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NOMINAL INDEX

ACTS, ORDER, RULES & REGULATION

Acts & No.	
1996 -26	Arbitration and Conciliation Act, 1996
1908- 5	Code of Civil Procedure, 1908
1973- 02	Code of Criminal Procedure, 1973
1950	Constitution of India, 1950
1952- 19	Employee Provident Funds & Miscellaneous Provisions Act, 1952
1948- 34	Employee's State Insurance Act, 1948
1955-10	Essential Commodities Act, 1955
1984- 66	Family Courts Act,1984
1860-45	Indian Penal Code, 1860
1988- 59	Motor Vehicle Act, 1988
1881-26	Negotiable Instruments Act, 1881
1969-15	Odisha Education Act, 1969
1965- 01	Orissa Grama Panchayat Act, 1964
1962- 33	Odisha Government Land Settlement Act,1962
2013- 30	Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013
1954- 43	Special Marriage Act, 1954
1963- 47	Specific Relief Act,1963

RULES:- Odisha Non-Government Aided College Lecturer Placement Rules, 2014

ORDER:- Orissa Public Distribution System (Control) Order, 2008

REGULATION:-Orissa State Road Transport Corporation Employee Classification Recruitment and Condition of Service Regulation,1978

TOPICAL INDEX

SUBJECT INDEX

Jurisprudence – It is a fit case to direct reinvestigation by an independent agency like the C.I.D (Crime Branch).

Bandhna Toppo -V- State of Orissa & Ors.
2023 (II) ILR-Cut…… 1185

CRIMINAL PROCEDURE CODE, 1973 – Section 482 – The Petitioner challenges the cognizance of offences punishable under section 498-A, 506, 323 and 34 of IPC – Marriage between the petitioner No.5 and Op. No.2 has been dissolved by decree of divorce – There has been an amicable settlement between the parties with exchange of articles – Rs.10,00,000/-has also been paid towards permanent alimony – Whether the criminal proceeding should be quashed in exercise of power U/s. 482 of Cr.PC – Held, Yes.

Arun Kumar Panigrahi & Ors. -V- State of Orissa & Ors.
2023 (II) ILR-Cut…… 1163

CRIMINAL PROCEDURE CODE,1973 – Section 482 – The special Judge took cognizance of the offences U/s. 13(2)r/w section 13(1)(d) of Prevention of Corruption Act as well as sections 419,420,468,471,120B of IPC – Petitioner prayed for quashing of cognizance order on the ground that, sanction U/s. 197 Cr.PC have not taken – Held, the order of special judge regarding cognizance of the offences against the petitioner under P.C Act is set aside – In the case of IPC offences, that will have to be examined on case to case basis whether the facts complained of actually comprised the official activities of the accused person, who happened to be a government servant at the relevant time.

Sailendra Kumar Samal -V- State of Odisha (Vigilance)
2023 (II) ILR-Cut…… 961

CRIMINAL TRIAL – Conviction of appellant for offence punishable U/s. 302 of IPC – There is clear credible testimony of eye witness – Effect of – When the evidence of eye witness was found not only credible but also cogent and his evidence could not be demolished in cross examination and such evidence when received ample corroboration from medical evidence strengthening the motive of crime and case of prosecution.

Maghu Hansda -V- State of Orissa.
2023 (II) ILR-Cut…… 973

CRIMINAL TRIAL – Conviction for commission of offence U/s. 302 of the IPC, 1860 – The Trial Court upon examination of evidence of the doctor and evidence of eye witnesses have arrived at the conclusion of conviction – The immediate witness PW.21 is not stating regarding any role of the accused or even as to his presence – It is not placed through evidence from the side of the prosecution in the trial that the PW.21 is stating falsehood – Whether the evidence of PW.6 and PW.7 stating that they had seen the accused inflicting injuries upon the deceased is admissible? – Held, No. – These evidence get pushed into thick cloud of doubt – Therefore we are

not in a position to say that, the prosecution has proved that it is the accused who is the perpetrator of the crime.

Kala @ Kishore Ghadei -V- State of Odisha.
2023 (II) ILR-Cut…… 1067

CRIMINAL TRIAL – Conviction for the offence U/ss. 302/201 of the Indian Penal Code – There are no eye witnesses to the alleged act – There is no mention of the alleged act in the depositions of the prosecution witnesses – The medical report is inconclusive – There is no chain of circumstances which lead to the conviction of the appellant against section 302 of IPC – Effect of – Held, the evidence led by the prosecution is not sufficient to hold accused persons liable for offence U/s. 302 of the IPC.

Jagadish Mohanta -V- State of Odisha.
2023 (II) ILR-Cut…… 1058

CRIMINAL TRIAL – Offence punishable under section 302 of IPC – The conviction based on eye-witness which is fully corroborated by the medical evidence – Legal principles governing the appreciation of testimony of eye witness summarised.

Kasinath Mallick -V- State of Odisha.
2023 (II) ILR-Cut…… 965

CRIMINAL TRIAL – Offence punishable U/ss. 302/34 of IPC r/w U/s. 3(2)(V) of Scheduled Caste and Scheduled Tribe(Prevention of Atrocities)Act –Dying Declaration – Evidence of Pws1 to 4 clearly suggest about deceased making an oral dying declaration before them attributing the authorship of the crime to the accused person – Whether in absence of any certification made by doctor, the oral dying declaration made by the deceased can be taken into consideration – Held, Yes – Reason explained with reference to case laws.

Kuna @ Sushant Swain -V- State of Orissa.
2023 (II) ILR-Cut…… 1048

CONSTITUTION OF INDIA, 1950 – Article 226 – Implementation of award passed in industrial dispute case – The Petitioner is the principal employer – The workmen involved in the issue were all under the employment of contractor/ the immediate employer – In the meantime the contract with the immediate employer being over, the contractor has vanished – Whether the principle employer is liable to implement the award – Held, Yes – The principal employer has a statutory obligation to take up the responsibility on account of immediate employer as a fall out of the direction in the industrial adjudication of the award.

M/s. Jindal India Thermal Power Ltd.,Angul -V- State of Odisha & Ors.
2023 (II) ILR-Cut…… 1074

CONSTITUTION OF INDIA, 1950 – Article 226 – Maintainability of Writ – Petitioners challenges the selection of Opp. parties No. 4 to 12 for the post of Assistant Town Planner/Junior Town Planner of BDA – Whether the writ petition is maintainable in absence of any specific prayer for their own claim? – Held, No. – The present lis is not dealing with a public interest litigation rather it is a service dispute where the selection and appointment of Opp. 4 to 12 is only under challenge – In absence of any pleading and/or prayer with respect of the petitioners themselves in the present writ petition, they cannot be treated as aggrieved party in service dispute for which this court is firm view that, the case at hand does not warrant any consideration.

Tusar Kanti Tripathy & Anr. -V- State of Odisha & Anr.

2023 (II) ILR-Cut…… 1214

CONSTITUTION OF INDIA,1950 – Articles 226,227 – Petitioner being successful in civil suit filed mutation application –Which kept pending – Petitioner filed the mutation appeal before the sub-collector for seeking direction for completion of the mutation proceeding at the earliest – But the Appellate authority entered into merit and dismissed the Appeal and advised the Tahasildar to obtain the views of the Government pleader to file Appeal against the Civil Court order – Effect of – Held, the order of appellate authority is without jurisdiction and authority of law.

Anadi Parua & Ors.-V- State of Odisha & Ors.

2023 (II) ILR-Cut…… 1072

Difference between "Acquisition of the land vis-a-vis Sale" – Explained with reference to case laws.

Kabiraj Samal -V- Union of India & Ors.

2023 (II) ILR-Cut…… 1004

EMPLOYEE PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952 – Section 2(f) – Whether the NMR/DLR casual workman working in OUAT are eligible for their coverage under the provision of ESI scheme as per the Act, 1952 – Held, Yes.

OUAT Workers Union -V- Union of India & Ors.

2023 (II) ILR-Cut…… 1232

EMPLOYEE'S STATE INSURANCE ACT, 1948 – Section 45-A and 45-G– Duty of the corporation being quasi-Judicial authority while issuing recovery proceeding by garnishee order – Held, function of a quasi-Judicial authority is not simply to follow the mandate of provision to give notice, it must also act in a manner, that is fair and reasonable, especially when it is moving ex-parte – It is absolutely necessary for corporation to act in such a way that there should not arise allegation of arbitrariness.

PAYMENT – Once it is accepted as "Full & Final" – Whether subsequently the same amount can be challenge or assailed before the court or Arbitrator? – Held, Yes. – Even in the case of issuance of full and final discharge/ settlement voucher/ no dues certificate the arbitrator or court can go into the question whether the liability has been satisfied or not.

Babaji Nayak -V- Rites Ltd. Through Deputy General Manager.
2023 (II) ILR-Cut…… 1131

RES-JUDICATA – Whether dismissal of the former suit on the ground of disappearance of cause of action can operate as res-judicata in a subsequent suit – Held, No. – When the matter which directly and subsequently an issue in the previous suit and never adjudicated, the said issue was available for adjudication even after dismissal of the suit for disappearance of cause of action.

Biswanath Mukharjee -V- Netaji Sangha & Ors.
2023 (II) ILR-Cut…… 1178

RIGHT TO FAIR COMPENSATION AND TRANSPARENCY IN LAND ACQUISITION, REHABILITATION AND RESETTLEMENT ACT, 2013 – The petitioner being the land owner executed registered sale deeds in favour of GAIL in respect of the identified land measuring Ac 2.18 in toto at the rate higher than the rate determined by the land acquisition officer – The petitioner claimed enhanced compensation in respect of the land already sold for establishment of intermediate pigging station-cum-receiving terminal of GAIL – Whether the petitioner is entitled to get enhanced compensation – Held, No. – Reason indicated.

Kabiraj Samal -V- Union of India & Ors.
2023 (II) ILR-Cut…… 1004

SPECIAL MARRIAGE ACT, 1954 – Section 37(2)(3) – Appellant/ wife got married after decree of divorce was passed – Whether re-marriage will be an absolute bar for receipt of maintenance or permanent alimony? – Held, No – She is entitled to receive maintenance till her remarriage and permanent alimony as awarded by the competent court of laws.

Manjushree Gantait-V- Suman Gantait.
2023 (II) ILR-Cut…… 989

SPECIFIC RELIEF ACT, 1963 – Section 6(3) r/w order XLIII Rule 1(r) of Code of Civil Procedure, 1908 – Whether in view of clear bar in the provision U/s 6(3) of the Act any appeal is maintainable U/o XLIII Rule 1(r) from an order U/o 39 Rule 1 and 2 of CPC – Held, No – The provision itself makes it clear that no appeal shall lie from any 'Order' including the order U/o 39 Rule 1 and 2 of CPC made in a suit under section 6 of the 1963 Act.

Gopal Banka & Ors. -V- Dinesh Agarwal.
2023 (II) ILR-Cut…… 1120

SERVICE LAW – No work no pay – If an employee is prevented by the employer from performing his duties whether the employee can be blamed for not performing the work and no work no pay principles will applicable to him – Held, No. – The principle is not applicable to the employee where they have been prevented to perform their duty.

Janaki Ballav Mohanty -V- Principal Secretary to Govt., Department of Water Resources (DOWR),Bhubaneswar & Ors.

2023 (II) ILR-Cut…… 1244

SERVICE LAW – Regularization – The Petitioners were engage in the vacant posts on contractual basis after obtaining due approval from Orissa State Agricultural Market Board with effect from 31.08.2007 – The authority rejected the representation for regularization – Effect of – Held, direction issued to the Opp. Parties to regularize the services of the petitioners and grant them all consequential service and financial benefits as due and admissible by making due calculation thereof within period of four months.

Rabiratan Sahu & Ors.-V- State of Odisha & Ors.

2023 (II) ILR-Cut…… 1255

SERVICE LAW – Selection/Appointment – Fraud – Petitioners candidature have been rejected and petitioners have deliberately suppressed such material fact – The Petitioner have not challenged their rejection order rather challenges that selection of private Opp. Party No. 4 to 12 – Effect of – Held, on account of suppression of material facts which amounts to committing fraud on court and making deliberately wrong submission in the Writ Petition thereby approaching this court with unclear hands, this lis invoking plenary jurisdiction of writ court under Article 226 of the constitution of India is not entertainable.

Tusar Kanti Tripathy & Anr. -V- State of Odisha & Anr.

2022 (II) ILR-Cut…… 1214

WORD –"Confectionary"– Define with reference to Judicial Precedents.

Om Prakash Agarwalla -V- S.C. Das, Inspector, Vigilance, C.D., Cuttack.

2023 (II) ILR-Cut…… 1104

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2023 (II) ILR – CUT - 961

Dr. S. MURALIDHAR, C.J.

CRLMC NO. 2742 OF 2018

SAILENDRA KUMAR SAMAL …….Petitioner

.V.

STATE OF ODISHA (VIGILANCE) …….Opp. Party

CODE OF CRIMINAL PROCEDURE,1973 – Section 482 – The special Judge took cognizance of the offences U/s. 13(2)r/w section 13(1)(d) of Prevention of Corruption Act as well as sections 419,420,468,471,120B of IPC – Petitioner prayed for quashing of cognizance order on the ground that, sanction U/s. 197 Cr.PC have not taken – Held, the order of special judge regarding cognizance of the offences against the petitioner under P.C Act is set aside – In the case of IPC offences, that will have to be examined on case to case basis whether the facts complained of actually comprised the official activities of the accused person, who happened to be a government servant at the relevant time.

Case Laws Relied on and Referred to :-

1. (2001) 6 SCC 704 : P.K. Pradhan Vs. State of Sikkim
2. (2007) 36 OCR (SC) 233 : Prakash Singh Badal Vs. State of Punjab.
3. (2014) 13 SCC 70 : Chandan Kumar Basu Vs. State of Bihar.
4. (2015) 1 SCC 513 : Rajib Ranjan Vs. R. Vijaya Kumar.
5. (2020) 70 OCR (SC) 728 : Satyabrata Gupta Vs. State of Jharkhand.

For Petitioner : Mr. S. Sourav

For Opp. Party : Mr. N. Moharana, Standing Counsel

ORDER Date of Order : 05.07.2023

Dr. S. MURALIDHAR, C.J.

1. The Petitioner seeks quashing of an order dated 3rd May, 2018 passed by the Special Judge, Bhubaneswar in T.R. Case No.8 of 2018 as well as Bhubaneswar Vigilance P.S. Case No.13 of 2013 on the ground that in the absence of sanction under Section 197 Cr PC cognizance could not have been taken of the offences under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (PC Act) as well as Section 419, 420, 468, 471, 120B of the Indian Penal Code,1860 against the Petitioner.

2. At the time of filing of the present petition in 2018, the Petitioner was 58 years old and was serving as Joint Secretary in the Revenue Department, Government of Odisha. He has since superannuated. At the relevant time, when the subject matter of the case took place i.e. 2011, the Petitioner was working as a District Sub-Registrar (DSR). The case against him is that without correctly establishing the identity of the buyers and sellers of various properties, registration

was allowed in favour of persons with fake identities, in respect of large tracts of land in district Khurda in the year 2011. The further charge against the Petitioner is that he conspired with the buyer, the seller and the witnesses to various sale deeds thereby causing wrongful gain to the buyer and cheating the original owner of the land.

3. A charge sheet was filed on 30th December, 2017 in which it was noted that the competent authority had been moved to accord the sanction for prosecution but it had been refused. Yet, by order dated 3rd May, 2018 in T.R. Case No.8 of 2018 the Special Judge,Bhubaneswar took cognizance of the aforementioned offences against the Petitioner.

4. On the previous date, learned Standing Counsel appearing for the Vigilance Department (Opposite Party) conceded that as far as the offences under Sections 13(1)(d) read with Section 13(2) of the PC Act are concerned, in the absence of sanction, cognizance could not have been taken by the concerned Court. Nevertheless, he maintained that as regards the IPC offences, cognizance could be taken without previous sanction. He sought to place reliance on a series of judgments of the Supreme Court and this Court. Learned counsel for the Petitioner, on the other hand, sought to place reliance yet another set of judgments in support of the stand that without previous sanction, cognizance could not have been taken even in respect of IPC offences against the Petitioner. The Court then adjourned the matter to enable both the parties to file their respective notes of submissions.

5. On the side of the Petitioner, reliance is placed by Mr. S. Sourav, Advocate on the recent judgment of the Supreme Court of India dated 23rd July, 2021 in Criminal Appeal No.593 of 2021 ***(Indra Devi v. State of Rajasthan)*** to urge that the entire proceedings against the Petitioner should be quashed.

6. This Court has carefully perused the said judgment in ***Indra Devi v. State of Rajasthan*** (*supra*). It appears to have turned the peculiar facts and circumstances of the case. There were two officers superior to the Petitioner in that case working in the same Municipality who were granted benefit by the High Court by not allowing the proceeding to continue continuing in absence of sanction under Section 197 Cr PC. It was noted by the Supreme Court that those orders had remained unchallenged by both the complainant and the State. It was further noted that the Government servant in question "was simply carrying out his official duties for the work allotted to him that pertained to allotment, regularization, conversion of agricultural land and all kinds of works related to land for conversion." It was further noted that the "two key people involved in the process had already been granted protection" and thus, "Opposite Party No.2 herein, who is duly a Lower Division Clerk, could not be denied similar protection."

7. In the present case, however, there is nothing brought to the notice of this Court of there being any similar case against an officer senior to the Petitioner who was granted similar protection as has been sought by the Petitioner.

8. On the other hand, Mr. N. Moharana, learned counsel for the Vigilance Department, places reliance on a series of judgments of the Supreme Court including ***P.K. Pradhan v. State of Sikkim (2001) 6 SCC 704*** where in the context of previous sanction under 197 Cr PC for prosecuting Government servants for IPC offences, it was observed as under:

> "15. Thus, from a conspectus of the aforesaid decisions, it will be clear that for claiming protection under Section 197 of the Code, it has to be shown by the accused that there is reasonable connection between the act complained of and the discharge of official duty. An official act can be performed in the discharge of official duty as well as in dereliction of it. For invoking protection under Section 197 of the Code, the acts of the accused complained of must be such that the same cannot be separated from the discharge of official duty, but if there was no reasonable connection between them and the performance of those duties,the official status furnishes only the occasion or opportunity for the acts, then no sanction would be required. If the case as put forward by the prosecution fails or the defence establishes that the act purported to be done is in discharge of duty, the proceedings will have to be dropped. It is well settled that question of sanction under Section 197 of the Code can be raised any time after the cognizance; may be immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. But there may be certain cases where it may not be possible to decide the question effectively without giving opportunity to the defence to establish that what he did was in discharge of official duty. In order to come to the conclusion whether claim of the accused, that the act that he did was in course of the performance of his duty was reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. In such an eventuality, the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial."

