>
> (i) Employees in category I Services/posts,
>
> (ii) Employees in Category II services/posts,
>
> (iii) **Employees in Category III Services/posts, and/or nomenclatures**.
>
> (iv) Employees in Category IV posts, and/or nomenclatures.
>
> Note:-1 **Employees in above categories are specified in the Schedule appended.**
>
> Note:-2 **Government servants and employees of other Organisations, if any, working on deputation at any time under the Board shall not be treated as employee for the purpose of these regulations."**
>
> EMPLOYEES IN CATEGORY I SERVICES/POSTS
>
> XXXXXXXX
>
> EMPLOYEES IN CATEGORY II SERVICES/POSTS
>
> XXXXXXXX
>
> EMPLOYEES IN CATEGORY III
> SERVICES/POSTS AND/OR NOMENCLATURE
>
> | | |
> |---|---|
> | Assistant Public Relations Officer | Circle U.D.C |
> | Attendant 'A' | Care Taker |
> | Assistant Store Keeper | Crane Operator Gr.I (E.O.T.) |
> | Assistant Gr. II | Crane Operator Gr.II |
> | Assistant Gr. I | Crane Operator Gr.III |
> | Accountant | Crane Operator Gr.IV |

Artisan 'C'	Chargeman
Artisan 'B'	Chargeman 'A'
Auto-Foreman	Compressor Driver
Auto Electrician	Carpenter
Assistant Foreman	Compounder (Pharmacist)
Asst. Store Keeper	Chemical Assistant
Assistant Teacher	Draftman 'C'
Assistant Care Taker (Guest House)	Draftman 'B'
Bradma Operator	Draftman 'A'
Boiler Operator	Driver 'C'
Clerk B	Driver 'B'
Clerk 'A'	Despatcher

(Emphasis Supplied)

"3. (a) **The age of retirement of an employee other than an employee in Category IV is 58 years ;**

(b) The age of retirement of an employee in Category IV is 60 years ;

Provided that

(i) an employee may retire at any time after completing 30 years of service or after attaining the age of 50 years by giving notice in writing to the appointing authority at least three months before the date on which he wishes to retire and it shall be open to the appointing authority to withhold permission to such an employee who seeks to so retire if he is under suspensionor if any disciplinary proceedings against him are pending or in the contemplation;

(ii) the appointing authority or the authority to which the appointing authority is administratively subordinate may also require an employee to retire at any time, after he completes 30 years of service or attains the age of 50 years by giving three months' notice in writing to the employee, for reasons to be recorded in writing that it is inexpedient or against the interest of the Board to continue to employ him in service ; provided that an employee may be retired under this regulations forthwith without complying with the requirement of notice and on such retirement he shall be entitled to an amount equal to three months' wages/salary. The decision of the appointing authority or the authority to which the appointing authority is administratively sub-ordinate requiring an employee to retire from service shall be final and binding on the employee." (Emphasis Supplied)

21. From the Regulations, 1979, as extracted above, it is amply clear that the age of retirement of an employee other than an employee in Category-IV is 58 years. Further, though the communication with regard to protected workman was made vide office order of GRIDCO dated 26.05.1997, the Petitioner never took such a plea as to his age of retirement should be 60 years till he attained the age of superannuation i.e.58 years, on 31.07.2003. Only after his retirement, he filed a grievance petition before the Opposite Party No.1, which was disposed of by a reasoned and speaking order after giving due opportunity of hearing to the Petitioner, so also other parties, as detailed vide the said impugned order.

22. Law is well settled that in terms of Section 2 (s) of the I.D. Act, 1947, the nature of job is the decisive factor to bring an employee under the definition

"workman" and not the designation of an employee or the salary drawn by him or her. Similarly, there are provisions under the said Act, 1947 to declare Office Bearers of Trade Union(s) as "protected workman".

23. From the pleadings and submissions made by the learned Counsel for the parties, so also discussions made above, this Court is of the view that since the Petitioner was working as Clerk-B and was General Secretary of Bhadrak Electrical Workers Union, he along with office bearers of other Trade Unions, functioning under the Industrial Establishment of GRID Corporation of Orissa Limited, were declared as protected workman in terms of Rule-68 of the Orissa Industrial Disputes Rule, 1959, read with Sub sections 3 and 4 of Section 33 of the I.D. Act, 1947. The same cannot be the basis to claim that the Petitioner is a workman and should have been superannuated at the age of 60 years applying the provisions of OCS (Pension Rules) read with Rule-71 of the Orissa Service Code, which is not applicable to him and is meant for the State Government Employee.

24. Further, law is well settled that the employees of an autonomous body cannot claim, as a matter of right, the same service benefits on par with the Government employees. Merely because such autonomous bodies might have adopted the Government Service Rules and/or in the Governing Council there may be a representative of the Government and/or merely because such institution is funded by the State/Central Government, employees of such autonomous bodies cannot, as a matter of right, claim parity with the State/Central Government employees. This is more particularly, when the employees of such autonomous bodies are governed by their own Service Rules and the service conditions. The State Government and the autonomous board/body cannot be put on par. In this regard a recent judgment of the apex Court in ***State of Maharashtra & Anr. v. Bhagwan & Ors. reported in 2022 Live Law (SC) 28*** is relevant and Paragraph 17 being relevant to the present list is extracted below:

> **"17**. Even if it is presumed that NWDA is "State" under Article 12 of the Constitution, the appellants have failed to prove that they are on a par with their counterparts, with whom they claim parity. As held by this Court in UT, Chandigarh v. Krishan Bhandari [(1996) 11 SCC 348], **the claim to equality can be claimed when there is discrimination by the State between two persons who are similarly situated. The said discrimination cannot be invoked in cases where discrimination sought to be shown is between acts of two different authorities functioning as State under Article 12**. Thus, the employees of NWDA cannot be said to be "Central Government employees" as stated in the OM for its applicability."
>
> **As per the law laid down by this Court in a catena of decisions, the employees of the autonomous bodies cannot claim, as a matter of right, the same service benefits on par with the Government employees. Merely because such autonomous bodies might have adopted the Government Service Rules** and/or in the Governing Council there may be a representative of the Government and/or

merely because such institution is funded by the State/Central Government, employees of such autonomous bodies cannot, as a matter of right, claim parity with the State/Central Government employees. **This is more particularly, when the employees of such autonomous bodies are governed by their own Service Rules and service conditions. The State Government and the Autonomous Board/Body cannot be put on par."** (Emphasis Supplied)

25. Admittedly, all the after retiral dues, including pension, have already been disbursed in favour of the Petitioner as detailed in the impugned Order dated 04.04.2016, so also admitted by the learned Counsel for the Petitioner.

26. From the pleadings of the parties, so also submissions made by the learned Counsel for the parties, as detailed above, as well as legal provisions, so also settled position of law quoted above, since there is no dispute that the Petitioner is abided by the Regulation, 1979, which is applicable to the NESCO Authority, as there is a clear cut provision under the said Regulation with regard to age of retirement of an employee, other than employees in Category IV, to be 58 years and the Petitioner was coming under Category III, he was rightly superannuated at the age of 58 years and the claim that he should have been superannuated at the age of 60 years, being contrary to the said Regulation, 1979 and misconceived, the Writ Petition is liable to be dismissed.

27. Hence, this Court is of the view that there is no infirmity or illegality in the impugned order dated 04.04.2016 passed by the Opposite Party No.1 i.e. Government of Odisha, P.G. and P.A. Department.

28. Accordingly, the Writ Petition stands dismissed. No order as to cost.

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2023 (II) ILR – CUT - 944

SANJAY KUMAR MISHRA, J.

W.P.(C) NO.16927 OF 2016

JYOTSNARANI BEHERA .....Petitioner

-V-

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

ODISHA CIVIL SERVICE(Rehabilitation Assistance) Rule, 1990 – Rule 2(b) r/w Odisha Civil Services(Rehabilitation Assistance) Rule, 2020 – Rule 2(b) – Family members – The deceased civil servant married the petitioner after the death of his first wife – Petitioner after the death of husband applied under the R.A Rule, 1990 – The authority rejected the application on the ground that petitioner being the second wife of civil servant not entitled as per the 1990 Rules – Whether such rejection is

justified – Held, Not Justified – The second marriage of civil servant after the death of his first wife, when is legal, in no case can be and should be the basis to hold the petitioner is the second wife of the deceased employee. (Para-17)

Case Law Relied on and Referred to :-

1. AIR 2022 (SC) 2836 : Malaya Nanda Sethy Vs. State of Odisha & Ors.

For Petitioner : Mr. S.Mishra

For Opp. Parties : Mr.G.N.Rout, ASC

JUDGMENT Date of Hearing and Judgment: 26.06.2023

SANJAY KUMAR MISHRA, J.

1. The Petitioner, who is the legally married wife of late Arup Kumar Behera, who was working as a Junior Engineer in the Department of Water Resources, has approached this Court challenging the decision of the Authority concerned dated 12.07.2016 (Annexure-14), vide which her application for appointment under the Rehabilitation Assistance Rules, was rejected solely on the ground that she being the second wife of late A.K.Behera, there is no such provision for appointment of the second wife of the deceased under the Odisha Civil Service (Rehabilitation Assistance) Rules, 1990, shortly, the Rules, 1990. The communication made by the Director, Personnel, to the Chief Construction Engineer, Anandapur Barrage Project, Salapada to the said effect, a copy of which was also marked to the Petitioner vide Memo dated 28.07.2016 (Annexure-15), is also under challenge.

2. The factual matrix, which lead to filing of the present Writ Petition is that the husband of the Petitioner, who was working as Junior Engineer in the Department of Water Resources, died on 04.10.2008 in a tragic road accident. After his death, the Petitioner being legally married wife of the deceased, applied for employment in the post of Junior Clerk to the Authority in terms of the Rules, 1990, in the year 2009 for survival of her two children, in-laws and herself. She applied in the prescribed form and submitted the same as required under the said Rules, 1990 appending thereto the required documents i.e. (i) death certificate of the Petitioner's Husband, (ii) Birth Certificate of the Petitioner, (iii) Petitioner's certificate of merit, (iv) No objection affidavits on behalf of the other legal heirs and (v) Legal heir certificate of the Petitioner's husband. She also moved before the Collector of the District in accordance with Part-IV of the application form for issuance of distress certificate. However,due to some misunderstanding, her mother-in-law, moved before the Administrative Tribunal for release of terminal benefits of late A.K.Behera in favour of her. The same was registered as O.A. No. 1548 (C) of 2010. The Tribunal did not pass any interim order restraining the Authority concerned, to release the after death dues of late A.K.Behera in favour of the Petitioner. Hence, the mother-in-law of the Petitioner approached this Court in

W.P.(C) No.13822 of 2010, which was ultimately disposed of on 09.04.2014 recording the terms of compromise made between the parties as to disbursement of the pension and other dues of late A.K.Behera.

3. Thereafter, the Petitioner took follow up action for issuance of the Distress Certificate by the Collector for effective consideration of her application for appointment under the Rules, 1990. Finally, with due approval of the Collector, the Deputy Collector (Estt.) Collectorate, Balasore, sent the Distress Certificate issued in favour of the distress family of late A.K.Behera to the Chief Construction Engineer, Anandpur Barrage Project, vide letter dated 20.08.2015 (Annexure-7) with copy to the Petitioner.