9. Thereafter, in ***Prakash Singh Badal v. State of Punjab (2007) 36 OCR (SC) 233***, the Supreme Court in para 57 observed as under:

> "The offence of cheating under Section 420 or for that matter offences relatable to Sections 467, 468, 471 and 120B can by no stretch of imagination by their very nature be regarded as having been committed by any public servant while acting or purporting to act in discharge of official duty. In such cases, official status only provides an opportunity for commission of the offence."

10. The Court's attention has also been drawn to the decisions in ***Chandan Kumar Basu v. State of Bihar (2014) 13 SCC 70; Rajib Ranjan v. R. Vijaya Kumar (2015) 1 SCC 513*** and ***Satyabrata Gupta v. State of Jharkhand (2020) 70 OCR (SC) 728.*** In ***Rajib Ranjan v. R. Vijaya Kumar*** *(supra), inter alia*, it was observed as under:

> "The real question therefore, is whether the acts complained of in the present case were directly concerned with the official duties of the three public servants. As far as the offence of criminal conspiracy punishable under Sections 120-B read with Section 409 of the Indian Penal Code is concerned and also Section 5(2) of the Prevention of Corruption Act, are concerned they cannot be said to be of the nature mentioned

> in Section 197 of the Code of Criminal Procedure. To put it shortly, it is no part of the duty of a public servant, while discharging his official duties, to enter into a criminal conspiracy or to indulge in criminal misconduct. Want of sanction under Section 197 of the Code of Criminal Procedure is, therefore, no bar."

11. In ***Satyabrata Gupta v. State of Jharkhand*** *(supra),* the Supreme Court observed as under:

> "We decline to deviate from the view taken by the High Court that the charge against the petitioner for offence punishable under the Indian Penal Code can continue irrespective of the fact that sanction in respect of offence punishable under Prevention of Corruption Act, 1988 is not forthcoming. To that extent, we find no infirmity in the conclusion reached by the High Court. Our understanding of the impugned judgment is that the High Court has made it clear that if sanction to prosecute the petitioner for offence punishable under Prevention of Corruption Act, 1988 is not or has not been granted, the question of proceeding against the petitioner for that charge does not arise. This aspect be borne in mind by the Trial Court while proceeding with the trial against the petitioner."

12. The ratio of the aforementioned decisions of the Supreme Court is that in the case of IPC offences will have to be examined on case to case basis whether the facts complained of actually comprised the official activities of the accused person, who happened to be a Government servant at the relevant point in time. As observed in ***P.K. Pradhan*** (supra), this position might become clear only in the course of trial. Therefore, it was observed "in such an eventuality, the question of sanction should be left open to be decided in the main judgment, which may be delivered upon the conclusion of the trial."

13. Even in the present case, whether in fact in the transaction complained of the Petitioner was performing a role strictly in terms of his official duty or beyond the scope of his official duty will be clear only in the course of the trial. Therefore, it is too early for the Petitioner to contend at this stage that without previous sanction cognizance cannot be taken of the IPC offences for which he is sought to be prosecuted.

14. The net result of the above discussion is the impugned order of the Special Judge, Vigilance, Bhubaneswar dated 3rd May, 2018 is interfered with only to the extent that it has proceeded to take cognizance of the offences against the Petitioner under the PC Act and to that extent the said order is set aside. However, the order is not interfered with as far as it has taken cognizance of the offences under IPC against the Petitioner.

15. The petition is disposed of in the above terms.

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2023 (II) ILR – CUT - 965

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

JCRLA NO. 81 OF 2006

KASINATH MALLICK ……Appellant

.V.

STATE OF ODISHA ……Respondent

CRIMINAL TRIAL – Offence punishable under section 302 of IPC – The conviction based on eye-witness which is fully corroborated by the medical evidence – Legal principles governing the appreciation of testimony of eye witness summarised. (Para 13)

Case Law Relied on and Referred to :-

1. CRLA No.739 of 2017: Shahaja @ Shahjahan Ismail Mohd. Shaikh .Vs. State. of Maharashtra.

For the Appellant : Mr. Debasis Sarangi, Amicus Curiae

For the Respondent : Mr. Janmejaya Katikia,AGA

JUDGMENT Date of Judgment: 14.07.2023

Dr. S. MURALIDHAR, C.J.

1. This appeal is directed against a judgment dated 13th April 2006 passed by the Additional Sessions Judge, Boudh in S.T. Case No.22 of 2005 convicting the Appellant for the offence punishable under Section 302 of IPC and sentencing him to undergo imprisonment for life.

2. By an order dated 19th January 2012, this Court directed that the Appellant be enlarged on bail during the pendency of the appeal.

3. The case of the prosecution is that on 24th October 2004 at around 9.30 am, while the Appellant was returning from the village Baragochha with his wife Bhagyaseni Mallick @ Keta (hereafter, 'the deceased'), on the way at Lungurujena near Kenjari jungle, he brutally assaulted the deceased by means of a stone and she died on the spot. On the report of Balakrushna Mahamallik (P.W.1), the local police commenced investigation. Surendra Baghsingh (P.W.11), who was the Officer-in-Charge, Manamunda Police Station (PS), received a written report of P.W.1 and in the course of investigation he visited the spot and examined witnesses. On 25th October 2004, he held an inquest over the dead body of the deceased. He seized the bloodstained earth, sample earth, the piece of stone stained with blood in the presence of witnesses and prepared a seizure list. He then sent the dead body for autopsy. He seized the wearing pant and shirt of the Appellant, the ornaments of the deceased and arrested the Appellant on 26th October, 2004. The statements of two of the witnesses were recorded under Section 164 Cr PC on 8th November, 2004. After

receipt of the postmortem report and chemical examination report, P.W.11 submitted a charge sheet on 11th January, 2005.

4. The Appellant pleaded not guilty and claimed trial. 11 witnesses were examined for the prosecution. Of these, the statements of Bishnu Prasad Sahu (P.W.6) and Bhikari Charan Meher (P.W.3) were, in the course of investigation recorded also under Section 164 Cr PC. No witness was examined for the Appellant.

5. On an analysis of the entire evidence, the trial court came to the conclusion that the prosecution had proved its case against the Appellant beyond all reasonable doubt. As regards the delay in registering the FIR, it was noted that no question had been put to the I.O. regarding its cause and further, no prejudice was shown to have been caused to the Appellant on that score. The Appellant was accordingly convicted of the offence punishable under Section 302 IPC and sentenced in the manner indicated.

6. This Court has heard the submissions of Mr. Debasis Sarangi, learned Amicus Curiae for the Appellant and Mr. Janmejaya Katikia, learned Additional Government Advocate for the State.

7. There are two eye-witnesses to the occurrence i.e., P.Ws.3 and 6. Both of their statements under Section 164 Cr PC were recorded. P.W.4 was a post occurrence witness, whereas P.Ws.5, 7 and 10 were witnesses to the seizure. Dr. Sk. Maniruddin (P.W.9) conducted the postmortem.

8. The following injuries on the body of the deceased were noticed by P.W.9:

> "(iii) There was a laceration of tongue of right side by the fractured ends of the lower jaw of right side. There was compound fracture of the right lower jaw which was broken into three pieces each of size 1 and ½ cm. x 2cm x 1cm. with a loss of two teeth, one premolar and one canine. There was dislocation of the right lower jaw from the joint tamper mandible joint."

9. As regards the cause of death, the opinion was as under:

> "Fracture and dislocation of the lower jaw of the right side leading to profuse haemorrhage, shock and suffocation."

10. The seized stone was shown to P.W.9 and he confirmed that the injuries over the body of the deceased could have been caused by it. P.W.9 was subjected to cross-examination and he was categorical that the injuries that he had detected were not possible by the impact of a medha or stick. He also ruled out the injury as a result of a woman suffering from epilepsy falling on a stony surface. He stated in his cross-examination that "in fact disfiguration is quite obvious in the present case, but I have not specifically so mentioned in my report".

11. P.W.3 very clearly stated that while he was proceeding to the Gundulia hat on the way at Kenjari jungle near a turning, he found a young girl child weeping near a bicycle on the road. Soon thereafter, P.W.3 saw the Appellant brutally

assaulting the deceased with a stone on the chest, face and neck. When P.W.3 raised a protest, the Appellant threatened him and out of fear, P.W.3 receded from the spot. He noticed one Bishnu Sahu (P.W.6) arriving at the spot. In his cross-examination, P.W.3 stated that when he asked the Appellant what he was doing there, the Appellant stood up holding a stone stained with blood and threatened to kill P.W.3. The cross-examination of this witness does not seem to have yielded much for the defence.

12. Likewise, P.W.6 stated that he too noticed a female child crying near a cycle parked on the road and he too saw the Appellant assaulting the deceased on her face and chest with a stone. He too noticed P.W.3 coming from Gundulia side. On the material aspects, both P.Ws.3 and 6 completely corroborated each other. In their respective statements under Section 164 Cr PC they were consistent in their version naming the present Appellant as being the assailant and his attacking the deceased with a stone on her neck and head.

13. The medical evidence has fully corroborated the eye-witness testimonies of P.Ws.3 and 6. Both these witnesses are the independent witnesses unrelated to the deceased or the Appellant. Recently in ***Shahaja @ Shahjahan Ismail Mohd. Shaikh v. State of Maharashtra*** (judgment dated 14th July, 2022 in Crl. A. No. 739 of 2017), the Supreme Court of India has summarized the legal principles governing the appreciation by courts of eye- witness testimony as under:

> "27. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:
>
> I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.
>
> II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.
>
> III. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.
>
> IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating

officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

VII. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness. [*See Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, 1983 Cri LJ 1096 : AIR 1983 SC 753, Leela Ram v. State of Haryana, AIR 1999 SC 3717, and Tahsildar Singh v. State of UP, AIR 1959 SC 1012]*

28. To put it simply, in assessing the value of the evidence of the eye-witnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, the circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would

> attach to their evidence. Although in cases where the plea of the accused is a mere denial, yet the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raise a definite plea or puts forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the value of the prosecution evidence."

14. Tested on the anvil of the above principles, this Court finds that the testimonies of the eye witnesses P.Ws.3 and 6 to be credible and reliable. Further they have received independent corroboration by the medical evidence. Therefore, it is safe to convict the Appellants on the basis of such evidence.

15. Although, learned Amicus Curiae for the Appellant sought to argue that there was an unexplained delay in the lodging of the FIR and some inconsistencies in the depositions of P.Ws.3 and 6 and in particular, the statement of the I.O., this Court finds that these really do not help the defence very much. There is some admission made by the I.O. about P.W.6 not telling him about the Appellant uttering certain words to the deceased and chasing her. However, on the material aspects of the statements of P.Ws.3 and 6 not much has been elicited from even P.W.11 to discredit their testimonies. As rightly pointed out by the trial court, even on the aspect of delay in lodging the FIR, no question was put to this witness to explain it. Therefore, this cannot be said to have weakened the case of the prosecution. Added to all of this is the chemical examination report which clearly showed that the clothes of the deceased contained stains of human blood. The stone had human blood of AB grouping. All of this strengthened the case of the prosecution against the Appellant.

16. Viewed from any angle therefore there is absolutely no case made out by the Appellant for interference with the impugned judgment of the trial court. The present appeal is accordingly dismissed.

17. The bail bonds of the Appellant are hereby cancelled. He is directed to surrender forthwith and, in any event, not later than 14th August 2023 failing which the IIC of the concerned Police Station will take steps to apprehend him to serve out the remaining sentence. A copy of this judgment be sent forthwith to the IIC of concerned Police Station for necessary action.

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2023 (II) ILR – CUT - 969

Dr. S. MURALIDHAR,C.J.

TRPCRL NOS.3 OF 2023 (WITH BATCH OF CASES)

(TRPCRL NOS. 104,106,107,108,109 & 110 OF 2022 AND 15 OF 2023)

PRASHANTA KUMAR DASH …….Petitioner

.V.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 219,220 – The petitioner who is the same in all these transfer petitions is a Director in M/s. Seashore Funds management Private Limited, M/s. Seashore Securities Limited and is also associated with 13 multi purpose co-operative of the seashore group – The petitioner filed these petitions seeking transfer of several criminal cases pending in different courts of the state to the court of the Special Judge CBI, Bhubaneswar – Whether such a prayer is acceptable – Held, No. – When all the cases are not constitute the "same offence" and are not part of the same"cause of action", there have to be separate trials for each of the offences alleged to have been committed by the petitioner and other of the Seashore Group of companies vis-a-vis individual depositors.

(Para-15)

Case Laws Relied on and Referred to :-

1. MANU/MH/0809/2019 : Pramod Bhaich & Raisoni Vs.The State of Maharashtra.
2. (2017) 8 SCC 1: State of Jharkhand Vs.Lalu Prasad Yadav.
3. (2021)131 CLT 770 : Pradeep Kumar Sethy Vs.State of Odisha.

For Petitioner : Mr. Rajeet Roy

For Opp. Parties : Mr. Janmejaya Katikia, A.G.A.
M/s. D. Pattnaik

ORDER Date of order: 14.07.2023

Dr. S. MURALIDHAR ,C.J.

1. The Petitioner, who is the same in all these transfer petitions, is a Director in M/s. Seashore Funds Management Private Limited, M/s. Seashore Securities Limited and is also associated with 13 Multipurpose Cooperatives of the Seashore Group. He has filed these petitions seeking transfer of several criminal cases pending in the courts of the SDJM and CJM of Dhenkanal (TRPCRL No.3 of 2023); the SDJM, Rourkela (TRPCRL No.104 of 2022); the JMFC, Soro, District-Balasore (TRPCRL No.106 of 2022); the CJM, Nabarangpur (TRPCRL No.107 of 2022), the CJM, Jajpur (TRPCRL No.108 of 2022), the ASJ-cum-CJM, Ganjam, Berhampur (TRPCRL No.109 of 2022), the SDJM, Titilagarh, District-Balangir (TRPCRL No.110 of 2022) and the CJM, Sonepur (TRPCRL No.15 of 2023) to the court of the Special Judge, CBI, Bhubaneswar, Khurda.

2. Notice was issued in all these transfer petitions and barring a few of them, service is complete on the respective Opposite Parties/Complainants of each of the criminal cases.

3. The background to the above prayer as explained by the Petitioner himself is that a common allegation was made in the 19 FIRs which form subject matter of these transfer petitions and several others registered in different Districts in the State of Odisha against the Petitioner, his relatives and office bearers of the M/s. Seashore

Group of Companies and Cooperative Societies regarding acceptance of moneys from various investors/depositors, which were then not returned to them. The genesis of the present set of cases is an order dated 9th May 2014 passed by the Supreme Court of India in Writ Petition (Civil) No.413 of 2013, pursuant to which FIR No.RC.49/S/2014-KOL came to be registered against the Petitioner and others on 5th June 2014 by the Central Bureau of Investigation (CBI). By the same judgment, the Supreme Court of India granted liberty to the CBI to conduct investigation in respect of all the cases registered against the Seashore Group of Companies and also to undertake further investigation where charge sheet had already been filed.

4. The grievance of the Petitioner was that CBI chose to take within its ambit the investigation of only 22 of the FIRs leaving out 19 other FIRs which form subject matter of the present transfer petitions.

5. On completion of the investigation, CBI filed a charge sheet dated 7th March 2015 in the court of the Special CJM, CBI under Sections 120(B), 420, 409 IPC and Sections 4, 5 and 6 of the Prize Chits and Money Circulations Schemes (Banning) Act, 1978 (PCMCSB Act). One more FIR of B.N. Pur which is P.S. Case No.341 of 2013 was clubbed with the above 22 FIRs. However, 19 FIRs registered in different PSs in the various Districts in Odisha against the Petitioner and others of the Seashore Group were not taken over by the CBI.

6. Aggrieved by this, the Petitioner filed Writ Petition (Crl.) No.171 of 2018 in the Supreme Court of India for a direction to the CBI to take over "investigation of the left out cases". On Petitioner's own showing the said writ petitions were dismissed by the Supreme Court of India on 18th January, 2019. To quote the Petitioner's own words in para 3 (h) "As a matter of fact, the fulcrum of investigation carried out by CBI concerns the alleged conspiracy onthe part of the Petitioner and others in duping investors of their deposits through the ponzi firms set up by them."

7. Again to quote the Petitioner in para 3 (g), it is averred that "although the allegations in the above 19 FIRs had the same spectrum as that of the one being investigated by the CBI, the Petitioner being aggrieved by the action of the CBI in failing to take over the investigation of 19 nos. of the FIRs filed a Writ Petition (Crl.) No.171 of 2018 before the Hon'ble Supreme Court …."

8. In short, the case sought to be made by the Petitioner before the Supreme Court of India was that these 19 FIRs pertained to allegations which were no different from those in the 22 FIRs which were taken over by the CBI for investigation.

9. Mr. Rajjeet Roy, learned counsel appearing for the Petitioner relies on the judgment of the Bombay High Court in ***Pramod Bhaichand Raisoni v. The State of Maharashtra, MANU/MH/0809/2019*** where after discussing the provisions of

Section 177 read with the provisions contained in Chapter XVII of the Code of Criminal Procedure 1973 (Cr.P.C.) (in particular Sections 219, 220, 221 and 223), the Bombay High Court directed that the trial of the 77 cases involving similar allegations against the Petitioners in those cases should be held in the same court of the Special Court (MPID, Jalgaon District) as that would be convenient not only to the prosecution, but also to the defence in those cases.

10. Mr. Roy submits that the present petitions also should therefore be allowed by directing that the cases pending in the different courts in the aforementioned various Districts of Odisha should all be directed now to be transferred to and heard by the Special Judge, CBI, Bhubaneswar, Khurda where the cases against the Petitioner pertaining to the 22 FIRs taken over by the CBI for investigation is stated to be pending.

11. Mr. Janmejaya Katikia, learned Additional Government Advocate appearing for the State on the other hand submits that with a similar prayer already having been rejected by the Supreme Court of India by the dismissal of writ petition filed by the Petitioner as noted hereinbefore, this Court ought not to entertain the present prayer as that will run contrary to the order of the Supreme Court of India. He also refers to the decision in ***State of Jharkhand v. Lalu Prasad Yadav (2017) 8 SCC 1*** and the decision of this Court in ***Pradeep Kumar Sethy v. State of Odisha (2021) 131 CLT 770*** to urge that these cases cannot be said to have arisen out of the "same cause of action" and cannot be said to be pertaining to the "same offence" and therefore would require an individual trial to be held in respect of each such offence in respect of each investor already deposited.

12. The above submissions have been considered.

13. At the outset, it requires to be noticed that the facts in ***Pramod Bhaichand Raisoni*** (supra) did not involve the Petitioners there first approaching the Supreme Court of India with a similar prayer which was rejected by the Supreme Court of India. It must be noted here that in the present case, the Petitioner appears not to have sought to withdraw the writ petition filed by him in the Supreme Court of India with liberty to approach the High Court for a similar relief. This is significant because the same case that is sought to be made out here before this Court by the Petitioner was also sought to be made out before the Supreme Court of India viz,., that all the FIRs pertain to the "same spectrum of charges" involving similar allegations and therefore, CBI should be asked to take over even the "left out cases" i.e the 19 FIRs. That prayer was rejected by the Supreme Court of India. Consequently, it would not be proper for this Court to entertain the prayer that the cases arising out of those left out 19 FIRs should now tried by the same court of the Special Judge, CBI, Bhubaneswar.

14. In a Special CBI court the prosecutor is the CBI. In the present case, in regard to the left out 19 cases it is obvious that the CBI would not be the prosecutor,

but the local Police. Therefore, to ask such cases to be transferred to the CBI Court would be impermissible in law. It should be noted here that in ***Pramod Bhaichand Raisoni*** (supra), the transfer was not ordered to a Special CBI court, but a Special Court (MPID, Jalgaon) which is very different from the prayer made in the present case.

15. Even as regards the arguments concerning'same offence' 'same transaction', there is merit in the contention of Mr. Katikia relying on the observations in ***State of Jharkhand v. Lalu Prasad Yadav*** (supra) that have to be separate trials for each of the 'offences' alleged to have been committed by the Petitioner and others of the Seashore Group of Companies vis-à-vis individual depositors. It cannot be said that all the cases constitute the 'same offence' and part of the same "cause of action". Be that as it may, with the Supreme Court already having rejected the prayer of the Petitioner, it would not be permissible for this Court to allow the prayer made in these petitions as that would be permitting the Petitioner to overcome the aforementioned order of the Supreme Court indirectly by virtually seeking the same result viz., that all the left out cases should be tried before the same court of the Special Judge, CBI, Bhubaneswar.

16. For the aforementioned reasons, this Court is not inclined to accept the prayers made in the present petitions and they are accordingly dismissed.

17. As regards the Petitioner's prayer for appearing virtually in various courts mentioned hereinbefore, if such a request is made by him, it would be considered by those respective courts keeping in view that such facilities are available in the District Court Complexes and other subordinate courts in the State of Odisha.

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2023 (II) ILR – CUT - 973

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

CRLA NO. 78 OF 2005

MAGHU HANSDA .....Appellant

.V.

STATE OF ORISSA .....Respondent

CRIMINAL TRIAL– Conviction of appellant for offence punishable U/s. 302 of IPC – There is clear credible testimony of eye witness – Effect of – When the evidence of eye witness was found not only credible but also cogent and his evidence could not be demolished in cross examination and such evidence when received ample corroboration from medical evidence strengthening the motive of crime and case of prosecution. (Para 22-23)

Case Laws Relied on and Referred to :-

1. (2002) 1 SCC 487 : Thanedar Singh Vs. State of Madhya Pradesh.
2. (2011) CRI L.J. 1677 : Mobarak Sk. @ Mobarak Hossain & Ors. Vs. The State of West Bengal.
3. (2011) 6 SCC 288 : Brahm Swaroop and another Vs. State of Uttar Pradesh.
4. 59 (1985) C.L.T. 488 : Nimai Murmu Vs. The State.
5. (2019) 12 SCC 326 : State of Madhya Pradesh Vs. Chhaakki Lal.

For Appellant : Mr.D.P.Dhal, Sr. Adv.

For Respondent : Mr. J.Katikia, Adll. Govt. Adv.

JUDGMENT Date of Judgment : 24.07.2023

G. SATAPATHY, J.

1. This appeal is directed against the judgment passed on 21.01.2005 by learned Additional Sessions Judge, Rairangpur in C.T. Case No. 52/03(S.T. Case No.285 of 2003) convicting the Appellant for offence punishable Under Section 302 of IPC and sentencing him to undergo Rigorous Imprisonment for life with payment of fine of Rs. 2,000/-(Two Thousand)only in default whereof to undergo Rigorous Imprisonment for a further period of one month, while acquitting the Appellant for offence punishable Under Sections 201/34 of IPC and the accused Gandhi Tudu for offence Under Sections 302/201/34 of IPC.

2. It is relevant to note here that this Court by an order passed on 19.11.2012 in Misc. Case No. 1638 of 2012 had directed for release of the Appellant on bail**.**

3. The prosecution case in brief was on 03.06.2003 at about 5pm while Kalia Soren(hereinafter referred to as the "deceased") and PW1 Pratap Hembram were returning to their village by riding bicycle after selling rice at Gorumahisami weekly market, on the way near Railway level crossing fatak (Gate) at village Kalimati, the Appellant and another came out by the side of a Khajuri(Date Palm Tree) and the other person caught hold of the bicycle of the deceased, who was moving little bit ahead of PW1 and the Appellant Maghu Hansda, to whom PW1 could identify, brought out a Bhujali from his towel and dealt blows on the chest of the deceased, as a result, the deceased fell down on the ground and out of fear, PW1 returned back to village Kalimati by riding his bicycle as he could not find any male persons and remained in the village Kalimati in the night. Due to assault of the Appellant and the other person by means of Bhujali, the deceased died at the spot.

4. On the following day i.e. 04.06.2003 at about 8.30am, PW1 lodged an FIR before OIC, Gorumahisami P.S. by stating therein that he can identify the other persons involved in the crime. Accordingly, the OIC, Gorumahisami registered PS Case No.21 dated 04.06.2003 and investigated into the matter. In the course of investigation, the I.O. conducted inquest over the dead body as well as got the autopsy done over the dead body of the deceased by PW7. The Appellant and one

Gandhi Tudu had surrendered before the Court on different dates and after being taken on remand from the Court, the Appellant on 29.08.2003 gave recovery of the Bhujali MOI from the place of concealment i.e a bush near Kalimathi hill, pursuant to his disclosure statement (Ext.10) and PW10 seized the MOI under Ext.6. In the course of investigation, the identity of the other person was unearthed as Gandhi Tudu. Besides, PW10 had also seized sample earth, blood stained earth, one black goggle, one half chain cover of Hero Cycle and a pair of leather chappal(footwear) from the spot under Ext.8 and sent the same along with sample blood of Appellant & MOI to SFSL, Bhubaneswar for chemical examination under the forwarding report vide Ext.11 and the Chemical Examination vide Ext.12 received by the Court. On completion of investigation, a charge-sheet was filed against the Appellant and co-accused Gandhi Tudu for offences punishable Under Sections 302/201/34 of IPC resulting in trial in the present case.

5. In support of its case, the prosecution had examined 10 witnesses in all and relied upon documents under Exts. 1 to 12 and material object MOI as against the oral evidence of sole witness DW1 Radhanath Bindhani. The plea of the Appellant was one of complete denial and false implication by PW1 on account of prior enmity.

6. After appreciating the evidence upon hearing of the parties, the learned trial Court convicted the Appellant and sentenced to the punishment indicated supra by the impugned judgment.

7. A careful glance of the impugned judgment, it appears that the learned trial Court had convicted the Appellant by mainly relying upon the evidence of eye witness PW1 and recovery of weapon of offence-MOI containing human blood stain of B+ve group at the instance of the Appellant and the motive behind commission of crime as deposed to by PW2 and PW4.

8. Although, neither the defence nor the Appellant had challenged the homicidal death of the deceased as arrived at by the learned trial Court, but it was seriously contended that the Appellant was not the author of the crime. A scrutiny of the evidence of PW1 would reveal that he was an eye witness to the occurrence and from his evidence it transpired that on the relevant date and time of occurrence, the Appellant and accused Gandhi Tudu, who was acquitted by the learned trial Court, came out of a Khajuri bush(Date Palm) and caught hold of the Bicycle of the deceased and the Appellant brought out MOI from his Gamucha(Napkin) and assaulted the deceased by means of MOI on his chest as a result, the deceased fell down on the ground and seeing it, he returned back to village Kalimati out of fear and stayed in the house of one Budhu. It was his further evidence that on the next day morning at 8am, he came to Gorumahisami PS and lodged an FIR vide Ext.1.

9. From the evidence of IO-cum-PW10, it transpired that on 27.08.2003, he took the Appellant on remand from the Court for 2 days and on 29.08.2003 at about

6.30am, the Appellant while in police custody made disclosure statement vide Ext.10 and gave recovery of MOI from a bush near Kalimati hill which was seized under Ext.6.

10. PW7 was the Doctor, who conducted Post Mortem over the dead body of the deceased and his evidence revealed the following injuries found on the dead body of the deceased.

(i) Incised wound 2x2 abdominal depth penetrating over left lower back.

(ii) Incised wound penetrating 3x2cm lungs depth above the right nipple.

(iii) Incised wound penetrating 3x2cm lungs depth 1cm above injury No.2

(iv) Incised wound penetrating 2x2x5cm over right chest 1cm from midline.

(v) Incised wound 3x2x1cm over front of the left seen of tibia.

(vi) Incised wound 1x1/2x1/2cm over each of the right thumb and middle fingers.

(vii) Incised wound 3x1x1/2 cm over front of the left neck.

(viii) Incised wound 1x1/2 x1/2cm over each of the left thumb, index and middle finger.

(ix) Incised wound 3x1/2x1/2 cm over left lateral side of knee.

10.1. On dissection PW7 found, the right lung had collapsed, penetrating injuries were seen over the right lung below the injury no.ii and iii. Right hyler vessels were cut thorough and through. Superior venacava injured, stomach contained semi digest food hard chambers were empty. All organs were pale.

11. According to the evidence of PW7, the cause of death of the deceased was due to hemorrhage and shock and these injuries can cause death in ordinary course of nature. It is his further evidence that he had furnished his opinion as to the query of possibility of injuries by MOI affirmatively vide Ext.5. It was elicited in cross-examination of PW7, "these injuries can be caused by one weapon like MOI or it may also be caused by several weapons."

12. On a close scrutiny of above evidence, the prosecution was considered to have established the homicidal death of the deceased which was never challenged or disputed by the appellant, but Mr. D.P. Dhal, learned Senior Counsel appearing for the Appellant has argued and criticized the impugned judgment mainly on four grounds firstly, the evidence of PW1 was not believable, secondly, the absence of names of Assailants/Appellant in the inquest report itself suggestive of FIR to be ante-timed and after thought and came to be prepared after due deliberation and consultation, thirdly, non-examination of witnesses to disclosure statement and lastly, absence of evidence of safe custody of MOI after its seizure till it reached SFSL, which had rendered the chemical examination report unreliable and the opinion made therein by the chemical examiner indicating presence of human blood of Group-B+ve on MOI cannot be said to be blood Group of the deceased.

13. Mr. J.Katikia, learned AGA, has countered the submissions of the Appellant by submitting *inter-alia* that the evidence of eye witness was corroborated by the

FIR which was further strengthened by the evidence of PW7 and the chemical examination report indicating presence of human blood of Group-B+ve on MOI which the defence had failed to offer any explanation. It is further submitted by learned AGA that when the evidence of eye witness is clear, cogent and convincing, such evidence cannot be discarded or thrown away merely because the I.O. had omitted to mention the names of Assailants in Ext.2 which was basically prepared to know the apparent cause of death and, therefore, the impugned judgment does not suffer from any infirmity.

14. Evaluating the evidence of eye witness PW1, it appears that the defence although had tried to demolish his evidence, but it only found to have explained by eliciting in the cross-examination that he saw two to three blows given by Appellant Maghu Hansda on his chest and neck region of the deceased by means of Bhujali (MOI). The testimony of PW1 was, however, assailed on two grounds, firstly, when his evidence was disbelieved by the learned trial Court in respect of co-accused Gandhi Tudu, who was identified by him in the Court during trial, how his evidence would be believed for convicting the Appellant and secondly, since he(PW1) was a signatory to Ext.2, how come the names of the Assailants did not find place in Ext.2 which was prepared subsequent to Ext.1 lodged by PW1 himself and thereby, it had rendered Ext.1(FIR) to be a product of embellishment. PW1 had of course not only identified the acquitted co-accused Gandhi Tudu in the Court, but also had described the role played by accused Gandhi Tudu, but the learned trial Court had acquitted the accused Gandhi Tudu for being neither named in the FIR nor put to TI parade to identify him and such finding of the trial Court having not challenged by the State, this Court does not wish to comment on the same. At any rate, the principle Falsus in Uno, Falsus in Omnibus does not apply to the criminal trial in our country and the witnesses cannot be branded as liars, merely because he lied on one thing nor this maxim occupies the status of rule of law.

15. A good number of decisions are relied upon for the Appellant to contend "omission to mention the names of the Assailants in inquest report renders the FIR to be ante-timed", but the defence having got the opportunity to cross-examine PW1 and PW10 had failed to make any cross-examination in this regard, no matter it was elicited from PW10 that in column 7, 9 & 10 of Ext.2 he had not mentioned the names of accused persons, but the same columns being meant for circumstances, if any, which give rise to suspicion of foul play, opinion of witnesses and police officer as to cause of death are hardly considered to doubt the veracity of prosecution case for omission to indicate the names of assailants in the aforesaid columns. Besides, neither PW10 nor PW1 was ever suggested that Ext.1 was lodged with deliberation and consultation much after the preparation of Ext.2. On careful and anxious consideration of the decision relied upon for the Appellant in ***Meharaj Singh v. State of U.P., (1994) 5 SCC 188*** on this point**,** the same appears to be not applicable to the present case since the prosecution neither produced eye witnesses

nor offered any explanation for non-examination of such eye witnesses in the relied on case, but there is eye witness account in the present case.

16. Similarly, in other decision in ***Thanedar Singh v. State of Madhya Pradesh, (2002) 1 SCC 487,*** the crime number/FIR number was not found in the inquest report, whereas in the present case it was stated in the top of Ext.2. Moreover, in another relied on decision in the case of ***Mobarak Sk. @ Mobarak Hossain & Others v. the State of West Bengal, (2011) CRI L.J. 1677,*** there was delay in sending the FIR to the Court for nearly 11 days after the occurrence and no eye witness was found stating to police to have seen the incident on the date of occurrence and on such ground, the Calcutta High Court took the adverse view against the prosecution.

17. On the other hand, in ***Brahm Swaroop and another v. State of Uttar Pradesh, (2011) 6 SCC 288***, wherein after noticing the names of the accused persons to have not been filled up in the inquest report, the Apex Court held that omission in the inquest report are not sufficient to put the prosecution out of the Court.

18. A bare perusal of the inquest report Ext.2 in this case, all the columns found therein had been duly filled up by giving reference of Gorumahisami PS Case No. 21 dated 04.06.2003 and other necessary facts, such as opinion of witnesses and police officer as to cause of death "accused persons inflicted severe wounds on the chest and other parts of the body of Kalia Soren and committed his murder."

19. What is the true purport and object of inquest report has been reiterated by Apex Court more than once in a plethora of decisions. The fundamental purpose of holding inquest report is to know the apparent cause of death, such as whether it was suicidal, homicidal or accidental and it is never meant to ascertain the perpetrator(s)/assailant(s) of the crime or as to who was responsible for the death of the deceased. According to law, inquest report cannot be read as substantive piece of evidence nor can it be used to discard the evidence which is otherwise clear, unambiguous and credible as well as establishes the prosecution case, but when there appears manipulation in it or it is otherwise a product of embellishment, the defence can certainly take advantage of it. Above all, when there is no column in it for recording the names of the accused persons in the State of Orissa, the veracity of prosecution case cannot be doubted for omission to indicate the names of the assailants in the inquest report.

20. Merely because the IO had committed a mistake to omit to mention the names of the assailants in the inquest report or he was not diligent in this regard, it does not necessarily mean by implication or otherwise that the reliable or clinching evidence adduced by the witnesses should be discarded by the Court on the selfsame ground**.** Hence, in the backdrop of preceding discussion, the argument advanced by the Appellant that omission to mention the names of Assailant in the inquest report to put the FIR as ante-timed and product of embellishment merits no consideration.

21. The recovery of MOI at the instance of Appellant/Convict was seriously disputed in the appeal for want of examination of independent witnesses Jadumani Sethy and Bidyapada Pahadi, but such assertion appears to be insignificant because the manner of recovery of MOI and its seizure vide Ext.6 were spoken to in evidence by PW10 the I.O. who had been thoroughly cross-examined, but nothing substantial was elicited from his mouth to disbelieve the recovery and seizure of MOI which on chemical examination was found containing human blood B+ve Group in Ext.12.

22. The late recovery and delayed chemical examination of MOI as well as its safe custody before its dispatch to SFSL were also seriously challenged in this appeal, but although it appears from the evidence of PW10 that MOI was recovered on 29.08.2003 at the instance of convict in police custody, but it was sent to SFSL, Rasulgarh on 22.09.2003, however, Ext.12 disclosed human blood stain of B+ve Group on MOI on chemical examination which was believed by the learned trial Court and this Court does not see any reason to disbelieve it inasmuch as no explanation was offered by the Appellant-Convict as to how human blood of B+ve group was found on MOI which was recovered at his instance. The decision in ***Nimai Murmu v. The State; 59 (1985) C.L.T. 488*** was relied on for the Appellant to disbelieve the chemical examination report, but what would be the consequence of defective or incomplete investigation, when there is clear and credible testimony of eye witness as was found in the form of PW1 in this case, in ***State of Madhya Pradesh v. Chhaakki Lal; (2019) 12 SCC 326***, the Apex Court in a somewhat similar situation has held in paragraphs 34 and 35 as under:-

> "34. For reversing the verdict of conviction, the High Court has pointed out that there was delay in sending the seized gun and pistol (recovered on 01.03.2006) which was sent to the FSL only on 19.04.2006. The High Court has doubted the case of prosecution by observing that apart from delay in sending the seized guns/pistol, there is no material showing as to where the seized weapons were kept during the period from 01.03.2006 to 19.04.2006. Such delay in sending the recovered weapons to FSL could only be an omission or lapse on the part of the Investigating Officer. Such omissions or lapses in the investigation cannot be a ground to discard the prosecution case which is otherwise credible and cogent. ***In Nankaunoo v. State of Uttar Pradesh; (2016) 3 SCC 317***, it was held as under : (SCC P. 322, Para-9)
>
> "9. ……any omission on the part of the investigating officer cannot go against the prosecution case. Story of the prosecution is to be examined dehors such omission by the investigating agency. Otherwise, it would shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice".
>
> "35. In ***V.K. Mishra v. State of Uttarakhand and; (2015) 9 SCC 588***, it was held as under : (SCC P.607, Para-38)
>
> "38. The investigating officer is not obliged to anticipate all possible defences and investigate in that angle. In any event, any omission on the part of the investigating officer cannot go against the prosecution. Interest of justice demands that such acts or omission of the investigating officer should not be taken in favour of the accused or otherwise it would amount to placing a premium upon such omissions".