4. Pursuant to the same, the Chief Construction Engineer forwarded the said Distress Certificate along with the requisite documents, to the Engineer-in-Chief, Water Resources, Odisha, Bhubaneswar, for consideration of the case of the Petitioner under the Rules, 1990.

5. Since there was some discrepancy as to the age of the Petitioner, a clarification was sought for by the office of the Engineer-in-Chief vide letter dated 29.10.2015. That apart, she was asked to submit no objection certificate from Soumya Ranjan Behera, son of late A.K.Behera, as he was a minor at the time of issuance of legal heir certificate i.e. on 24.11.2008, and turned to be major in the year 2015.

6. In response to the said communication, the Executive Engineer, Salandi Canal Division, Bhadrak, issued a detailed clarificatory letter to the Chief Construction Engineer, Anandpur Barrage Project, Salapada, and copy of the same was marked to the Petitioner.On receipt of the said information from the Executive Engineer, the same was forwarded to the Engineer-in-Chief, Water Resources, vide letter dated 09.02.2016 for taking necessary action at his end.

7. On being satisfied with fulfillment of all the conditions and submission of all requisite documents, the Director, Personnel, wrote on 22.02.2016 to the Deputy Secretary to the Government, Department of Water Resources, Bhubaneswar with respect to the proposal for appointment of the Petitioner in the post of "Junior Clerk" under the Rules, 1990. It was indicated therein that the Collector has also issued the Distress Certificate, as required under Part- IV of the Application and that the Petitioner has also submitted all requisite documents for consideration of her candidature, as per the checklist for taking further necessary action at Government level. However, when the Petitioner was legitimately expecting an order of appointment to be passed by the authority in favour of her under the Rules, 1990, vide letter dated 28.07.2016 the Director, Personnel (Opposite Party No.5), intimated to the Chief Construction Engineer that the proposal for appointment of the Petitioner was placed before the Committee constituted under the Chairmanship of Principal Secretary, G.A. Department for consideration. Subsequently, the

Committee, after due consideration, rejected the case of the Petitioner for appointment under the Rules, 1990, with the remarks that after death of the Government employee on 04.10.2008, his second wife has applied on 05.06.2009 for appointment under Rules, 1990, since the son of the first wife was minor at the time of death of the employee and there is no such provision for appointment of the second wife in the Rules, 1990 and a copy of the said communication was marked to the Petitioner.

8. The State-Opposite Parties have filed a Counter Affidavit taking a stand therein that the Petitioner had applied to the Executive Engineer, Salandi Canal Division, Bhadrak for her appointment under the Rules, 1990, which was processed through the Chief Construction Engineer, Anandpur Barrage Project, Salapada. After death of her husband, the Petitioner submitted application before the Executive Engineer, Salandi Canal Division, Bhadrak (under whom Petitioner's late husband Mr.A.K.Behera was working) for appointment under the R.A Scheme. After routing through the Chief Construction Engineer, Anandpur Barrage Project, Salapada, it was finally submitted to the Deputy Secretary to Govt., Department of Water Resources vide letter dated 22.02.2016 of the office of the Engineer-in-Chief, Water Resources. The said proposal was placed before a Committee constituted under the Chairmanship of the Principal Secretary to Government, GA Department, for consideration. The same was rejected on the ground that the Petitioner is the second wife of the deceased employee, who applied for appointment under the R.A. Scheme, when minor son of first wife is available and there is no provision under the Rules, 1990 for appointment of second wife. The said decision of the Committee was communicated vide letter dated 12.07.2016. It has further been stated in the Counter Affidavit that the said decision was not arbitrary as alleged by the Petitioner. Rather, it is in consonance with the Rehabilitation Assistance Rules, 1990.

9. Learned Counsel for the Petitioner submits, Smt. Ranjita Behera, wife of late A.K.Behera, died on 12.06.1999. After her death, A.K.Behera married to the Petitioner on 13.06.2002 and she became the legally wedded wife of A.K.Behera and rejection of the application of the Petitioner on the ground that she is the "second wife" is misconceived. Learned Counsel for the Petitioner further submits, it is not a case of bigamy. Rather, after death of Ranjita Behera, who was the first wife, late A.K.Behera, decided to go for second marriage during his life time.

10. Learned Counsel for the Petitioner, relying on the pre amended conditions stipulated under Rule-2 (b) of the OSC (RA) Rule, 1990, submits, the Petitioner being legally married wife of late A.K.Behera, is entitled for consideration of her case for compassionate appointment under the said Rules, 1990. The Authority concerned misread the said provisions under the 1990 Rules and illegally rejected her application for compassionate appointment alleging herself to be the second wife of late A.K.Behera and such action of the Authority concerned, being contrary to the legal provisions under the 1990 Rules, deserves interference.

11. Mr.Rout, learned Additional Standing Counsel for the State-Opposite Parties, reiterating the stand taken in the Counter Affidavit, submits that the Rule-2 of the Rules, 1990 has been omitted vide notification dated 05.11.2016. He further submits, in the meantime the Odisha Civil Services (Rehabilitation Assistance) Rules, 2020 has come into force with effect from 27.02.2020. In terms of sub rule (d) under Rule-2 of the said Rules, 2020, "Family Members" shall mean and include the following members –

"(i) Spouse of the deceased Government servant.

(iii) Sons or step sons or sons legally adopted through a registered deed executed before the death of the government servant.

(iv) Un-married daughters and Un-married step daughter.

(v) Widow daughters or daughters-in-law residing permanently with the family of the deceased Government employee.

(v) Legally divorced daughter."

12. Mr. Rout further submits that there is no infirmity in the impugned order.

13. Admittedly, as revealed from pleadings made by the parties, so also the documents available on record, the Petitioner got married to Arup Kumar Behera on 13.06.2002, only after the death of his first wife Ranjita Behera on 12.06.1999 and became the legally married wife of late A.K.Behera, who died on 04.10.2008 in a tragic road accident.