23. After having carefully scrutinized the evidence available on record with the assistance of learned counsels for the parties, this Court on discussion made in the foregoing paragraph is unable to buy the arguments advanced for the Appellant that prosecution was unable to establish the guilt of the accused for commission of murder of the deceased Kalia Soren beyond all reasonable doubt, especially when the evidence of eye witness was found not only credible but also cogent and his evidence could not be demolished in cross-examination and such evidence when received ample corroboration by medical evidence together with recovery of MOI containing human blood of B+ve group, for which the appellant could not offer any explanation, at the instance of appellant lends assurance to the prosecution case which was further strengthened by proof of motive of crime as deposed to by PW2, PW4 and PW6.

24. Consequently, no ground is made out for interference of the impugned judgment in this appeal.

25. In the result, the appeal being found unmerited stands dismissed on contest, but there is no order as to costs. As a necessary corollary, the impugned judgment and order of sentence passed on 21.01.2005 by learned Additional Sessions Judge, Rairangpur in C.T. Case No. 52/03(S.T. Case No.285 of 2003) are hereby affirmed.

26. Since Appellant Maghu Hansda is on bail, his bail bonds stands cancelled and he is directed to surrender to custody forthwith and in any event, not later than 20th August 2023 failing which the IIC of the concerned PS will take steps forthwith to take him into custody to serve out the remainder of his 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 - 980

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

W.P.(C) NO. 8976 OF 2017

CHITTARANJAN DAS ……Petitioner

.V.

STATE OF ODISHA & ORS. ……Opp. Parties

(A) ODISHA NON-GOVERNMENT AIDED COLLEGE LECTURER PLACEMENT RULES, 2014 – Rule 4(1)(c) and explanation appended to it – Whether an explanation/clarification can take away any benefit granted by the Substantive Rule – Held, No – To obviate the effect of the explanation, we read down and hold that an explanation can provide many things but not in contrast to the basic rules. (Para 29-30)

(B) INTERPRETATION OF STATUTE –"Note" & "Explanation" to a statutory provision – Legal effect – Explain with reference to case laws.

Case Laws Relied on and Referred to :-

1. OJC No.9242 of 2000 : Akshaya Kumar Swain Vs. State of Orissa & Ors.
2. AIR 2007SC2053 : V.B. Prasad Vs. Manager, P.M.D.U.P. School & Ors.
3. AIR 1985 SC 582 : S. Sundaram Pillai Vs. V.R. Pattabiraman & Ors.
4. (1961) 1 SCR 902: AIR 1961 SC 315 : Burmah Shell Oil Storage and Distributing Co. of India Ltd. Vs. Commercial Tax Officer:

For Petitioner : Mr. Budhadev Routray, Sr. Adv.
Mr. B. Mohanty.

For Opp. Parties : Mr. D. Nayak, Addl. Govt. Adv.

JUDGMENT Date of Judgment : 03.04 2023

S. TALAPATRA, J.

By means of this writ petition, the petitioner has challenged the notification dated 24.01.2017, Annexure-7 to the writ petition. Further, the petitioner has urged this court for directing the Opposite Parties to grant the benefits of Lecturer Group-A Scale to the petitioner w.e.f. 01.06.2003, instead of 01.06.2012. The petitioner has also urged to quash the explanation, appended to Rule 4(1)(c) of the Odisha Non-Government Aided College Lecturer Placement Rules, 2014, published by the notification dated 04.01.2014 or in the alternative to declare the said explanation as not applicable for giving placement to the petitioner in the grade of Lecturer Group-A.

2. We have heard Mr. B. Routray, learned Senior Counsel along with Mr. B. Mohanty, learned counsel appearing for the petitioner and Mr. D. Nayak, learned Addl. Government Advocate appearing for the Opposite Parties No.1 and 2.

3. Facts are mostly admitted. The petitioner was initially appointed as the Demonstrator in Chemistry by the Governing body of Adikabi Sarala Das College, Tirtol, hereinafter referred to as AS College, on 02.01.1990. Appointment of the petitioner was approved by the notification dated 07.08.1996, issued by the Director, Higher Education, Government of Odisha, in pursuance to G.O No.46209, with effect from 01.06.1990.

4. The petitioner was granted full salary w.e.f. 01.06.1994 as Demonstrator in Chemistry. In terms of the letter dated 07.08.1996 issued by the Director, Higher Education, in respect of the 4th post of Lecturer in Chemistry in AS College, the Governing body of the said College, by the resolution dated 17.10.1995 had approved the appointment of the petitioner as Lecturer in Chemistry, by invoking the power available under Rule 8(2)(b) of the Orissa Education (Recruitment and Conditions of Services of Teachers and Members of Staff of Aided Educational Institutions) Rules, 1974, hereinafter referred to as the Rules, 1974. The petitioner was eligible for payment under grant in aid (hereinafter referred to as GIA). After

the appointment of the petitioner in the post of Lecturer in Chemistry, due steps were taken for necessary approval of the Government. The Government of Odisha, in the Higher Education Department, by their letter No.22849 dated 05.04.1999 accorded approval to the appointment of the petitioner as Lecturer in Chemistry with effect from 23.05.1995, by exercising the powers conferred under Rule-8(2)(b) of the Rules, 1974.

5. For appointment of the petitioner to the post of Lecturer in Chemistry, the payment of GIA against the post of the Demonstrator was stopped w.e.f. 23.05.1995. As the payment under the Grant-in-aid was abruptly stopped by the order communicated by the letter dated 05.05.1999 and thereafter, the consequential order was passed by the Director, Higher Education (Orissa) on 30.07.1999. But the petitioner continued in service without the Grant-in-Aid discharging his duties as Lecturer in Chemistry w.e.f. 23.05.1995. As the petitioner was not getting the Grant-in-Aid scale and other benefits against the post of Lecturer w.e.f. 23.05.1995, the day when the petitioner was appointed as the Lecturer, he had approached this court by filing a writ petition being WP(C) No.8175/2004 claiming payment of Grant-in-Aid scale and other benefits against the post of Lecturer from the date of his appointment. The said writ petition was transferred to the State Education Tribunal for adjudication on merit. As per the procedure of the State Education Tribunal, the said case was registered as G.I.A. Case No.189/2011. The said case was finally heard and disposed of, by the Judgment dated 30.01.2012(Annexure-4 to the writ petition).

6. By the said Judgment, the Opposite Parties were directed to release the full salary to the petitioner in the post of Lecturer in Chemistry w.e.f. 23.05.1995, as per the Grant-in-Aid Order, 1994 within a period of 3 months from the date of receipt of the said order and to adjust the salary paid to him against the post of Demonstrator w.e.f. 23.05.1995.

7. By modifying the letter of approval under No.22895 dated 19.05.2005, a fresh order was issued by the Higher Education Department on 04.03.2013 directing release of full salary under the Grant-in-Aid w.e.f. 23.05.1995 in favour of the petitioner for his holding the post of Lecture in Chemistry. From the order dated 19.07.2005 (Annexure-3 to the writ petition), it appears that the Department of Higher Education had released the current salary as was admissible to the petitioner w.e.f. 01.03.2005, in pursuance to an interim order passed by the High Court of Orissa on 28.03.2005. Later on, the said order was modified.

8. By the order dated 04.03.2013, the full Grant-in-Aid salary was released in favour of the petitioner w.e.f. 23.05.1995 for his occupying the post of Lecturer in Chemistry. The petitioner had been continuing as the Lecturer in Chemistry (Grant-in-Aid) w.e.f. 23.05.1995 uninterruptedly. As the petitioner had completed 9 years of continuous service in the post of Lecturer (Chemistry), he was entitled to get the benefits of Lecturer Group-A w.e.f. 01.06.2003, instead of 01.06.2016, as provided

by the notification dated 24.01.2017 (Annexure-7 to the writ petition) with all consequential service and financial benefits, in terms of Rule 4(1)(b) of the Orissa Non-Government Aided College Lecturers Placement Rules, 2014. For purpose of reference the said Rule-4 is extracted hereunder:

> ***"4. Eligibility Criteria for placement:***
>
> *(1) In order to be eligible for placement to the grade of Lecturer ((Group-A)) Scale of pay under Rule 9, a lecturer as covered under rule-3 must have-*
>
> *(a) completed at least 08 (eight) years of service as such from the approved date of joining, in case of SSB sponsored Lecturers/Junior Lecturers;*
>
> *(b) completed at least 08(eight) years of service from the date of receiving of full GIA in the post of Lecturer in case of appointment by the management;*
>
> *(c) completed at least 08 (eight) years of service from the date of eligibility for full GIA in case of Lecturers whose services have been validated under the Validation Act;*
>
> *Explanation – For the purpose of clause (b) and clause (c) of this rule, the expression full GIA shall mean completion of 09 (nine) years of continuous service from his/her approved date of joining.*
>
> *(d) satisfactory performance as a Lecturer/Junior Lecturer supported with CCRs or ACRs by whatever name called.*
>
> *(2) A lecturer placed under Lecturer (Group-A) Scale of pay under rule 9 in order to be eligible for consideration for placement to Reader (State Scale) scale of pay under rule 9 must have completed at least 10 years of continuous service in the said Lecturer ((Group-A)) Scale of pay."* **[Emphasis Added]**

9. Rule 9 of the said Rules 2014 provides the pay matrix for the post of Lecturer (Group-A') which is as follows:

> *Rs.9,300-34,800/-+Grade Pay Rs.5,400/-*

10. The petitioner is claiming for the said pay scale from the date when he had completed 9 years of service, in terms of Rule 4 (c) of the said Rules i.e. 01.06.2004.

11. The Opposite Parties No.1 and 2 have filed their counter affidavits. The first one was filed on 12.12.2018 and the second one was filed on 09.09.2022. It has been contended by the Opposite Parties No.1 & 2 that in case of an SSB sponsored Lecturer/Junior Lecturer, the benefits are given from the very date of appointment in the same manner, as applicable to the DP vacant post. The petitioner was to complete 17(9+8) years of service from the approved date of his joining as the Lecturer for being considered as the Lecturer (Group A Scale). From the above Rule 4, according to the Opposite Parties, it is clear that Lecturers who are appointed by the Management in the Grant-in-Aid scale and on their completion of 17 years of service shall be considered for placement to the grade of Lecturer (Group-A Scale) as the explanation appended below Rule 4 (1) (c) stipulates 9 years of continuous service from the approved date of joining is required to have full GIA. But an SSB Lecturer is considered for placement in the grade of Lecturer (Group-A Scale) on completion of 8 years of service.

12. The Opposite Parties No.1 and 2 have referred to the clarification given by the Letter No.22523/HE dated 07.10.2015. It has been clarified by the said letter that the above benefit can be availed by the lecturers only from 01.01.2014. Those who have retired or passed away prior to 31.12.2013, their case shall not be considered.

Those lecturers who have already acquired the eligibility for such benefit prior to 01.01.2014, they may get the financial benefit on notional basis till 01.01.2014 and actual benefits w.e.f. 01.01.2014.

13. It has been further asserted in the counter affidavit filed by the Opposite Parties No.1 and 2, having referred to the said Letter No.22523/HE dated 07.10.2015 (Annexure-A1 to the counter affidavit) that a non SSB Lecturer gets, as per GIA principles, the full Grant-in-Aid under normal situation after 9 years. His case is to be considered for Lecturer (Group-A Scale) after 17 (9 +8) years and for Reader (SS) after 27 (9 + 8 + 10) years from the date of his approved joining. Since an SSB lecturer receives Grant-in-Aid full salary from the very date of his joining against a sanctioned and approved Direct Payment (DP) vacant post, his case for Lecturer (Group-A Scale) and Reader (SS) is considered after completion of 8 years and 18 (8 + 10) years of continuous service from the approved date of joining.

14. By applying the said principle to the case of the petitioner, he was not considered for the said benefit on his completion of 9 years of service, in accordance with Rule-4 (1)(c) of the said Placement Rules read with the explanation as referred above.

15. According to the Opposite Parties No.1 & 2, the petitioner has been correctly given the placement as Lecturer (Group-A Scale) from 01.06.2012 by the Notification No.2354 dated 24.01.2017 (Annexure-7 to the writ petition). No discrimination was meted out. The clarification is unambiguous and hence, no interference is called for.

16. Mr. Routray, learned Senior Counsel appearing for the petitioner has contended that the said decision of the Opposite Parties No.1 and 2 is grossly arbitrary and in contrast to Rule 4 (c) of the Placement Rules, in as much as the full salary cost of the petitioner was sanctioned at 100% GIA w.e.f. 23.05.1995, in the same manner as provided in the case of an SSB sponsored candidate under Rule 4 (1) (a) of the said Placement Rules.

17. Mr. Routray, learned Senior Counsel has submitted that as no distinction can be made between two classes of lecturers, there cannot be differential treatment. There is no distinction on the basis of qualification and the duties they are to discharge. The said order granting the pay scale of Lecturer (Group-A Scale) in favour of the petitioner from a posterior date deserves to be interfered with as that stands in contradiction to the equality clause. He has also contended that the petitioner is entitled to get the said benefit w.e.f. 01.06.2003, instead of 01.06.2012. Mr. Routray, learned Senior Counsel has contended that by the executive order

[Annexure-A] the basic provision of the Rules cannot be truncated. If such attempts are made that will amount to overriding without exercising the rule making power.

18. Mr. Routray, learned Senior Counsel has referred to a decision of this court in ***Akshaya Kumar Swain Vs. State of Orissa & Ors.*** (Order dated 27.10.2005 delivered in OJC No.9242 of 2000). In that case, a lecturer in English was appointed by the Management of a Grant-in-Aid College and he was allowed to receive Grant-in-Aid Scale w.e.f. 04.11.1989. But the lecturers who were appointed on the basis of the selection made by the Service Selection Board (SSB) were granted the UGC scale of pay w.e.f. 01.04.1989. Those who were appointed by the Management, were not favoured with the said benefit. In this backdrop, it has been observed in ***Akshaya Kumar Swain*** *(supra)* as follows:

> ***"****We are also not in a position to find any ground to deny such benefit to the petitioner. The ground for such denial only being that he was recruited by the Management. As the petitioner has satisfied the requirements so far as they relate the qualification in Annexure-3 and 5 and as there is nothing contrary to show in the record that the petitioner is not eligible to get grant-in-aid save and except saying that this is the reason he was recruited through the Governing Body, we are convinced that the petitioner shall be entitled to get the benefit as has been given to the similarly situated Lecturers like the ones sponsored by the Selection Board and adjusted against the direct payment post after 01.04.1989 as detailed in Annexure-4 to the application."* **[Emphasis Added]**

19. Mr. Routray, learned Senior Counsel has submitted that the centrality of controversy is identical and hence, the said principle will apply to the present case. Whether the clarification can take away the core of the principal clause or not, on that aspect, Mr. Routray, learned Senior Counsel has placed his reliance on a few decisions of the Apex Court.

In ***V.B. Prasad Vs. Manager, P.M.D.U.P. School and Other: AIR 2007SC2053,*** the apex court has quite succinctly held that it is well settled principle of law that the note appended to a statutory provision or the subordinate legislation must be read in the context of the substantive provision and not in derogation thereof. Five years' teaching experience for appointment to the post of Head Master in that case was a sine qua non. Such teaching experience was to be 'teaching experience' and not a deemed teaching experience.

20. We are persuaded to observe that the Opposite Parties even did not claim that the petitioner's appointment was a deemed appointment w.e.f. 23.05.1995. As such, we do not find any relevance of the said report in the present context. However, what the Apex Court has observed in ***S. Sundaram Pillai Vs. V.R. Pattabiraman & Others; AIR 1985 SC 582*** may have some ramification as in that report, the Apex Court has interpreted various aspects viz. words and phrases including the explanation [in Para 45]. The apex court has dwelled on the impact of the *Explanation* on the proviso which deals with the question of wilful default. Before, we appreciate the said delicate question, we may appreciate the intent, purpose and legal effect of an *Explanation*. It is now well settled that an *Explanation*

added to a statutory provision is not a substantive provision in any sense of the term, but it purports to explain or clarify certain ambiguities which may emerge from the statutory provision.

21. In ***Burmah Shell Oil Storage and Distributing Co. of India Ltd. Vs. Commercial Tax Officer: (1961) 1 SCR 902: AIR 1961 SC 315*****,** a Constitution Bench had occasion to observe as follows:

> *"Now, the Explanation must be interpreted according to its own tenor, and it is meant to explain cl. (1)(a) of the Article and not vice versa. It is an error to explain the Explanation with the aid of the Article, because this reverses their roles."*

22. Thereafter, the Apex Court in ***S. Sudaram Pillai*** *(supra)* has enunciated the object of an Explanation to a statutory provision in the following terms:

> *"(a) to explain the meaning and intendment of the Act itself.*
>
> *(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to sub serve.*
>
> *(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,*
>
> *(d) an explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and*
>
> *(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.*
>
> *Therefore, only when there is some ambiguity or get explanation may be the aid otherwise not, explanation is always subordinate to the main clause, it cannot alter or reverse the meaning of the main clause."* **[Emphasis Added]**

23. In order to repel the submission of Mr. Routray, learned Senior Counsel, Mr. D. Nayak, learned Addl. Government Advocate appearing for the Opposite Parties No.1 and 2 has stated that by the Clarification, as embodied in the communications dated 07.10.2015 and 20.01.2016 (Annexures-A and B1 to the counter affidavit), it is intended to say that Lectures who are eligible for the post of Lecturer (Group-A Scale) and Reader (State Scale) prior to 01.01.2014, they can get the benefit notionally from the date of eligibility without any financial benefit. Their pay will be fixed notionally from the date of eligibility up to 01.01.2014.

It has been further clarified that a non-SSB lecturer can get the benefit of Lecturer (Group-A Scale) and Reader (State scale) under the Rules after completion of 17 years and 27 years of continuous service from the approved date of joining and an SSB lecturer can get the similar benefits after completion of 08 years and 18 years of continuous service respectively from the approved date of joining.

The lecturers who were eligible for placement as Lecturer (Group-A Scale) and Reader (State Scale) prior to 01.01.2014, their pay will be fixed in the corresponding prevailing scale, but they will not be eligible to claim any arrear.

24. Mr. Nayak, learned Addl. Government Advocate has drawn our further attention to the Clarification regarding interpretation of the Odisha Non-Government Aided College Lecturer Placement Rules, 2014, circulated by the Communication No.HE-FE-VI-PLAN-126/2015 dated 07.10.2015, Annexure-A to the counter affidavit filed by the Opposite Parties No.1 and 2. Para-3 of the clarification is similar to the proposition as advanced by the explanation as aforestated [as reproduced in Para-8 before]. For that reason, no elaborate reference is made in respect of clarification dated 07.10.2015.

25. Having appreciated the submissions of the learned counsel appearing for the parties, we would like to refer, at the threshold, to Rule 8 (2) (b) of the Orissa Education (Recruitment and Conditions of service of Teachers and Members of Staff of Aided Educational Institutions) Rules, 1974, whereby it is provided *inter alia* as follows:

> *"(b) the vacancy in a post, carrying higher scale of pay, is filled up with prior approval of Government in case of a College and the concerned Director in case of an institution other than a college, by an employee of the same institution who possesses the prescribed qualifications and experience and whose performance in respect of the post he holds, has been found satisfactory. Such appointment shall be treated as regular appointment from the date, the same is filled up on ad hoc basis by the Managing Committee or the Governing Body, as the case may be, in the event of its approval by the competent authority."*

26. From the undisputed facts, we have seen that the petitioner was appointed as the Lecturer in Chemistry as he was found suitable. His qualification and experience conformed to the prescribed eligibility criteria. Thereafter, the appointment of the petitioner was approved by the Director of Higher Education, Government of Odisha. As such, his appointment has to be treated as the regular appointment w.e.f. 23.05.1995. Moreover, the Opposite Parties have not disputed that the petitioner had been holding the post from the date of his appointment i.e. 23.05.1995. The petitioner has asserted that he has been discharging the duties of the Lecturer of Chemistry from 23.05.1995 to the entire satisfaction of the authority. Above all, by the Judgment dated 30.01.2012 delivered in G.I.A. Case No.189/2011, the State Education Tribunal held that the petitioner is entitled to GIA full salary with effect from his initial date of appointment i.e. 23.03.1995. In compliance thereof, full GIA salary was paid to the petitioner.

27. There had been a judicial scrutiny and by the Judgment dated 30.01.2012, the State Education Tribunal had directed the Opposite Parties to release the full salary to the petitioner for the post of Lecturer w.e.f. 23.05.1995 as per the Grant-in-Aid Order, 1994, within a period of 3 months from the date of receipt of the said

order. The said order was never challenged by the Opposite Parties. Hence, this court cannot observe anything contrary to the finding as returned by the said Judgment dated 30.01.2012. Therefore, the only question that remains to be addressed to is whether the petitioner has conformed to the requirement of Rule-4(b) read with *Explanation* provided by the Rules called the Odisha Non-Government Aided College Lecturer Placement Rules, 2014. Rule 4 (b), op. cit., is according to us, the relevant rule for purpose of determining the relief as prayed by the petitioner in this writ petition. Rule 4 (b) provides that in order to be eligible for placement in the grade of Lecturer (Group-A Scale under Rule-9), a lecturer covered by Rule 3 of the said Rules must have ***"completed at least 08 (eight) years of service from the date of receiving of full GIA in the post of Lecturer in case of appointment by the management."***

28. As stated, there is no dispute that the petitioner was appointed as the Lecturer in Chemistry by the Management and such appointment was approved by the Director of Higher Education, Government of Odisha. We find from the facts as averred in the writ petition that AS College was brought under the Grant-in-Aid rules much prior to the appointment of the petitioner in the post of Lecturer in Chemistry and the petitioner himself was enjoying the Grant-in-Aid (GIA) Scale in the post of Demonstrator. Reference has been made to Rule 4(1)(c) of the said Rules but that rule, in our considered opinion, may not be the appropriate provision under which the petitioner's case is to be considered.

29. Mr. Nayak, learned Addl. Government Advocate has strenuously contended that Clauses (b) and (c) of Rule 4 clearly provide that such benefits can only be availed on completion of 9 years of continuous service from the approved date of joining and coming over to the full GIA scale. Even if, we accept the proposition as provided by *Explanation*, the requisite period for the petitioner to get into the post of the Lecturer (Group-A Scale) is 9 years [of continuous service from the approved date of joining]. But we cannot accept the proposition in as much as the said explanation is in contrast to the basic provisions of Rules 4 (1) (b) and (c) of the said Rules. To obviate the effect of the explanation, we read down and hold that an explanation can provide many thing but not in contrast to the basic rules.

30. In view of the discussion as made above, there cannot be any ambivalence that the petitioner's approved date of appointment is 23.05.1995 and the same was approved by a posterior order. We are constrained to observe that the Clarification dated 07.10.2015 (Annexure-A to the counter affidavit filed by the Opposite Parties) and the Clarification dated 20.01.2016 (Annexure-B to the counter affidavit filed by the Opposite Party No.2) cannot be sustained so far as the interpretation as provided in Para 3 is concerned. It has been provided by Para 3 that a non-SSB lecturer can avail the benefit of Lecturer (Group-A Scale) and Reader (State Scale) only after completion of 17 years and 27 years of continuous service respectively from the approved date of joining. We read down the said provision for being contrary to the

provision of Rule-4(1) (b) of the Orissa Non-Government Aided College Lecturers Placement Rules, 2014. That apart, a clarification, cannot take away any benefit granted by the substantive rule. The placement of a Non-SSB Lecturer to the grade of Lecturer (Group-A Scale) will be guided by the provision of Rule-4 (1)(b) of the said Rules [of 2014].

31. Hence, we declare that the petitioner is entitled to get the benefit of the Lecturer (Group-A Scale) from the date when he had completed 8 years of service in the post of Lecturer from the date of getting the GIA scale. But so far the policy of the Government to pay notionally for a certain period is not intervened by us. That part of the notification dated 20.01.2016 (Annexure-B to the counter affidavit filed by the Opposite Parties), therefore, stands good. The pay of the petitioner in the post of Lecturer (Group-A Scale) shall be fixed notionally from the date of his eligibility till 01.01.2014, but it is made absolutely clear that the petitioner's pay shall be fixed in the said scale in the manner as provided under Rule 9 of the said Rules, as reproduced above, in the post of Lecturer (Group-A Scale) on the date of eligibility i.e. 23.05.2003.

32. It is made absolutely clear that the petitioner will not be entitled to actual financial benefits till 01.01.2014 as per the Government policy, but his pay and allowances shall be notionally counted till 01.01.2014. The petitioner's arrear pay and allowances, in terms of this order shall be paid to him within a period of 3 (three) months from the date when the petitioner will submit a copy of this order to the Opposite Parties. The Opposite Parties shall be at liberty to adjust the amount already paid to the petitioner on account of pay and allowances. The petitioner shall, however, be entitled to the other service benefits from the date of eligibility.

As corollary to the observations made above, this writ petition stands allowed. There shall be no order as to costs.

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2023 (II) ILR – CUT - 989

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

MATA NO. 3 OF 2020

MANJUSHREE GANTAIT .....Appellant

.V.

SUMAN GANTAIT .....Respondent

(A) SPECIAL MARRIAGE ACT, 1954 – Section 37(2)(3) – Appellant/ wife got married after decree of divorce was passed – Whether re-marriage will be an absolute bar for receipt of maintenance or permanent alimony? – Held, No – She is entitled to receive maintenance till her remarriage and permanent alimony as awarded by the competent court of laws. (Para 33)

(B) FAMILY COURTS ACT,1984 – Section 19 – Power of appellate court – Whether a modification of granting permanent alimony can be accepted before the court of appeal – Held, Yes – Relief can be afforded to the parties in order to shorter litigation or to do complete justice between the parties. (Para-30)

Case Laws Relied on and Referred to :-

1. 2013 (I) OLR (SC) 905 : U. Sree Vs. U. Srinivas.
2. 120 (2015) CLT : Smt. Pratima Mohapatra @ Napak Vs. Dibakar Mohapatra.
3. 1 (2018) DMC 232 (ORI) Ritanjali Patra Vs. Bhabani Shankar Patra.
4. AIR 2013 AP 58 : Guntamukkala Naga Venkata Kanaka Durga Vs. Guntamukkala Eswar Sudhakar and Ors.
5. 2010 SCC OnLine Del 2912 : Sanjay Bhardwaj & Ors. Vs. The State & Anr.
6. (2021) 2 SCC 324 : Rajnesh Vs. Neha.
7. AIR 1989 (Cal) 120 : Harendra Nath Burman Vs. Suprova Burman.

For Appellant : Mr. A.C. Panda

For Respondent : Mr. A.K. Sarangi

JUDGMENT Date of Judgment :23.06.2023

MISS. SAVITRI RATHO, J.

This appeal has been filed by the Appellant-wife who is aggrieved by the quantum of permanent alimony awarded by the learned Judge, Family Court, Rourkela vide judgment dated 29.11.2019 and decree dated 13.12.2019 in Civil Proceeding No. 129 of 2015 . She has prayed for enhancement of the amount. The civil proceeding filed by the Appellant–wife under Section 27(1)(d) of the Special Marriage Act, seeking dissolution of her marriage by a decree of divorce and for permanent alimony against the Respondent has been allowed, dissolving the marriage and awarding Rupees Ten lakh as permanent alimony.

CASE OF THE APPELLANT-WIFE

2. On 07.03.2012 the parties solemnized their marriage before the Marriage Officer, Tumluk II Block, East Midnapur, West Bengal under the Special Marriage Act. After the solemnization of marriage, both the parties lived together as husband and wife initially at Haldia and then at Mumbai. There was no issue born out of their wedlock. During the time of marriage, the father of the Appellant had given cash and gold ornaments to the Appellant and Respondent. But during the social marriage function on 16.05.2012, the sister and mother of the Respondent demanded a car from the father of the Appellant. The father of the Appellant declined to satisfy such an unlawful demand, for which the in-laws of the Appellant started torturing her both physically and mentally. When her parents had come to visit her, they were humiliated by the Respondent and his family members for which they went back. She was not allowed to get to her parents house or talk to them over telephone. On 02.06.2012 the Appellant, Respondent and sister of the Respondent left for Mumbai

where brother and sister were working. When they went out, they kept the Appellant locked inside. When her parents came to Mumbai to visit her, torture and ill treatment on her increased in order to compel her to fulfill the demand for car. She was not given enough food nor taken for treatment when she fell ill. Instead of taking her to the doctor, they told her that it was better if she died. Her sister in law often threatened to send her to jail with false accusations. She had been made to sign some blank papers in her matrimonial house. When during Durga Puja of the year 2013, the Appellant had come to her parents house. The Respondent did not choose to take her back. When her father enquired from the Respondent on 29.05.2014, he stated that unless their demand for car is fulfilled, they will not take her back. The Appellant is staying with the parents since October 2013 and finding no way out, she lodged information before the Biramitrapur Police Station alleging commission of offence under Sections 498-A, 323, 294, 506, 406, 34 of the IPC read with Section 4 of the D.P. Act on basis of which, Biramitrapur P.S. Case No. 81 of 2014 was registered against the husband and his family members. She further stated that the Respondent-husband was working as a Marketing Manager in TATA Housing Development Co. Ltd. and getting salary to the tune of Rs.1,50,000/- per month and leading a lavish life but was neglecting his statutory obligation to maintain her. She was also filed C.P. No. 226 of 2014 for maintenance under Section 18 of the Hindu Adoption & Maintenance Act which was subjudice. When the cruelty meted out to her by the Respondent and other family members became unbearable, she lost all hope for a conjugal life with the Respondent and approached the learned Judge, Family Court seeking dissolution of her marriage with the Respondent and for permanent alimony.

CASE OF THE RESPONDENT –HUSBAND

3. On being served with notice the Respondent appeared before the learned Judge, Family Court, Rourkela and filed his written statement denying all the allegations. The contents of the written statement have not been discussed in the judgment in detail. Copy of the written statement is also not available in the scanned copy of the LCR sent to this Court but a copy of the same has been filed by learned counsel for the respondent along with his written submission. Perusal of the same reveals that it has been interalia averred therein that that there was no need for scope or intention to demand of dowry by the Respondent's family members from the petitioner's family and there was no mental and physical torture to the appellant. The parents of the Appellant were never misbehaved or humiliated by the Respondent and his family members during their visits to his house. He has denied that the Appellant was not allowed to go to her parental house or talk to her parents over phone. The allegation that the appellant was confined to the house by locking the exit door is also denied and he has stated that he had never severed conjugal relation with the appellant when she was staying in the matrimonial house and that he was desirous of spending a conjugal life with the Appellant so that they can live together. The allegations that the Appellant was not given proper food or medical

treatment has also been denied. The allegation that the Appellant was not allowed to carry her documents, certificates and ornaments when she was giving her parents house has been stated to be false and denied. He has stated that the averment that he is an employee of TATA Housing Development Co. Ltd. and is getting a monthly salary to the tune of Rs. 1.5 lakh is false and fictitious. It was stated that the Respondent is unemployed and had no source of earning and the Appellant was provided all comfort and was happy in her matrimonial house She was well looked after in her matrimonial home, and the Respondent and his family made all attempts to keep her happy and comfortable and on account of her desertion from the association of the Respondent and her subsequent action on the direction of her father has caused irreparable loss and injury to the Respondent for which he is in extreme distress and the he is earnestly looking forward to return of the Appellant to his association by breaking free from the clutches of her father who is bent upon to wreck her life.

4. The scanned copy of the LCR in C.P. No. 129 of 2015 has been called for and received by this Court. Perusal of the order sheet reveals that the Respondent-husband had been set ex-parte on 16.12.2015 and the case was posted to 25.01.2016 for ex parte hearing. He has remained absent when the case was posted for conciliation. On 11.04.2016, the Respondent–husband appeared and filed an application under Order–9, Rule 6 of the C.P.C. This application was rejected on 24.08.2016 as not moved and the case was posted for ex parte hearing. On 03.01.2017 the Respondent filed an application under Order 9, Rule- 7 of the C.P.C which was registered as I.A. No. 1 of 2017. This application was allowed by order dated 17.07.2017 and order dated 24.08.2016 (setting him ex parte) was set aside. Thereafter, when the C.P. No. 129 of 2015 was posted for conciliation on different dates, the Respondent–husband remained absent. So on 25.07.2018 notice was again issued to him in C.P. No. 129 of 2015. On 20.08.2018 though notice was back after service, the Respondent–husband did not appear. On 27.08.2018, he was set exparte. On 27.11.2019, the Appellant - wife was examined as P.W 1 and Ext.1 marked on her behalf. Argument was heard later that day and the impugned judgment was pronounced on 28.11.2019.

IMPUGNED JUDGMENT

5. The learned Court below found that the wife had proved that cruelty was shown to her which entitled her to a decree of divorce. It also found that the parties were living separately for more than five years and there appeared to be irretrievable breakdown of marriage and severance of marital ties. As the husband did not contest, conciliation could not be done. The Court concluded that the marriage was dead for all purposes. The sentiments and emotions of the wife were completely dried up and it would be wise to dissolve the marriage by a decree of divorce. Referring to the evidence of the wife that the husband was earning Rs.1,50,000/- per month, leading a lavish life and neglecting to maintain her, it held that she is entitled

to permanent alimony. He allowed the Civil Proceeding ex-parte by judgment dated 28.11.2019, dissolving the marriage solemnized on 07.03.2012 between the Appellant and Respondent under the Special Marriage Act by a decree of divorce and directed the Respondent to pay a sum of Rs. 10,00,000/- (Rupees Ten Lakhs only) as permanent alimony within three months, granting liberty to the wife to realize the same under due process of law.

SUBMISSIONS ON BEHALF OF THE APPELLANT

6. Mr. A.C. Panda, learned counsel for the Appellant – wife has submitted that the amount of permanent alimony awarded by the learned Judge, Family Court is grossly low and needs to be enhanced. He has submitted that it is the basic requirement under law to consider the status of the parties, their social needs and the financial capacity of the husband but this has not been considered by the learned trial court. The learned Judge, Family Court has failed to consider that that the monthly salary of the Respondent is Rupees One Lakh Fifty Thousand per month and awarded a meager amount as permanent alimony which is liable to be enhanced. He only took note of those documents filed by the Appellant to establish the service status of the Respondent- husband but did not consider the same.

7. He further submitted that the Respondent- husband. has tried his best to avoid his legal, social and moral duties to maintain her. He entered appearance in the Civil Proceeding, filed his written statement but thereafter did not choose to contest the proceeding for which the pleadings and evidence led by the Appellant- wife went unrebutted and correctly so. He relies on the decision of the Supreme Court in the case of ***U. Sree Vs. U. Srinivas*** repoted in ***2013 (I) OLR (SC) 905*** where it has been categorically held that *"it is the duty of the court to see that the wife lives with dignity and comfort and not in penury. The living need not be luxurious but simultaneously she should not be left to live in discomfort. The court has to act with pragmatic sensibility to such an issue so that the wife does not meet any kind of man-made misfortune".*

8. He has also submitted that it is settled in law that alimony is not alms and is the entitlement of a wife for a decent living. Apart from the take home salary, relevant factors affecting fiscal expenses have to be considered. Capacity to earn and actual earning and savings of the husband for securing his future life is also significant and has to be counted while determining the amount of alimony.

9. His further submission is that C.P. No. 266 of 2014 filed by the Appellant has been decreed on contest since 13.07.2018 by the very same Court granting Rs.20,000/- per month from the date of the petition i.e. 17.10.2014 towards maintenance. But till date she has not been paid a single pie nor to the knowledge of this Appellant, has the decree passed in C.P. No. 266 of 2014 been challenged by the husband till date. As per the decree passed in C.P. No. 266 of 2014 the arrear comes to Rs.12,40,000/- as on 17.12.2019. But the learned court while awarding permanent

alimony in the proceeding for divorce has erroneously observed that C.P. No. 266 of 2014 is still pending and awarded a low amount towards permanent alimony. Hence such meager amount of permanent alimony is not sustainable in the eye of law and is liable to be enhanced.

10. He further submits that it is settled in law that there is no fixed arithmetic formula to assess the quantum of permanent alimony. Besides the status of the parties, their social needs, financial capacity and another important issue, i.e. the life expectancy of a female has to be considered. Relying on the decision of this Court in the case of ***Smt. Pratima Mohapatra @ Napak Vs. Dibakar Mohapatra*** reported in ***120 (2015) CLT 401*** and in the case of ***Ritanjali Patra vs. Bhabani Shankar Patra*** reported in ***1 (2018) DMC 232 (ORI),*** he submits that the life expectancy of a female is 70 years and as Appellant was 34 years when she approached the learned Family Court, her life expectancy was 36 years and she was entitled to get 34 x 12 x 20,000/- (maintenance granted in C.P. No. 266 of 2014) = Rs. 82,60,000/-.