14. Further, it is revealed from record that the Petitioner, being the legally married wife, promptly applied on 05.06.2009 in terms of Rule- 8 (1) (a) of the OCS (RA) Rules, 1990 in the prescribed form for her appointment under the said Rules, 1990 enclosing thereto the documents required for the said purpose. Being further asked by the Authority concerned, she also furnished affidavit regarding the family maintenance, her marital status, so also affidavit regarding her actual age proof, vide communication dated 18.01.2016 made to the Executive Engineer, Salandi Canal Division, Bhadrak along with other documents. The said application with documents were duly forwarded by the Chief Construction Engineer, Anandapur Barrage Project, Salapada to the Engineer-in-Chief, Water Resources, Odisha, Bhubaneswar.

15. As per the definition of family members in terms of sub rule (b) in Rule 2 of the Rules, 1990 "Family Members" shall mean and include the following members in order of preference –

"(i) ***Wife/Husband****;*

(ii) Sons or step sons or sons legally adopted through a registered deed;

(iii) Unmarried daughters and unmarried step daughter;

(iv) Widowed daughter or daughter-in-law residing permanently with the affected family.

(v) Unmarried or widowed sister permanently residing with the affected family;

(vi) Brother of unmarried Government servant who was wholly dependent on such Government servant at the time of death" (Emphasis Supplied)

16. Since the Petitioner got married to A.K.Behera only after death of his first wife namely, Ranjita Behera and after the death of Late A.K.Behera, his son Soumya Ranjan Behera was only 12 years old, similarly Trailokya Behera, son of the present Petitioner, was only 2 years old, this Court is of the view that the Petitioner, being the only person eligible then for applying under the Rules, 1990, and even preference wise, being the wife of deceased employee, rightly applied in terms of the said Rules, 1990 and supplied all the information and documents, as required and asked for.

17. This Court is of further view that the Authority concerned was not justified in rejecting the Petitioner's application for appointment under Rules, 1990 on the sole ground that she is the alleged second wife of late A.K.Behera and there is no such provision for appointment of the second wife under the Rehabilitation Assistance Scheme in Rules, 1990. In term of Section- 5 (i) of the Hindu Marriage Act, 1955, a marriage may be solemnized between two Hindus, if neither party has a spouse living at the time of the marriage. Hence, second marriage of Arup Kumar Behera after death of his first wife, which is legal, in no case can be and should be the basis to hold that the Petitioner is the second wife of the deceased employee.

18. As may be seen from letter dated 20.08.2015 as at Annexure-7, the Deputy Collector (Estt.) Collectorate, Balasore, sent to the Chief Construction Engineer, the Distress Certificate issued in favour of the deceased family of late Arup Kumar Behera in response to his letter dated 22.07.2009. Though the Petitioner, being the legally married wife of late A.K.Behera, promptly applied for her appointment under the 1990, Rules in the year 2009, the same was finally processed after receiving the Distress Certificate in the year 2015, i.e. after six years, though a request was made to the said effect to the Collector, Balasore by the Authority in the year 2009. Ultimately, the application of the Petitioner for compassionate appointment was rejected after about 17 years i.e. on 12.07.2016, on a flimsy ground that she is the second wife of the deceased employee.

19. The apex Court in ***Malaya Nanda Sethy v. State of Odisha & Others, reported in AIR 2022 (SC) 2836*** vide paragraph-9 observed as follows:

"9. Before parting with the present order, we are constrained to observe that considering the object and purpose of appointment on compassionate grounds, i.e., ***a family of a deceased employee may be placed in a position of financial hardship upon the untimely death of the employee while in service and the basis or policy is immediacy in rendering of financial assistance to the family of the deceased consequent upon his untimely death, the authorities must consider and decide such applications for appointment on compassionate grounds as per the policy***

prevalent, at the earliest, but not beyond a period of six months from the date of submission of such completed applications.

We are constrained to direct as above as we have found that in several cases, applications for appointment on compassionate grounds are not attended in time and are kept pending for years together. ***As a result, the applicants in several cases have to approach the concerned High Courts seeking a writ of Mandamus for the consideration of their applications. Even after such a direction is issued, frivolous or vexatious reasons are given for rejecting the applications****. Once again, the applicants have to challenge the order of rejection before the High Court which leads to pendency of litigation and passage of time, leaving the family of the employee who died in harness in the lurch and in financial difficulty. Further, for reasons best known to the authorities and on irrelevant considerations, applications made for compassionate appointment are rejected. After several years or are not considered at all as in the instant case.*

If the object and purpose of appointment on compassionate grounds as envisaged under the relevant policies or the rules have to be achieved then it is just and necessary that such applications are considered well in time and not in a tardy way*. We have come across cases where for nearly two decades the controversy regarding the application made for compassionate appointment is not resolved. This consequently leads to the frustration of the very policy of granting compassionate appointment on the death of the employee while in service.* ***We have, therefore, directed that such applications must be considered at an earliest point of time. The consideration must be fair, reasonable and based on relevant consideration. The application cannot be rejected on the basis of frivolous and for reasons extraneous to the facts of the case. Then and then only the object and purpose of appointment on compassionate grounds can be achieved****."*

(Emphasis Supplied)