11. He has finally submitted that as per the decision of the Supreme Court, the wife is entitled to 25% of the net salary of the husband towards her maintenance. The Appellant-wife is therefore entitled to more than Rs.67 lakhs. The future economic condition should also be considered for which the amount of permanent alimony granted in the impugned judgment should be appropriately enhanced.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

12. Mr. A.C. Sarangi, learned counsel for the Respondent-husband without filing a copy of the order, had vehemently urged that C.M.A. No. 45 of 2021 had been filed by the Respondent - husband in the Court of the learned Judge, Family Court challenging the ex parte decree of divorce, so this Appeal should not be entertained. When the order sheet in C.M.A 45 of 2021 was produced, it was found that for non removal of defects, the case had been dismissed for default on 26.07.2022. Mr. Sarangi's further submissions are that Appellant-wife is not eligible to get any alimony and the matter should be remanded for fresh adjudication after allowing him a chance to adduce evidence. In support of his submissions, he relied on the following decisions:

(i) ***Guntamukkala Naga Venkata Kanaka Durga v. Guntamukkala Eswar Sudhakar and Others : AIR 2013 AP 58***.

(ii) ***Sanjay Bhardwaj & Others v. The State & Another*** reported in ***2010 SCC OnLine Del 2912***

COUNTER APPEAL / CROSS OBJECTION

13. On 12.04.2023 titled as, "*an application for counter appeal filed by the respondent under Chapter – VI , Rule-27(a) of Orissa High Court Rules read with Section 19 of the Family Court Act*" has been filed by the Respondent annexing copy of CMA No. 11 of 2023 (Annexure 1) and copy of the written statement in

CP.No. 129 of 2015(Annexure 2).The copy of the judgment dated 28.11.2019 challenged has not been annexed to the counter appeal / application. The following prayers have been made in the counter appeal/application :

> "*i) accept the counter claim and set aside the order dt. 28.11.2019 passed by the learned Judge Family Court, Rourkela in C.P.No. 129 of 2015.*
>
> *ii) Direct the parties to adduce additional evidence or in alternative remand the case to learned family judge Rourkela to reopen the case.*
>
> *iii) Pass any such other order(s) which would deem fit and proper in the ends of justice.*"

14. There is also no provision under Chapter –VI, Rule -27 (a) of Orissa High Court Rules for filing an appeal or "counter appeal". This "counter appeal" is barred by time. But as it has been styled as a "counter" appeal, there is no stamp report.

15. We have however examined the averments in the counter appeal / cross objection and find that the Respondent-husband has challenged the judgment primarily on the following grounds **:**

> **i)** The MATA is not maintainable on facts and law. As "the petitioner "has filed CMA No 11 of 2023 under Order -9 Rule - 4 for restoration of C.P.No. 129 of 2015. The appeal is vexatious, misconceived and not maintainable and has been filed to linger the matter and harass the "opp. parties."
>
> **ii)** The marriage was solemnized without any dowry and the statement and evidence regarding dowry are all false and fabricated and concocted story.
>
> **iii)** The appellant has given her evidence as P.W.1 and not examined any independent witness and there is no cross examination as respondent was set exparte. There is no proof of income or cruelty, it is illegal to impose financial burden on him
>
> **iv)** Findings regarding dowry demand are completely false and not proved.
>
> **v)** GR case No 1260 of 2014 filed by the appellant before the SDJM Panposh is still pending and he is on bail. The allegations of cruelty is not proved. The findings in paragraphs 1 and 2 of the judgments are therefore not admissible and contrary to law.
>
> **vi)** The Respondent had appeared and filed his written statement. But the material facts in the written statement have not been considered for which the judgment is liable to be set aside.
>
> **vii)** Section 27 of the Special Marriage Act is not attracted as cruelty has not been proved by examining any independent witness or adducing documentary evidence.
>
> **viii)** Opportunity was not given to the respondent to file his evidence and he has always been trying to bring the appellant / wife to his society to maintain a happy conjugal life but she has not agreed.
>
> **ix)** Dissolution of marriage without any valid cause is illegal, arbitrary and violates the principles of natural justice.
>
> **x)** Sufficient evidence has not been adduced for award of permanent alimony which has been observed by the learned Family Judge. Hence question of payment of permanent alimony does not arise.

xi) A false plea has been taken that the respondent earns monthly salary Rs 1.5 lakhs. Fake and false documents have been given regarding his income.

xii) The respondent has no source of income now to pay permanent alimony as he is now in distress condition which has been mentioned in paragraph 14 of the written statement but has not been discussed by the learned Judge , Family Court. He is unemployed while the appellant is earning Rs 1 lakh per month from her teaching and tailoring business.

xiii) The Respondent is always ready and willing to take back the Appellant to his matrimonial house and lead a happy conjugal life with her.

WRITTEN NOTE OF SUBMISSION BY THE RESPONDENT.

16. Mr. Sarangi, learned counsel for the Respondent – husband has filed written arguments alongwith the following documents -,

i) Copy of case status of MATA 133 of 2018,

ii) Order dated 11.11.2020 passed in MATA No.133 of 2018

iii) Case Status of CMAPL No. 105 of 2021,

iv) Copy of faculty details of Tagore Public School with name of Manjushree Kundu Teacher Sl. No 15 highlighted.

v) Certificate of merit awarded to Mrs. Manjushree Gantait in Rabindra Sangeet,

vi) photograph of a married couple

vii) a group photograph,

viii) petition in CMA No 11 of 2023 filed under Order – 4, Rule 4 CPC, in the Court of the learned Judge Family Court, Rourkela by Sumon Gantait, and

ix) written statement filed by the Respondent in C.P. No. 129 of 2015.

New documents cannot be introduced in a case after hearing is closed by filing them alongwith the written arguments. In the interest of justice, we have gone through the written note as well as the documents.

17. It has been stated in the written note of submission , that in C.P. No. 266 of 204, the respondent husband has been directed to pay Rs. 20,000/- per month to the appellant as maintenance from date of the application i.e. 17.04.2014 and the arrears to be paid within first week of October 2018 and current maintenance to be paid by first week of each succeeding month .That decree was challenged in MATA No. 133 of 2018 but it was listed on 11.11.2020 and the counsel could not appear due to Covid 19 and it was dismissed. CMAPL No. 104 of 2021 filed for restoration is pending. So the ratio of C.P. No. 266 of 2014 cannot be considered in this case. The Appellant is a Teacher in Tagore Public school and a Grade 1 Rabindra Sangeet Singer and earns Rs 2 lakhs per month .She should not be paid any maintenance as she has voluntarily left the matrimonial house. She has married one Pramod Agarawal in the meanwhile and is blessed with one son and their marriage photo is enclosed. From the ex parte judgment in C.P. No. 264 of 2014 and letter of TATA Housing Development Corporation dated 08.01.2014, it is apparent that the

Respondent husband has no job and source of income and is mentally depressed and is in a pathetic condition for which he could not properly advise his conducting Advocate to contest the case . MATA No. 3 of 2020 is not maintainable in this Court in facts and law as CMA No.11 of 2023 has been filed for restoration of C.P. No. 129 of 2015 and the Family Court has been approached for early disposal. G.R. Case No.1260 of 2014 filed before the S.D.J.M., Panposh is still pending and allegations of cruelty made against the Respondent are baseless. Though he had appeared and filed his written statement, but the learned Judge, Family Court has failed to discuss the material facts in the written statement. Section 27 of the Special Marriage Act is not attracted as cruelty has not been proved. As no other independent witness has been examined, the evidence of the appellant is not believable. Opportunity was not given to the respondent to file evidence. In spite of his best efforts to lead a happy conjugal life, the Appellant is not agreeing and hence there is no valid cause to dissolve the marriage. Sufficient evidence has not been adduced for permanent alimony which has been observed by the learned Family Judge. Without sufficient evidence, a false plea has been taken that the respondent earns monthly salary Rs 1.5 lakhs. Fake and false documents have been given regarding his income. Now the respondent has no source of income to pay permanent alimony. So the case is liable to be dismissed with heavy cost.

CASE LAW

18. In the case of ***Guntamukkala Naga Venkata Kanaka Durga*** (supra) the Andra Pradesh High Court was dealing with two appeals against a common order of the Family Court. One appeal had been filed by the wife under Section 18 of the Hindu Adoption and Maintenance Act, 1956 for past and future maintenance while the other had been filed by the husband under Section 13(1)(ia) of the Hindu Marriage Act, 1955 for dissolving his marriage. The learned Judge, Family Court found that the wife was guilty of mental cruelty and of having left the matrimonial home and did not return inspite of the efforts made by the husband. As it found the wife to be responsible for breakdown of marriage, while decreeing the proceeding filed by the husband for divorce, it dismissed the proceeding filed by the wife for maintenance. The High Court did not interfere with the findings and dismissed the two appeals holding as follows :

> *"30. The legislative intendment of framing various provisions for granting maintenance to a wife or a husband or any of their relatives as enshrined definitely was to uphold the concept of marriage. 'Marriage' is the sacred union, legally permissible, of two healthy bodies of opposite sexes. It has to be mental, psychological and physical union. When two souls thus unite, a new soul comes into existence. That is how the life goes on and on this planet (see Mr. 'X' v. Hospital 'Z': **AIR 1999 SC 945 : (1998) 9 Sup. 220)**. By marriage two souls are united following which they start living together. The purpose of life is to live happily which can be attained by maintaining peace and tranquility between two persons or among group of persons within the society at large whatever may come or intercept. To achieve that object one has to mould himself or herself while dealing with any eventuality which he or she may come across. When there is no*

adaptability differences are bound to arise which may lead to break down of relationship between two individuals or among different individuals as the case may be unless rectified by prudence and sensibility. The system of marriage have bearing not only upon two individuals i.e., spouses but also among their family members and the society because the family is a unit in the society. According to Hindu philosophy the purpose of marriage is to serve mainly the other components of the society. That objectivity is not only for the purpose of serving the society at large but also maintaining love, peace and tranquility among the members of the society and contributing for its prosperity.

31. In the context of the observations made above awarding maintenance to a wife because of whose fault the marriage between her and her husband has been broken is against the concept of marriage. How can one of the spouses who got no respect for the marital bond be granted maintenance. The wife or husband will have the obligation of maintaining the other spouse when the other spouse is neglected by him or her without lawful excuse having got sufficient means while the other spouse got no means to maintain herself or himself having entered into the wedlock.

S***anjay Bhardwaj*** (supra) was a case where the husband had filed an application under Section 482 of the Cr.P.C. challenging the order of interim maintenance under the Protection of Women from Domestic Violence Act, 2005 by the Magistrate and confirmed by the Addl. Sessions Judge. The marriage had been settled through matrimonial advertisement and the wife had claimed to be an MA and MBA and working in a multinational company. After their marriage, the parties had stayed together for 10 days. The Delhi High Court set aside the order of the Magistrate who had directed the petitioner - husband, an NRI working in Angola to pay interim maintenance, from date of application. The husband had filed an application under section 12 of the Hindu Marriage act for declaring the marriage null and void on the ground of fraud after which FIR was lodged by the wife and the application under the PDV Act was filed. The Court held that a husband is supposed to maintain his non earning spouse out of the income from which he earns .The Court cannot tell him to beg borrow or steal more so when both husband and wife are almost equally qualified and equally capable of earning and both claimed to be employed before marriage .Without there being prima facie proof that the husband was gainfully employed in India especially when his passport has been seized , fixing of maintenance is contrary to law and was not warranted under the provisions of the Domestic Violent Act. An unemployed husband holding an MBA degree cannot be treated differently from a wife holding an MBA degree as both are on equal footing unless one of them is employed. It also observed that there cannot be a legal presumption that behind every failed marriage there is either dowry demand or domestic violence.

MAINTAINABILITY OF THE COUNTER APPEAL / CROSS OBJECTION

19. The MATA had been admitted on 12.02.2020. As notice returned unserved from the address of the Respondent in Mumbai, vide order dated 01.11.2022, I.A. No. 254 of 2022 filed under Order – 5, Rule – 20 of the C.P.C had been allowed.

Notice had been published in the Kolkotta Edition of the Telegraph on 19.11.2022 fixing the date of appearance to be 21.12.2022. Mr. A.K. Sarangi learned counsel entered appearance on behalf of the Respondent on 20.12.2022. On 21.12.2022, when the matter was listed, he asked for and was served a copy of the memorandum of appeal and its annexures. The matter was listed on 30.01.2023, 07.02.2023, 09.03.2023, 16.03.2023. On 16.03.2023 it was adjourned to 17.04.2023 for disposal on merit and it was specifically observed that no further accommodation will be made on the next date.

20. The cross appeal / application has been filed on 12.04.2023. As per Section – 19 (3) of the Family Court Act "*Every appeal under this section shall be preferred within a period of thirty days from the date of judgment or order of a Family Court."* In view of the decision dated 16.05.2023 of this Court in ***MATA No. 54 of 2020*** in the case of ***Bibhuti Bhusan Rout vs Sasmita Nayak*** (which has since been referred to a larger Bench) it should be filed within 90 days. Whether the period of limitation is taken as 30 or 90 days, the appeal/ application is grossly barred by limitation. No application for condonation of delay has been filed. The reasons mentioned in the Appeal Memo not challenging the impugned judgment in time are vague and unconvincing. It is not a case where Respondent- husband had not received notice in the case in the Civil Proceeding. It is his own case that he had appeared and filed his written statement and thereafter could not appear. It is also an admitted fact that the Respondent- husband was contesting C.P. No. 266 of 2014 in the same Court. So non appearance in the case appears to be deliberate.

21. Even if we consider this appeal to be a cross objection under Order 41, Rule 22 of the C.P.C. it should have been filed "within one month from the date of service" on the Respondent or his pleader of the notice of the day fixed for hearing the appeal or within such further time as the Appellate Court may see fit to allow. In the present case, the date indicated in the notice published in the newspaper was 21.12.2022. As noted earlier, the respondent entered appearance in the case through counsel on 20.12.2022. On 21.12.2022 he was served with copy of the appeal memo alongwith annexures. Although the case was listed six times before being finally adjourned to 17.04.2023 as last chance, neither the Respondent nor his counsel took leave of this Court to prefer the cross objection. (As the cases are being heard by virtual mode in this High Court, the Respondent could have appeared on virtual mode and addressed this Court even if his counsel failed to do so). On 17.04.2023, this Court was informed that a cross objection has been filed.

22. This cross objection is barred by time as sufficient cause has not been shown for not filing it within the time specified in Order 41, Rule 22 of the C.P.C. Leave of the Court has also not been taken or sought for filing the same for which it is not maintainable. Filing of the cross objection/application after almost four months after receiving notice in the MATA seems to be an afterthought and another attempt to delay the proceedings. We are therefore find no reason to admit the counter appeal/cross objection.

DISCUSSION, ANALYSIS AND CONCLUSION.

23. We have carefully gone through the plaint, written statement and deposition of the appellant P.W.1. We have gone through the ordersheet in C.P. No 129 of 2015 and perused the orders passed in CMA 45 of 2021. We have also gone through the judgment dated 13.07.2018 passed in C.P. No. 266 of 2014 which has been passed on contest; the counter appeal filed by the Respondent and the written note of submission filed by the learned counsel for the Respondent and the documents/ photographs annexed to it.

24. In her plaint as well as in her evidence in C.P. No. 129 of 2015, the appellant has stated about the manner in which she has been treated by the respondent and his family members on account of unfulfilled dowry demand. She has not been cross examined as the respondent had been set exparte. In his written statement filed in C.P. No. 129 of 2015, the Respondent has denied the allegations of cruelty and ill treatment. He has also stated that he was always ready and willing to take the Appellant to his matrimonial home and resume conjugal relations with her, but she was not willing. This stand is belied by his conduct during the proceeding (C.P.No.129 of 2015) which has been described in detail earlier. He has remained absent on most dates for which he had been set ex parte once earlier. That order was set aside and, the case was posted for conciliation on various dates but he did not appear, for which fresh notice had to be issued to him. But inspite of receiving notice he did not appear in the case for which he was set exparte again and after exparte hearing the impugned judgment was passed. He had filed CMA No. 45 of 2021 under Order 9, Rule 13 of the C.P.C. to set aside the exparte decree, but did not pursue it for which it was dismissed on 26.07.2022, which is long before the date on which the Respondent- husband entered appearance through his counsel in this Court but this was not intimated to this Court and this was revealed much later when the counsel for the Appellant-wife filed the order sheet in CMA 45 of 2021. That CMA No. 11 of 2023 has been filed under Order – 9, Rule 4 C.P.C. for restoration of C.P. No.129 of 2015, has been stated for the first time in his counter appeal / cross objection and written note of argument.

25. Apart from the fact that the counter appeal/cross objection is grossly barred by time , from the conduct of the Respondent after he was set ex-parte for the first time in C.P. No.129 of 2015, we are satisfied that he had no intentions whatsoever of contesting the matter on merit or restoring marital relations with the Appellant but wanted to linger the proceedings. In order to avoid paying any maintenance or permanent alimony to the Appellant, he has been filing various applications and petitions. He has participated and contested in C.P. No.266 of 2014 filed by the Appellant wife for maintenance but chose to remain absent in C.P. No.129 of 2015, for which he was set ex-parte and CMA No. 45 of 2021 filed by him to set aside the ex parte decree has been dismissed for non prosecution and CMA No.11 of 2023 purportedly filed by him has been filed at a grossly belated stage. We are therefore

of the considered view that even assuming that CMA No.11 of 2023 is pending in the Court of the learned Family Judge, Rourkela it would neither be in the interest of justice to wait till its disposal nor to set aside the judgment impugned in this Appeal and remit the matter for fresh disposal in view of the conduct of the Respondent – husband. So we do not find any reason to interfere with the impugned judgment and decree granting dissolution of marriage.

26. The decision in ***Guntamukkala Naga Venkata Kanaka Durga*** (supra) cannot come to the aid of the Respondent, as he has not contested the case to prove that the appellant is responsible for breakdown of the marriage or that she has sufficient means to maintain herself and he has not neglected to maintain her. That apart, it is no longer *res integra* that a wife is entitled to permanent alimony in case of dissolution of marriage even if the reason for dissolution of marriage is attributed to her.

27. The decision in ***Sanjay Bharadwaj*** (supra) has no application to this case as in the present case the Respondent has not contested the case to prove that he has no job or that the Appellant has left the matrimonial house without sufficient cause and disentitled herself for payment of alimony and that she has sufficient means to maintain herself. That apart, since the Respondent has the qualification to be employed, his plea of being unemployed (even if proved) cannot be a valid plea for non payment of maintenance or permanent alimony.

28. Section 37 of the Special Marriage Act, provides for grant of permanent alimony at the time of passing of the decree, or thereafter. Instead of directing for payment of maintenance every month, a Court can award a gross sum as permanent alimony after taking note of the property and resources of the parties. The Court has also been given the power to rescind or modify the order directing for payment on account of change in circumstances. The provision is as follows :

> *"**Section. 37. Permanent alimony and maintenance**.—*
>
> *(1) Any court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree or at any time subsequent to the decree, on application made to it for the purpose, order that the husband shall secure to the wife for her maintenance and support if necessary, by a charge on the husband's property such gross sum or such monthly or periodical payment of money for a term not exceeding her life, as, having regard to her own property, if any, her husband's property and ability, the conduct of the parties and other circumstances of the case, as it may seem to the court to be just.*
>
> *(2) If the district court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-Section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the court to be just.*
>
> *(3) If the district court is satisfied that the wife in whose favour an order has been made under this Section has remarried or is not leading a chaste life, it may, at the instance of the husband, vary, modify or rescind any such order and in such manner as the court may deem just."*

29. The Supreme Court in the case of ***Rajnesh vs. Neha*** reported in ***(2021) 2 SCC 324*** has *interalia* held that the "*parties may lead oral and documentary evidence with respect to income, expenditure, standard of living, etc. before the concerned Court, for fixing the permanent alimony payable to the spouse",* and has specified that status of the parties, reasonable needs of the wife and dependant children, qualification of the applicant, if she has any independent source of income and whether it is sufficient to maintain the same standard of living as she was accustomed to in her matrimonial home, capacity of the spouse to pay to be some of the relevant considerations for fixing the amount of maintenance. It has also emphasized that maintenance is dependent upon factual situations and the Court should mould the claim for maintenance based on various factors brought before it to arrive at the appropriate quantum of maintenance to be paid and that " *the plea of the husband that he does not possess any source of income ipso facto does not absolve him of his moral duty to maintain his wife if he is able bodied and has educational qualifications*"

30. It has been stated in the written note of argument filed on behalf of Respondent–husband on 19.04.2023 that the Appellant -wife has married in the meantime for which she is not entitled to any maintenance. Re-marriage is a ground under Section 37 (2) and (3) of the Special Marriage Act for modifying the order granting maintenance. This averment of the Respondent - husband should normally have been accepted after formal proof giving opportunity of hearing to the Appellant –wife. Instead of relegating the Respondent–husband to the Family Court for modification of the order granting permanent alimony after formal proof of such an averment, we have thought it fit to accept this averment to be true and deal with the same in order shorten the litigation and do complete justice, by relying on the decision of the Calcutta High Court in the case of ***Harendra Nath Burman vs. Suprova Burman : AIR 1989 (Cal) 120***, where it has been inter alia been held as follows:

> *"While ordinarily a lis is to be determined on the cause of action accruing on the date of the initiation of the lis, It is nevertheless well-settled that it is open to a Court, including a Court of appeal, to take notice of events which have happened after the institution of the suit and afford relief to the parties where it is necessary to do in order to shorten litigation or to do complete justice between the parties. If any authority is needed in support of this proposition, reference may be made to the decision of the Supreme Court in* ***Shikharchand v. Digambar Jain,*** *where the leading decision of this Court on the point of Sir Ashuthosh in* ***Rai Charan v. Biswanath, (AIR 1915 Cal 103)*** *has been referred to with approval It should be so done all the more in matrimonial proceedings where multiplicity of proceedings should always be discouraged and the dispute should be disposed of as early as possible in the interest of the parties as well as in the interest of the society at large. In fact such courses appear to have been adopted in a series of decisions to which our attention has been drawn by Mr. Dutta and reference inter alia may be made to the decisions of the Delhi High Court in* ***Savitri v. Mulchand****, in* ***Ashok v. Santosh,*** *and in a Bombay decision in* ***Jaishree v. Mohan, AIR 1987 Bom 220."***

31. The challenge of the respondent- husband to award of permanent alimony should normally not have been considered as we have not admitted his counter appeal/cross objection. His contention that the Appellant has not adduced enough documentary evidence to prove his income and he is unemployed and not in a position to pay permanent alimony, is not acceptable as he has not led any evidence to that effect. After going through his written statement, counter appeal /cross objection and written note of submission, we feel that the contention that the Appellant –wife is not entitled to permanent alimony is otherwise liable to be rejected in view of his admission that he was once employed with TATA Housing Development Company.

32. Normally the permanent alimony is calculated by keeping in mind the age of the wife and taking ¼ of the monthly salary of the husband. In the present case when the proceeding was filed in the year 2015, the appellant was 34 years of age. So if the monthly salary of the Respondent –husband is taken to be Rs 1, 00,000/- instead of Rs 1,50,000/- , ¼ of the same will be Rs 25, 000/-. Without taking into account the cost of litigation, the yearly maintenance amount would be Rs 3 lakhs. The amount of Rs 10 lakhs awarded by the learned Judge Family Court towards permanent alimony is therefore grossly low and we would have enhanced the same had it not been for the development which has taken place in the meanwhile – i.e. remarriage of the Appellant – wife.

33. The Respondent – husband has stated in his written note of submission that the Appellant has married in the meanwhile annexing some photographs.The impugned judgment granting dissolution of marriage by a decree of divorce has been passed on 28.11.2019 and the decree has been signed 13.12.2019. The Appellant wife has not challenged the decree of divorce and she has filed this MATA with a prayer for enhancement of the quantum of permanent alimony. The Respondent has not challenged the judgment and decree of divorce for all these years. So there was absolutely no bar on the Appellant to get married for the second time after decree of divorce and remarriage will not be an absolute bar for receipt of maintenance or permanent alimony. She is entitled to receive maintenance, but till her re-marriage. Rs Three lakhs is the amount, she should have been paid towards her annual maintenance. Accepting the submission of the Respondent (without formal proof) regarding remarriage of the Appellant, she would be entitled to an amount of Rupees 12 lakhs for four years. The amount of Rupees Ten lakhs having been awarded towards permanent alimony, we do not think it necessary to interfere with this amount.

34. As regards the challenge of the Respondent- husband to the judgment dated 13.07.2018 passed in C.P. No.266 of 2014 awarding Rs 20,000/- per month from the date of application, we cannot decide the same in this MATA. MATA No. 133 of 2018 has admittedly been dismissed for default on 11.11.2020 (more than two years back). Even though CMAPL No. 105 of 2021 has been filed for its restoration, no

attempt has been made to restore MATA No. 133 of 2018 for all these years. Had this been brought to our notice by the counsel for the Respondent (who is the counsel for the husband in MATA No 133 of 2018) when he appeared in this appeal (MATA 3 of 2020) and sought for adjournment it could have been tagged and heard with the present Appeal and heard and disposed of.

35. In view of the aforesaid facts and discussion, we find no infirmity or illegality in the judgment passed in C.P. No. 129 of 2015 by the learned Judge, Family Court , Rourkela and therefore no reason to interfere with it.

36. The Matrimonial Appeal and the counter appeal /cross objection are accordingly dismissed, but without any cost. The Respondent shall pay the permanent alimony of Rupees Ten lakhs to the Respondent within a period of two months from today, failing which it will carry interest at the rate of 6% per annum from date of the judgment (i.e. 29.11.2019) passed in C.P.No.129 of 2015. Decree be drawn up accordingly.

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2023 (II) ILR – CUT - 1004

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

W.P.(C) NO. 18668 OF 2023

KABIRAJ SAMAL .....Petitioner

.V.

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

(A) RIGHT TO FAIR COMPENSATION AND TRANSPARENCY IN LAND ACQUISITION REHABILITATION AND RESETTLEMENT ACT, 2013 – The petitioner being the land owner executed registered sale deeds in favour of GAIL in respect of the identified land measuring Ac 2.18 in toto at the rate higher than the rate determined by the land acquisition officer – The petitioner claimed enhanced compensation in respect of the land already sold for establishment of intermediate pigging station-cum-receiving terminal of GAIL – Whether the petitioner is entitled to get enhanced compensation – Held, No. – Reason indicated. (Para 13)

(B) Difference between "Acquisition of the land vis-a-vis Sale" – Explained with reference to case laws. (Para 6-9)

Case Laws Relied on and Referred to :-

1. (1999) 8 SCC 419 : State of Kerala Vs. Koliyat Estates.
2. (2004) 4 SCC 79 : R.L. Jain Vs. DDA.
3. (2008) 9 SCC 191 : State of A.P. Vs. Larsen & Turbro Ltd.
4. (2005) 1 SCC 308 : Tata Consultancy Services Vs. State of A.P.
5. AIR 1977 SC 781 : State of Haryana Vs. Karnal Distillery.
6. AIR 1994 SC 579 : Chancellor Vs. Bijayananda Kar.
7. 2018 (II) OLR 436 : Netrananda Mishra Vs.State of Orissa.
8. 2022 (Supp.) OLR 970 : State of Odisha & Ors. Vs. Lalat Kishore Mohapatra & Anr.

For Petitioner : M/s S.B. Mohanty,S. Mohapatra & B.B. Mohapatra

For Opp. Parties : Mr. P.K. Parhi, DSGI
Mr. B.K. Parhi, CGC
Mr. L. Samantray, Addl.Govt.Adv.

JUDGMENT Date of Hearing &Judgment: 23.06.2023

Dr. B.R. SARANGI, J.

The petitioner, by means of this writ petition, seeks to quash the order dated 11.11.2022 passed by the Deputy General Manager, Gas Authority of India Limited (GAIL) under Annexure-14, by which the representation of the petitioner claiming enhanced compensation in respect of the land sold at Mouza- Balaramprasad, Tahasil-Banarpal, District-Angul for establishment of Intermediate Pigging Station-cum-Receiving Terminal of GAIL (India) has been rejected by stating that land owners are not entitled for any enhanced compensation as well as rehabilitation and resettlement benefits, as claimed.

2. The factual matrix of the case, in a nutshell, is that the Government of India, in order to consolidate and comprehend a suitable legislation regarding installation of gas pipeline or the station controlling the petroleum and mineral products brought out an Act in the Parliament called "Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962", wherein the provisions were framed in a hierarchical manner describing the application of the Act, manner of acquisition, calculation of compensation and taking over the provisions of the land and also declaration of acquisition of right of user over the schedule land. In terms of such provision, GAIL authority in respect of Jagispur, Haladia, Bokaro, Dhamsara Gas pipeline project issued a notice on 25.12.2017 intending to acquire the land in respect of Kuspangi mouza under the Tahasil of Banarpal. After the acquisition proceeding as undertaken under Section 3(1) of the Petroleum and Minerals Pipelines Act, 1962, on payment of proper compensation, the right of user was exercised over the schedule property of Puspangi mouza and the conditions to be abide were properly implementation.

2.1 Thereafter, the Land Acquisition Collector, Angul, vide letter dated 08.11.2018, issued a notice to the petitioner and other affected persons conveying

the decision that the ensuring meeting to be held on 13.11.2018 for assessment of compensation by the District Compensation Advisory Committee was postponed and later date shall be intimated through official letter. Consequentially, on 20.11.2018, the Land Acquisition Collector intimated the petitioner and others convening the decision that on 27.11.2018 a meeting shall be held by District Compensation Advisory Committee for purchase of Ac.2.64 decimals of land from the land owners directly for construction of Gas Pipeline Intermediate Pigging Station over Balaramprasad mouza. Accordingly, the land of the petitioner bearing plot nos.4877, 4833, 4882, 4882/14582, 4881, 4884, 4885 and 4858 and 4859 in Balaramprasad village were intended to be purchased by the GAIL authority. Thereafter, demarcation of the schedule land was made and taking into consideration the cost of area in respect of the plots, the General Manager (Construction) GAIL India Ltd., vide letter dated 04.12.2018, calculated the cost of such plots to be Rs.11.3 crores and intended for acquiring the lands for Angul Receiving Terminal through negotiation and direct purchase system. As such, the same was implemented and the lands were purchased and the same was registered in favour of GAIL India Ltd. on receipt of the amount by the petitioner. A report was furnished by the D.S.R., Angul to that extent and on that basis the Land Acquisition Officer, Angul prepared a chart on computation of compensation of village Balaramprasad and prepared a figure towards the market value of the land amounting to Rs.1,64,81,142/- and giving solatium in the figure of 100% and the total cost of the land (Ac.2.64 decimals) came to Rs.3,69,17,758/-.

2.2 After the land was purchased by the opposite parties and the same was taken over on payment of consideration amount and due execution of sale deed, the petitioner claimed that he should be extended with the benefits under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter to be referred as "RFCTLARR Act, 2013" for short). The same having been denied, earlier the petitioner had approached this Court by filing W.P.(C) No. 17380 of 2022, which was disposed of vide order dated 26.07.2022 directing the Deputy General Manager (GAIL) to redress the grievance of the petitioner on his fresh representation by giving emphasis to RFCTLARR Act, 2013 and also RFCTLARR (Removal of Difficulties) Order, 2015. In compliance to the same, the Deputy General Manager, Gas Authority of India Limited (GAIL) has passed the order dated 11.11.2022 under Annexure-14 rejecting the claim of the petitioner. Hence, this writ petition.

3. Mr. S.B. Mohanty, learned counsel for the petitioner vehemently contended that the land having been acquired for the purpose of drawing pipelines, the provisions of the RFCTLARR Act, 2013 are applicable and, as such, the benefit of giving employment under the RFCTLARR Act, 2013 should have been extended to the petitioner. It is contended that since the grievance of the petitioner was not considered by the authority, he filed representation before the authority, but the Deputy General Manager, Gas Authority of India Limited (GAIL) rejected the same

vide order dated 11.11.2022 under Annexure-14. Thereby, the order impugned passed by the authority cannot be sustained in the eye of law and the same should be quashed.

4. Mr. L. Samantray, learned Addl. Government Advocate appearing for the State-opposite parties contended that the contention raised by learned counsel for the petitioner is contrary to the records available. In the instant case, the lands were not acquired by the authority, rather the petitioner had sold the lands to the GAIL. Therefore, the provisions of the RFCTLARR Act, 2013 have no application. It is contended that having sold the land on receiving the consideration amount, the claim made by the petitioner for grant of R&R benefit has absolutely no nexus. Consequentially, he justifies the order dated 11.11.2022 passed by the Deputy General Manager, Gas Authority of India Limited (GAIL) under Annexure-14 and states that the petitioner is not entitled to the relief, as sought in the writ petition.

5. This Court heard Mr. S.B. Mohanty, learned counsel for the petitioner and Mr. L. Samantray, learned Addl. Government Advocate appearing for the State-opposite parties in hybrid mode and perused the record. Since it is a certiorari proceeding, on the basis of the pleadings available on record and after going through the reasoned order passed by the authority under Annexure-14, the matter has been heard and disposed of finally with the consent of learned counsel for the parties at the stage of admission.

6. Before delving into the merits of the case in hand, Mr. S.B. Mohanty, learned counsel appearing for the petitioner, vehemently contended that the land has been acquired by the opposite party, therefore, he is entitled to get higher compensation. But on perusal of the record, it appears that the contention of learned counsel for the petitioner is not correct. Rather, it indicates that the land has been sold by the petitioner on receipt of the consideration money after execution of the sale deed. Therefore, the claim of higher compensation, three years after the sale of the land, may not have any justification. But learned counsel appearing for the petitioner is confusing with regard to "acquisition of the land" vis-à-vis "Sale". The plain and simple meaning of "acquisition" means gaining of possession or control. If the State acquires property for a public purpose under statutory powers, this is described as acquisition of land.

In ***State of Kerala v. Koliyat Estates***, (1999) 8 SCC 419, while interpreting the word, "acquisition", the apex Court held that "acquisition" means the act of becoming the owner of certain property. The statutory process by which the State becomes the owner of the property cannot be understood as different from acquisition made by the State.

Similarly, in ***R.L. Jain v. DDA***, (2004) 4 SCC 79, the apex Court held that "acquisition" means taking not by voluntary agreement, but by authority of an act of Parliament and by virtue of the compulsory powers thereby conferred. In case of

acquisition, the property is taken by the State permanently and the title to the property vests in the State.

7. Now coming to the question of "Sale", as prescribed under Section 54 of the Transfer of Property Act, "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

As per Section 77 of the Indian Contract Act, "Sale" is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer.

Even sale has been defined under various Acts, but the "Sale" with grammatical variations and cognate expression, means any transfer of property in goods by one person to another by cash or deferred payment or for any other valuable consideration, which includes other conditions.

While considering Section 2 (28) of the A.P. Value Added Tax Act, the apex Court in ***State of A.P. v. Larsen & Turbro Ltd.***, (2008) 9 SCC 191, held that "Sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods (whether as such goods or in any other form in pursuance of a contract or otherwise) by one person to another in the course of trade or business, for cash, or for deferred payment or for any other valuable consideration or in the supply or distribution of goods by a society (including a cooperative society), club, firm or association to its members, but does not include a mortgage, hypothecation or pledge of, or a charge on goods.

On consideration of Section 2 (n) of A.P. General Sales Tax Act, 1957, in the case of ***Tata Consultancy Services v. State of A.P.***, (2005) 1 SCC 308, the apex Court held that a transfer of right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration shall be deemed to be a "sale".

8. Regard may also be had to definition clause contained in Article 366 (29A) of the Constitution of India. "Sale" having been effected by execution of "sale deed" that itself means an agreement to sell relating to immovable property with transfer of possession to the vendee comes within the ambit of the expression ' sale deed' for the purpose of stamp duty and penalty.

9. Taking into consideration the two different meaning attached to word "acquisition of land" and "Sale", it is made clear that both bears distinct and separate meaning and admittedly the petitioner has sold the land in favour of the opposite parties by execution of sale deed, meaning thereby immovable property was transferred along with transfer of possession, in favour of the opposite parties. That itself is conclusive one that the petitioner has ceased his right over the property after the execution of the sale deed on receipt of the consideration money. Therefore, claim of higher compensation on acquisition of land is absolutely is misleading

statement made by learned counsel for the petitioner. Thereby, the petitioner has not approached this Court with clean hand.

10. In ***State of Haryana v. Karnal Distillery***, AIR 1977 SC 781, the apex Court refused to grant relief on the ground that the applicant had misled the Court.

In ***Chancellor v. Bijayananda Kar***, AIR 1994 SC 579, the apex Court held that a writ petition is liable to be dismissed on the ground that the petitioner did not approach the Court with clean hands.