20. In paragraph-7 of the said judgment of ***Malaya Nanda Sethy*** (supra), it was also observed as follows:

"7. ***XXXX Not appointing the appellant under the 1990 Rules would be giving a premium to the delay and/or inaction on the part of the department/authorities. There was an absolute callousness on the part of the department/authorities. The facts are conspicuous and manifest the grave delay in entertaining the application submitted by the appellant in seeking employment which is indisputably attributable to the department/authorities****. In fact, the appellant has been deprived of seeking compassionate appointment, which he was otherwise entitled to under the 1990 Rules.* ***The appellant has become a victim of the delay and/or inaction on the part of the department/authorities which may be deliberate or for reasons best known to the authorities concerned****. Therefore, in the peculiar facts and circumstances of the case, keeping the larger question open and aside, as observed hereinabove,* ***we are of the opinion that the appellant herein shall not be denied appointment under the 1990 Rules****."* *(Emphasis Supplied)*

21. In view of the observations made above and the settled position of law, the impugned decision of the Deputy Secretary to Government, Government of Odisha,

Department of Water Resources dated 12.07.2016,as at Annexure-14 and the Memo dated 28.07.2016, as at Annexure-15 are hereby set aside. The Opposite Party No.1 is directed to take a decision afresh on the application of the Petitioner dated 05.06.2009 and to consider her appointment on compassionate ground under the Rules, 1990, which was in vogue during the relevant period and to appoint the Petitioner in the post of Junior Clerk, if she is otherwise found suitable.

22. It is further directed that the aforesaid exercise shall be completed within a period of four weeks from the date of communication of the certified copy of this judgment.

23. Accordingly, the Writ Petition stands disposed of. No Order as to cost.

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2023 (II) ILR – CUT - 951

G. SATAPATHY, J.

BLAPL NO.1703 OF 2023

GULASHAD …….Petitioner

-V-

STATE OF ODISHA …….Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 r/w section 37 of NDPS Act – Offence punishable U/s 20(b)(ii)c of NDPS Act – There was recovery and seizure of commercial quantity of contraband Ganja to the tune of 102kg and 400 gms from the dickey of maruti car in which the petitioner was found travelling at the relevant time – The mandatory conditions for granting bail as available U/s 37 of the NDPS Act have not been fulfilled by the petitioner – Effect of – Held, this court is unable to persuade itself to grant bail to the petitioner. (Para-16)

Case Law Relied on and Referred to :-

1. (2016) 14 SCC 358 : Darshan Singh Vs. State of Haryana.
2. 1995 SCC Online Delhi 895 : Amiri Ali Ligaga Vs. The State.
3. 2022 Live Law (SC) 267: Sanjeev & Anr. Vs. State of Himachal Pradesh.
4. (2018) 9 SCC 708 : SK. Raju @ Abdul Haque @ Jagga Vs. State of West Bengal.
5. Criminal Appeal No. 1051 of 2009 : Rajender Singh Vs. State of Haryana.
6. AIR 1994 SC 1872 : State of Punjab Vs. Balbir Singh.
7. (2004) 12 SCC 266 : Sarija Banu(A) Janarthani & Ors. Vs. State through Inspector of Police.
8. (2009) 8 SCC 539 : Karnail Singh Vs. State of Haryana.
9. (1999) 6 SCC 172 : State of Punjab Vs. Baldev Singh.
10. (2020) 12 SCC 122: State of Kerala and others Vs. Rajesh & Anr.

11. 2023 CRI.L.J. 487 : Rahul Rajput Thakur Vs. State of Odisha.
12. (2011) 1 SCC 609 : Vijaysingh Chandubha Jadeja Vs. State of Gujarat.
13. 2022 SCC Online SC 891 : Narcotics Control Bureau Vs. Mohit Agarwal.

For Petitioner : Mr. S.Manohar
For Opp. Party : Mr. P.K.Pattnaik, AGA

JUDGMENT Date of Argument :12.04.2023: Date of Judgment: 25.04.2023

G. SATAPATHY,J.

1. This is an application U/S. 439 of Cr.P.C. by the Petitioner for grant of bail in connection with Machakund P.S. F.I.R. No. 36 dated 19.04.2021 corresponding to Special T.R. Case No. 40 of 2021 pending in the Court of learned Addl. Sessions Judge-cum-Special Judge, Koraput for commission of offence punishable U/S. 20(b)(ii)(C) of NDPS Act.

2. The broad allegations as appearing against the petitioner and others are that on 19.04.2021 at 10.30 A.M. the informant Police S.I. and staff while performing vehicle verification at Kangrapada bridge, noticed one white colour Swift Dzire car coming towards Lamtaput side from Machkund side and they, accordingly, stopped the car and detained the four occupants of the said car including the driver. On suspicion, they verified the car and found three numbers of tensil jery bags loaded in the dicky of the car with no registration number plate and out of such jery bags, acute smell of ganja was emitting. On being asked, the four occupants detained by the police disclosed their names as Ajay Pratap Kori, Hari Sankar Singh, Gulashad (petitioner) and Rahul Kumar Verma. After procuring weighman and two independent witnesses as well as successfully requisitioning the Executive Magistrate-cum-Tahasildar, the informant-police officer gave notice to the above named accused persons in writing U/S. 50 of NDPS Act and weighed the contents of recovered three numbers of jari bags which were found to be flowering and fruiting tops of cannabis plant (Contraband Ganja) in presence of witnesses and Executive Magistrate and it came to 102 Kgs and 400 grams of Contraband Ganja without jery bags. The informant police officer thereupon, accordingly, seized the aforeaid quantity of Contraband Ganja in presence of witnesses. In the course of search of the said Swift Dzire car, one registration certificate bearing No. UP70CX5086 standing in the name of Nishar Ahmad of Pratapgarh (UP) and one pollution certificate were also recovered. On personal search of each of the four occupants, different articles such as mobile phones, Aadhar cards etc. were found and seized. On the aforesaid fact, the S.I. of Police lodged a FIR before the IIC, Machkund Police Station who registered Machkund Police Station FIR No. 36 dated 19.04.2021 which was investigated into and on completion of investigation, charge sheet was filed against the accused persons including the present petitioner for commission of offence U/S. 20(b)(ii)(C) of NDPS Act.

2.1 On 14.11.2022, the present petitioner unsuccessfully moved an application for grant of bail before the learned Addl. Sessions Judge-cum-Special Judge, Koraput who eventually rejected the bail application of the petitioner after taking note of the allegations and the stipulation as contained in Section 37 of NDPS Act. The petitioner, thereafter, approached this Court in this bail application for his release on bail.

3. In the course of hearing of bail application, Mr.Shyam Manohar, learned counsel for the petitioner appearing virtually has submitted that the petitioner is neither the owner nor the driver of the car from which Contraband Ganja was recovered and even in the course of investigation, no materials has been collected to prima facie indicate that the petitioner was dealing with the Contraband Ganja either as a seller or purchaser nor was any Contraband Ganja recovered from the personal search of the petitioner and therefore, by no stretch of imagination, conscious possession of Contraband Ganja can be attributed to the petitioner. It is further submitted by Mr. Manohar that the possession of Contraband Ganja would have been attributed to the petitioner, had he been found alone in the vehicle and when the personal search of the petitioner does not lead to seizure of any Contraband Ganja, he thereby can be safely presumed to be innocent occupant of the vehicle. Additionally, learned counsel for the petitioner has also submitted that apparently there was neither any compliance of Section 42 nor of Section 50 of the NDPS Act and such non-compliance would strike at the very root of the case and therefore, the petitioner is entitled to bail on the very ground of non-compliance of section 42 and 50 of NDPS Act, compliances of which are mandatory in nature. On summing up his argument, learned counsel for the petitioner has prayed to allow the bail application of the petitioner by relying upon the following decisions (i***) Darshan Singh Vrs. State of Haryana; (2016) 14 SCC 358, (ii) Amiri Ali Ligaga Vrs. The State; 1995 SCC Online Delhi 895, (iii) Sanjeev and another Vrs. State of Himachal Pradesh; 2022 Live Law (SC) 267, (iv) SK. Raju @ Abdul Haque @ Jagga Vrs, State of West Bengal; (2018) 9 SCC 708, (v) Rajender Singh Vrs. State of Haryana in Criminal Appeal No. 1051 of 2009*** disposed of on 8th August***, 2011, (vi) State of Punjab Vrs. Balbir Singh; AIR 1994 SC 1872 and (vii) Sarija Banu(A) Janarthani and others Vrs. State through Inspector of Police; (2004) 12 SCC 266***.

4. In reply, Mr.P.K.Pattnaik, learned AGA has however, strongly opposed the bail application of the petitioner by contending inter alia that there was adequate compliance of Sections 42 and 50 of the NDPS Act as evident from the materials on record and even if, the prosecution has complied the provisions of Section 42 and 50 of NDPS Act, but since the recovery of Contraband Ganja was from the dicky of the car, there is absolutely no requirement of compliance of Section 50 of NDPS Act which speaks about the compliance for personal search of the person accused of offences under NDPS Act. Learned AGA has submitted by taking this Court through the materials placed on record that the petitioner was found as one of the occupants of the car having no registration number plate, carrying 102 Kgs. of Contraband

Ganja which by itself attracts the stipulation as contained in Section 37 of NDPS Act, but the petitioner having failed to satisfy the Court the twin conditions as enumerated therein, he is not entitled to be released on bail. On the aforesaid submissions, learned AGA has prayed to reject the bail application of the petitioner.

5. After having considered the rival submissions advanced on behalf of the parties, it appears that the petitioner has approached this Court for grant of bail primarily on two grounds. One of such ground is non-compliance of Sections 42 and 50 of the NDPS Act and the other one is for want of prima facie allegations. In addressing the first plank of argument, it appears to the Court that the petitioner claims apparent non-compliance of Sections 42 and 50 of NDPS Act, but learned AGA on the other hand claims sufficient and adequate compliance of the same. In support of his contention for non-compliance of Section 42 by the Investigating Officer, the learned counsel for the petitioner has taken this Court through the contents of the FIR, but the learned trial Court while rejecting the bail application of the petitioner has indicated in his order that "the S.I. of Police has recovered and seized 102 Kgs. and 400 Grams of Contraband Ganja from the exclusive and conscious possession of the present accused along with co-accused persons **after observing all the formalities of search and seizure under NDPS Act**." This Court, however, is conscious of the fact that compliance of Section 42 of NDPS Act is not only mandatory, but also a relevant fact, but in view of the rival claims, the moot question crops up for consideration is whether compliance/ adequate compliance or non-compliance of Section 42 of NDPS Act can be ascertained by merely going through the contents of FIR/charge sheet or is it required to be ascertained from the full-fledged evidence led in the course of trial?. In support of his contention to the effect that non-compliance of aforesaid provision can be ascertained from FIR, Mr.S.Manohar, learned counsel for the petitioner has relied upon number of decisions in ***(i) Darshan Singh(supra), (ii) Amiri Ali (supra), (iii) Sanjeev(supra) (iv) SK. Raju(supra), (v) Rajender Singh(supra) and (vi) Balbir Singh(supra)*** but these decisions are rendered after the trial when the compliance or non-compliance of mandatory provision under NDPS Act can be precisely ascertained through the evidence on record. On the other hand, the petitioner has sought to press the non-compliance of mandatory provision of Section 42 of NDPS Act for grant of bail by taking this Court through the contents of FIR, more particularly when trial is yet to commence and evidence thereon is yet to be led in the case at hand. It is, of course, contended by the learned counsel for the petitioner that non-compliance of Section 42 would enure to the benefit of the accused for grant of bail and in support of such contention, reliance has been placed by him to the decision in ***Sarija Banu(A) Janarthani and others Vrs. State through Inspector of Police; (2004) 12 SCC 266*** wherein a two Judge Bench of the Apex Court in paragraph-7 has held thus:-

> *"The compliance of Section 42 is mandatory and that is a relevant fact which should have engaged attention of the Court while considering the bail application."*

In the prsent case on hand, non-compliance of Section 42 of the NDPS Act has been claimed by the petitioner which is seriously refuted by the learned AGA by submitting that there is adequate compliance of Section 42 of NDPS Act. The petitioner of course has drawn the attention of the Court by taking through the averments made in the FIR, but in the same vigor learned AGA has also drawn the attention of the Court to the relevant portion of the FIR where the informant has stated "as I have reason to believe that delay may be caused in obtaining search warrant which would facilitate the culprits to escape with contraband Ganja, I thought it proper to detect the Ganja loaded vehicle without obtaining the search warrant and then I intimated the fact to IIC, Machkund P.S., SDPO, Nandapur as my immediate superior and subsequently to S.P. Koraput as per the provision of NDPS Act at 11.15 A.M." Be that as it may, there is no dispute about total non-compliance of Section 42 of NDPS Act is impermissible in the eye of law as held by a Constitution Bench of Apex Court in ***Karnail Singh Vrs. State of Haryana; (2009) 8 SCC 539*** wherein while answering a reference whether compliance of Section 42 is mandatory or not and substantial compliance is sufficient, a five Judges Bench of the Apex Court recorded its conclusion in Paragraph-35 and it is, accordingly, held therein at Paragraph 35 (c) and (d), which are very much relevant for this case, as under:-

> *"(c) In other words, the compliance with the requirements of Sections 41 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer.* ***But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency****.*
>
> *(d) While total non-compliance with requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with section 42. To illustrate,* ***if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of section 42****. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act.* ***Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case****. The above position got strengthened with the amendment to section 42 by Act 9 of 2001."*

6. In ***Karnail Singh(supra),*** the Apex Court in Paragraph-33 and 34 has further held that:-

> 33. xx xx xx "the relaxation by the legislature is evidently only to uphold the object of the Act. The question of mandatory application of the provision can be answered in the light of the said amendment. ***The non-compliance of the said provision may not vitiate the trial if it does not cause any prejudice to the accused***."
>
> 34. xx xx xx "***these provisions should not be misused by the wrongdoers/offenders as a major ground for acquittal. Consequently, these provisions should be taken as discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug-peddlers.***"

7. It is, therefore, very clear on a conspectus of the principles laid down by the Apex Court in ***Karnail Singh*** (supra) that whether there is adequate or substantial compliance of Section 42 of NDPS Act or not is a question of fact to be decided in each case and such non-compliance may not vitiate the trial, if it does not cause any prejudice to the accused and the provision should be taken as a discretionary measure which should check the misuse of the act, rather than providing an escape to the hardened drug peddlers and therefore, the non-compliance or compliance can be precisely ascertained at the stage of trial when full-fledged evidence is led before the Court and therefore, it would not be possible to ascertain meticulously the compliance or non-compliance of Section 42 at the stage of granting bail particularly in absence of the evidence.

8. Adverting to the other contention of the petitioner with regard to non-compliance of Section 50 of the NDPS Act, this Court is never in doubt that the Empowered Officer is under obligation of his duty, before conducting the search of the person of a suspect, to inform the suspect either orally or in writing about his right to be searched before a Gazetted Officer or a Magistrate, but failure to give such information would not only vitiate the trial, but render the recovery of illicit article illegal. This Court, however, is of the view that the compliance of Section 50 applies to search of a person, but not for the recovery of contraband articles in a search of premises or conveyance. In this regard, this Court is fortified with the decision of Constitutional Bench of Apex Court in ***State of Punjab Vrs. Baldev Singh; (1999) 6 SCC 172*** which was relied upon by the petitioner and wherein a five Judges Bench of Apex Court has been pleased to hold at Paragraph-12 as under:-

> *12. "On its plain reading, Section 50 would come into play only in the case of a **search of a person** as distinguished from **search of any premises** etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted."*

9. Whether compliance of Section 50 is a question of fact or not has been well explained by the Apex Court in ***Baldev Singh(supra)*** wherein at Paragraph-33, the Apex court held as under:-

> *33."The question whether or not the safeguards provided in Section 50 were observed would have, however, to be determined by the Court* ***on the basis of the evidence led at the trial*** *and the finding on that issue, one way or the other, would be relevant for recording an order of* ***conviction or acquittal****. Without giving an opportunity to the prosecution to establish at the trial that the provisions of Section 50 and, particularly, the safeguards provided in that section were complied with, it would not be advisable to cut short a criminal trial."*

10. In the instant case in support of grant bail to the petitioner for non-compliance of Section 50 of NDPS Act before commencement of trial, learned counsel for the petitioner also relies upon the decision of this Court in ***Raghu alias Rahul Rajput Thakur Vrs. State of Odisha; 2023 CRI.L.J. 487*** for grant bail to the accused therein for non-compliance of Section 50 in matters relating to illegal transportation of 137 Kgs and 300 Grams of Contraband Ganja in a vehicle, but this Court at the cost of repetition once again reiterates the observation of the Apex Court in the decision relied upon by the petitioner in ***Vijaysingh Chandubha Jadeja Vrs. State of Gujarat; (2011) 1 SCC 609*** wherein a Constitutional Bench of five Judges of our Apex Court has observed in paragraphs-20 and 31 as under:-

> *20."The mandate of Section 50 is precise and clear viz. if the* ***person intended to be searched*** *expresses to the authorized officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorized officer to do so.*
>
> *31. "The question* ***whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf****."*

11. On analyzing the provision of Section 50 of NDPS Act and following the dictum of the Apex Court in ***Baldev Singh (supra) and Vijaysingh Chandubha Jadeja(supra)*** which have definite and clear precedent value, this Court is of the firm view that compliance of Section-50 applies to search of person, but not to apply to search of premises or conveyance, and the compliance or non-compliance of Section 50 of the NDPS Act is a question of fact and thereby, is a matter of trial and it can be ascertained precisely after complete evidence is led before the Court. In the present case, the narration of allegation reveals that Contraband Ganja was recovered from a Maruti Suzuki Swift Dzire car without having any registration number and the petitioner was one of the occupants of said car, and although a prima facie compliance of Section 50 in the context may not be required for search of the vehicle, but the investigating agency has, of course, made endeavor for compliance of Section 50 of NDPS Act for search of the person of the petitioner, which is to be examined/tested after evidence is tendered in this case.

12. In view of the settled position of law as explained by the Apex Court in ***Baldev Singh (supra) and Vijaysingh Chandubha Jadeja(supra),*** the compliance or non-compliance of Section 50 is a question of fact and can be gone into in the course of trial, but when the trial is yet to commence in this case and evidence is yet to be led, this Court cannot precisely conclude that there is apparently non-compliance of Section 50 of NDPS Act, more particularly when the learned Government Advocate stoutly refutes the contention of the petitioner for non-compliance of Sections 42 and 50 by placing reliance to the averments made in the FIR and copy of notice given U/S. 50 to the petitioner and he, thereby, emphatically submits adequate compliance of Sections 42 and 50 of NDPS Act which can be examined/tested after evidence is led in the case. What emerges from the aforesaid discussions in the present case by following the law laid down by Apex Court in ***Karnail Singh (supra), Baldev Singh (supra) and Vijaysingh Chandubha Jadeja(supra)*** is that since the compliance or non-compliance of Section 42 & 50 of the NDPS Act being questions of facts can be ascertained after full-fledged evidence is tendered in the trial before the Court, but the same cannot be ascertained at this stage when investigation has been completed and the evidence is yet to be tendered. Hence, the submissions made on behalf of petitioner for grant of bail to him owing to non-compliance of Section 42 & 50 of the NDPS Act is not acceptable and merits no consideration at this stage, especially when evidence in this case is yet to be tendered.

13. In this case, the FIR lodged by police officer discloses that the informant and the staff had detected the Maruti Swift Dzire car without any registration number plate and the petitioner and three others were allegedly found as occupants therein with three Jari bags containing 102Kgs and 400 Grams of Contraband Ganja in the dicky of the said car at the time of detection and the informant police officer, accordingly, seized the Contraband Ganja and later on, one number plate with number UP70CX5086 along with one pollution certificate was allegedly recovered by the informant from the front desk of the car. The FIR also does not disclose any explanation of the petitioner for his presence in the car. What is the most important is that the quantity of Contraband Ganja allegedly seized from the car is coming under commercial quantity and, thereby, the petitioner has to satisfy the Court the mandatory conditions of Section 37 of NDPS Act for grant of bail to him, but on conspectus of the materials placed on record, this Court finds it difficult to record satisfaction at this stage to the effect that the petitioner is not guilty of the offence and he is unlikely to commit offence while on bail, which are mandatory requirements of Sec. 37 of NDPS Act for grant of bail to the petitioner.

14. While granting bail to the accused for an offence under NDPS Act involving commercial quantity of Contraband articles, it is imperative for the Court to see that when the Public Prosecutor opposes the bail application of the accused, the Court has to be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on

bail. In this regard, this Court considers it profitable to refer to the case in ***State of Kerala and others Vrs. Rajesh and another; (2020) 12 SCC 122*** wherein the Apex Court has held that:-

> *"19. The scheme of Sec. 37 reveals that the exercise of power to grant bail if not only subject to the limitation contained U/s.439 Cr.P.C., but is also subject to the limitation placed by Sec. 37 which commences with non-obstante clause. The operative part of the said Sec.is in the negative form prescribing the enlargement of bail to any person acquit of commission of an offence under the Act, unless twin conditions are satisfied.The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.*
>
> *"20. The expression "reasonable grounds" means something more that prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence.The reasonable believe contemplated in the provisions requires existence of such facts and circumstance as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Sec.37 that in addition to the limitations provided under the Cr.P.C.or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.*

15. In ***Narcotics Control Bureau vs Mohit Agarwal ; 2022 SCC Online SC 891*** the Apex Court has been pleased to held as under:-

> *"In our opinion the narrow parameters of bail available under Section 37 of the Act, have not been satisfied in the facts of the instant case. At this stage, it is not safe to conclude that the respondent has successfully demonstrated that there are reasonable grounds to believe that he is not guilty of the offence alleged against him, for him to have been admitted to bail.* ***The length of the period of his custody or the fact that the charge-sheet has been filed and the trial has commenced are by themselves not considerations that can be treated as persuasive grounds for granting relief to the respondent under Section 37 of the NDPS Act****."*

16. In view of the discussions made in the foregoing paragraphs and taking into consideration the allegations leveled against the petitioner and keeping in mind the alleged recovery and seizure of commercial quantity of Contraband Ganja to the tune of 102Kgs and 400 Grams from the dicky of Maruti car in which the petitioner was found travelling at the relevant time of detection and recovery of Contraband Ganja and the consequent failure of the petitioner to fulfill the mandatory conditions of Section 37 of NDPS Act whereby satisfaction of the Court is sine qua non for

grant of bail to the accused for offence under NDPS Act involving commercial quantity and taking into account the materials placed on record in entirety, this Court is unable to persuade itself to grant bail to the petitioner.

Hence, the bail application of the petitioner stands rejected. Trial be expedited, if there is no other legal impediment. Accordingly the BLAPL stands disposed of.

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