Taking into consideration the above judgments, this Court, in ***Netrananda Mishra v. State of Orissa***, 2018 (II) OLR 436, came to a conclusion in paragraph-26 of the said judgment and held as under:-

> *"…….For suppression of facts and having not approached this Court with a clean hand, the encroacher is not entitled to get any relief, particularly when the valuable right accrued in favour of the petitioner is being jeopardized for last 43 years for no fault of him, on which this Court takes a serious view……"*

Therefore, applying the above ratio to the present case, this Court is of the considered view that the petitioner has not approached this Court with clean hand. The same has also been taken note of by this Court in the case of ***State of Odisha and others v. Lalat Kishore Mohapatra and Anr.***, 2022 (Supp.) OLR 970.

11. On perusal of records, it reveals that the lands of the petitioner situated in mouza-Balaramprasad in the district of Angul were purchased by the GAIL in March, 2019 by paying consideration money. Initially, an agreement was executed between the parties and thereafter the same was registered in March, 2019. As such, the lands were purchased on direct negotiation between the GAIL and the petitioner. But after receiving the consideration money and after lapse of more than three years, the petitioner approached this Court by filing W.P.(C) No. 17380 of 2022, which was disposed of vide order dated 26.07.2022 directing the Deputy General Manager (GAIL) to redress the grievance of the petitioner on his fresh representation by giving emphasis to RFCTLARR Act, 2013 and also RFCTLARR (Removal of Difficulties) Order, 2015. In compliance to the same, the Deputy General Manager, GAIL considered the grievance of the petitioner by referring to the fact mentioned in the representation, that the petitioner has suffered due to less compensation that would be payable to him under the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962 read with the guidelines dated 28.08.2015 issued by the Govt. of India, Ministry of Rural Development, and also contention raised that the GAIL should not have resorted to the direct purchase in accordance with the circular dated 31.03.2014 issued by the Govt. of Odisha. But fact remains, the circular issued by the Govt. of Odisha on 31.03.2014 enumerates the instructions regarding direct purchase of private land for social infrastructure development project for direct negotiation. Further, the guidelines dated 28.08.2015 of the Ministry of Rural Development, Govt. of India provides to extend the provisions

relating to the determination of compensation in accordance with the First Schedule, rehabilitation and resettlement in accordance with the Second Schedule and infrastructure amenities in accordance with the Third Schedule shall apply to all cases of land acquisition under the enhancements specified in the Fourth Schedule to the RFCTLARR Act, 2013. As such, the lands have been purchased by the GAIL in terms of the Schedules First, Second and Third of RFCTLARR Act, 2013 and circular dated 28.08.2015 issued by the Ministry of Rural Development. Therefore, once the sale has already been done and the petitioner has already received the entire amount, in that case, question of re-opening of the matter once again at a belated stage does not arise. By way of approaching this Court in filing this writ petition, the petitioner cannot invoke the jurisdiction of this Court for reopening of the matter once again which has concluded for all times to come.

12. Furthermore, in compliance of the order passed by this Court, GAIL has already considered the grievance of the petitioner by giving due notice and on 15.10.2022 all the land owners, including the petitioner and some of the authorized representatives, had appeared before the authority for hearing. After giving due opportunity, the authority passed a detailed and reasoned order stating inter alia that GAIL had a requirement of land for establishment of receiving terminal in the vicinity of Angul for the Dhamra-Angul Pipiline Project. The land required was limited being around Ac.2.5 decimals. In view of the limited extent of land required, it was considered to opt for direct purchase instead of acquisition under the RFCTLARR Act, 2013. Consequentially, a committee was formed by GAIL for negotiating with the land owners of village Balaramprasad. The said committee approached the land owners for negotiations on 17.02.2018. The land owners demanded an abnormally high value of Rs.4,00,000/- per decimal of agricultural land and also submitted a written representation in that regard. In view of the exorbitant demand, GAIL approached the Angul District Administration for calculation of market value of agricultural land at village Balaramprasad. The Land Acquisition Officer, Angul assessed the market value and compensation payable in terms of Sections 26 to 30 of the RFCTLARR Act, 2013 by considering the benchmark value, sales statistics, radial distance, additional market value at the rate of 12% per annum and 100% solatium etc. The compensation was assessed at Rs.1,39,83,999/- per acre as per the computation made therein. Accepting such determination of land value, the average sale price comes to Rs.62,42,857/- per acre for S.J.I. kisam of land. Taking into consideration the computations the market value of Ac.2.64 decimals comes to Rs.3,69,17,758/-, as the market value of Ac.1.00 comes around Rs.1,39,83,999/-.

13. Thereafter, the District Compensation Advisory Committee which was chaired by Addl. District Magistrate, Angul called a meeting on 13.11.2018 between the officials of GAIL and the land owners for facilitating a consensus amongst the parties, but the same was postponed to 27.11.2018. On 27.11.2018, the Land Acquisition Officer explained that the claim of the land owners, viz., Rs.4,00,000/-

per decimal is very high and he revealed that fair compensation payable for the land would be Rs.1,39,83,999/- per acre considering the benchmark value, sales statistics, radial distance, additional market value @ 12% and 100% solatium etc., but the land owners were not satisfied.Thereafter, on the next meeting of the District Compensation Advisory Committee, it was made clear to the petitioner/land owners that there will not be any rehabilitation and resettlement benefit for sale of land. Subsequently, negotiation was continued with the land owners and an agreement for sale was executed between GAIL on the one hand and the land owners represented through Jubraj Samal and Sri Dibya Ranjan Samal on the other hand in respect of the land comprised in Plot Nos. 4877, 4822, 4883, 4881, 4882/14582, 4884, 4885, 4858 and 4859. It was agreed that consideration payable for the sale of land would be at the rate of Rs.2,20,00,000/- per acre. Accordingly, the Tahasildar, Banarpal was requested to demarcate the plots. Ultimately, on 1st March, 2019 the land owners executed registered sale deeds in favour of GAIL in respect of the identified land measuring Ac.2.18 in toto. But no sale deed was executed in so far as plot no.4877 is concerned. The value at which the lands were purchased by GAIL was at the rate of Rs.2,20,00,000/- higher than the rate determined by the Land Acquisition Officer, Angul. Consequentially, the payment was made and the petitioner also acknowledged the receipt of the amount on execution of sale deed in favour of GAIL. The petitioner, having executed the sale deed and received the consideration amount, after lapse of more than three years approached this Court by filing a writ petition claiming other benefits and the same were directed to be considered by the Deputy General Manager, GAIL. In compliance thereof, the representation of the petitioner was considered and disposed of by the authority, i.e., Deputy General Manager, GAIL by passing a reasoned order on 11.11.2022 under Annexure-14, by holding that the petitioner is not entitled to get enhanced compensation as well as rehabilitation and resettlement benefits as claimed.

14. In the above view of the matter, this Court does not find any illegality or irregularity committed by the authority in passing the order dated 11.11.2022 under Annexure-14 so as to cause interference with the same.

15. Hence, the writ petition merits no consideration and the same is hereby dismissed. However, under the circumstances of the case, there shall be no order as to costs.

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2023 (II) ILR – CUT - 1011

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

W.P(C) NO. 23028 OF 2015

HADU PALTASINGH .....Petitioner

.V.

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

ODISHA GOVERNMENT LAND SETTLEMENT ACT,1962 – Section 7A(3) r/w Amendment Act, 2013 – The land is settled in favour of the petitioner in the year 1978 – Revision proceeding initiated U/s. 7A(3) after 36 years of settlement of land as per 2013 amendment Act – Whether the proceeding is maintainable in the eyes of law – Held, No. – The exercise of power of revision is beyond the period stipulated under the second proviso to section 7A (3) of the OGLS Act, 1962 and cannot sustain in the eyes of law. (Para -16)

Case Laws Relied on and Referred to :-

1. 2006(I) OLR 184 : Purna Ch. Pradhan Vs. State of Orissa & Ors.
2. 2012(Supp.-II) OLR 450 : Nirmal Kumar Pattnaik Vs. State of Orissa & Ors.
3. 2010 (I) OLR 723 : Bata Krushna Nayak Vs. State of Orissa & three Ors.
4. (2011) 6 SCC 739 :Thirumalai Chemicals Ltd. Vs. Union of India.
5. (2015) 17 SCC 324 : State of UP Vs. Aryaverth Chawl Udyog.
6. (1964) 1 SCR 29 : S.C. Prashar Vs. Vasantsen Dwarkadas.
7. 1976 2 All ER 865 (HL) : Fairmount Investments Ltd. Vs. Secy of State for Environment
8. 1977 3 All ER 452 : R. Vs. Secy. Of State for Home Affairs, ex p. Hosenball, Geoffrey Lane, LJ
9. AIR 1981 SC 818 : Swadeshi Cotton Mills Vs.Union of India.
10. AIR 1965 SC 1767 : Bhagwan Vs. Ramchand.
11. AIR 1991 SC 471 : (1991) 1 SCC 588 : Union of India Vs. Mohd. Ramzan Khan.
12. AIR 1994 SC 1074 : (1993) 4 SCC 727 : Managing Director, ECIL Vs. B. Karunakar.
13. AIR 1987 SC 1919 : (1986) 3 SCC 35 : Union of India Vs. Tulsiram Patel.
14. AIR 1988 SC 1000 : Union of India & Ors. Vs. E. Bashyan.

For Petitioner : M/s. Tanmay Mishra & S. Senapati

For Opp. Parties : Mr. H.M. Dhal, Addl. Govt. Adv.

JUDGMENT Decided on : 14.07.2023

Dr. B.R. SARANGI,J.

The petitioner, by means of this writ petition, seeks to quash the order dated 02.01.2015 passed in O.G.L.S Revision No.2 of 2014 under Annexure-9, by which opposite party no.2-Collector, Khurdha has cancelled the lease sanctioned in favour of the petitioner as per Section 7-A(3) of the Odisha Government Land Settlement (Amendment) Act, 2013.

2. The factual matrix of the case, in brief, is that the petitioner had filed an application in prescribed format under the Orissa Government Land Settlement Act, 1962, (hereinafter to be referred in short as "OGLS Act, 1962") before the competent authority on 15.04.1976 for grant of lease of a piece of land measuring Ac.4.000 dec. out of plot no.910/1126 under khata no.293 in Mouza-Nayakote for agriculture purpose. In pursuance thereof, W.L. Case No.98 of 1976 was instituted and a notice was published by the Tahasildar, Khurda inviting objections from the

general public. A notice was also sent to the concerned Gram Panchayat, i.e., Olasingha G.P., where the land is situated, which was received by the then Sarapanch, Olasingha G.P. Thereafter, the Tahasildar, Khurda also directed the Revenue Inspector to cause an enquiry regarding the statements made by the petitioner in his application form. In response thereto, the R.I. enquired into the matter, as per provisions of the OGLS Act, 1962 and the OGLS Rules, 1974 about the eligibility of the petitioner regarding his landed property, income, etc., and submitted his report before the Tahasildar for settlement of the land. After due enquiry and after receipt of the report from the Panchayat, following due procedure as laid down in the statute, the Tahasildar leased out one acre of land in favour of the petitioner, vide order dated 26.08.1978.

2.1 As per the order of the Tahasildar, the R.I. went to the spot and after necessary measurement, handed over possession of the land to the petitioner. The Tahasildar also issued Form 'K' in favour of the petitioner. Since then the petitioner is in peaceful possession of the land till date.

2.2 While the matter stood thus, on the report of opposite party no.3-Sub-Collector, Khurdha, opposite party no.2-Collector, Khurda initiated a proceeding under Section 7-A(3) of OGLS (Amendment) Act, 2013 by instituting OGLS Revision No.2 of 2014 and issued a show-cause notice dated 12.08.2014 to the petitioner alleging that the land has been settled in his favour under a mistake of fact and on account of material irregularity of procedure.

2.3 After receiving the show-cause notice, the petitioner filed his show-cause reply dated 09.09.2014 (Annexure-8) in OGLS Revision No.2 of 2014 annexing all the documents, which he had received under the Right to Information Act, 2005, denying and disputing all the allegations. It was specifically submitted by the petitioner that before granting lease in his favour, the provisions of the OGLS Act, 1962 and the OGLS Rules, 1974 had been properly followed and there was no irregularity in granting lease in his favour. It was further stated that the findings given by the Sub-Collector in his enquiry report, which formed the basis for initiation of the revision proceeding, have no basis at all and perverse, for which dismissal of the revision case was prayed.

2.4 Opposite party no.2-Collector, Khurdha, without verifying the documents filed by the petitioner and without considering the objection filed by the petitioner and without taking into account the material evidences available on record in their proper perspective, passed the impugned order dated 02.01.2015 in OGLS Revision No.2 of 2014, whereby the lease sanctioned in favour of the petitioner was cancelled. It is also alleged that no specific finding with regard to his objection was given by the revisional authority. Hence, this writ petition.

3. Mr. S. Senapati, learned counsel appearing for the petitioner vehemently contended that since the land in question was settled in favour of the petitioner in the

year 1978, the OGLS (Amendment) Act, 2013 is not applicable to the case of the petitioner. Thus, initiation of the revision proceeding under Section 7-A(3) of the OGLS Act, 1962 as per said amendment after 36 years of settlement of the land is not maintainable in the eye of law. It is contended that if the statute prescribes a mode to do in a particular manner, without assigning any reason and without following due procedure, the action taken by opposite party no.2-Collector, Khurda cancelling the lease granted in favour of the petitioner cannot be sustained in the eye of law, as he had got the lease settled in his favour by following due procedure. It is further contended that though the petitioner had taken a specific plea in his application and also advanced argument at the time of hearing, the same was not taken into consideration nor any finding has been recorded to that effect by the Collector, Khrdha, while passing the impugned order dated 02.01.2015 in OGLS Revision No.2 of 2014. Thereby, the said order cannot be sustained in the eye of law, being without jurisdiction, and is liable to be quashed. The action of the Collector, Khurdha is hit by limitation under Section 7A(3) of the OGLS Act, 1962. To substantiate his contentions, he has relied upon ***Purna Ch. Pradhan v. State of Orissa & Ors***, 2006(I) OLR 184; ***Nirmal Kumar Pattnaik v. State of Orissa & Ors***., 2012(Supp.-II) OLR 450 and ***Bata Krushna Nayak v. State of Orissa & three Ors***.,2010 (I) OLR 723.

4. Mr. H.M. Dhal, learned Addl. Government Advocate appearing for the opposite parties contended that since there were irregularities in the settlement of land in favour of the petitioner, the same having been detected on perusal of the records and report of the Sub-Collector, Khurdha, the Collector, Khurdha issued notice to the petitioner by initiating OGLS Revision No.2 of 2014. Thereby, after giving opportunity of hearing to the petitioner, the Collector, Khurdha passed the impugned order dated 02.01.2015 in OGLS Revision No.2 of 2014 cancelling the lease sanctioned in favour of the petitioner as per Section 7-A(3) of the OGLS (Amendment) Act, 2013. Therefore, the Collector, Khurdha has not committed any illegality or irregularity in passing the impugned order so as to cause interference by this Court at this stage.

5. This Court heard Mr. S. Senapati, learned counsel appearing for the petitioner and Mr. H.M. Dhal, learned Addl. Government Advocate appearing for the State-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 issue involved in this case, the relevant provisions of Section 7-A(3) of the OGLS Act, 1962, as they existed prior to amendment vide the OGLS (Amendment) Act, 2013, are reproduced herein below:-

> *"The Collector may, of his own motion or otherwise, call for and examine the records of any proceeding in which any authority, subordinate to it has passed an order under this Act for the purpose of satisfying himself that any such order was not passed under a*

mistake of fact or owing to a fraud or misrepresentation or on account of any material irregularity of procedure and may pass such order thereon as he thinks fit.

Provided that no order shall be passed under this sub-section unless the person affected by the proposed order has been given a reasonable opportunity of being heard in the matter.

Provided further that no proceeding under this sub-section shall be initiated after the expiry of fourteen years from the date of the order."

7. As per the second proviso to Section 7-A(3), no proceeding under this sub-section shall be initiated after the expiry of fourteen years from the date of the order. But the aforesaid provisions by way of amendment have been substituted on 13.11.2013. By virtue of amendment, the limitation period of 14 years, as per second proviso to Section 7A(3), has been removed. But fact remains, initiation of cancellation proceeding of lease granted vide W.L. Lease Case No.98 of 1976 was made on 08.08.2014 by issuing notice to the petitioner and by that time 14 years from the date of settlement of the land in favour of the petitioner had expired. More so, the notice does not contain anything with regard to any irregularity committed in the allotment of land in favour of the petitioner. In absence of any specific mention with regard to the same in the notice nor in order dated 08.08.2014 directing for issue of notice, the impugned action taken under Section 7A(3) of the OGLS Act, 1962 cannot be sustained in the eye of law.

8. Apart from the same, the petitioner had specifically pleaded in paragraph-7 of his objection to the following effect:-

"7. That the second proviso to Sub-Section-(3) of Section-7-A of O.G.L.S. Act, specifically provides that no proceeding under the said section shall be initiated after expiry of 14 years from the date of order. It is also well settled principle of law that the authority has no jurisdiction to initiate any proceeding U/s.7-A(3) of O.G.L.S. Act, after expiry of 14 years and initiation of any Revision proceeding U/s.7-A(3) of O.G.L.S. Act, 1962 after expiry of 14 years from the date of order of settlement of land is not maintainable in the eye of law. It is humbly submitted that as the land in question has been settled in the year 1978, the amendment act is not applicable to the case of the applicant/Opp. Party. Therefore, as the present revision proceeding U/s.7-A(3) of O.G.L.S. Act, 1962 has been initiated after about 36 years of settlement of land, it is not maintainable in the eye of law and the same is liable to be dropped/dismissed."

Referring to such averment, learned counsel for the petitioner advanced his argument, but on perusal of the order impugned, it would be apparent that no finding to that effect has been recorded nor has any discussion been made in regard to the same therein. The Collector, Khurdha is duty bound to answer the argument advanced on behalf of the petitioner, when the question of law is involved and more so when such pleadings are available in the objection filed by the petitioner.

8.1 In this connection it is worthwhile to notice the principles of exercise of power with reference to limitation provided under the statute as laid down in various judgments.

It has been succinctly laid down by the Supreme Court of India in ***Thirumalai Chemicals Ltd. v. Union of India***, (2011) 6 SCC 739 as follows:

> *"Limitation provisions, therefore, can be procedural in the context of one set of facts but substantive in the context of different set of facts because rights can accrue to both the parties. In such a situation, test is to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations. An accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is nevertheless a right, even though it arises under an Act which is procedural and a right which is not to be taken away pleading retrospective operation unless a contrary intention is discernible from the statute Therefore, unless the language clearly manifests in express terms or by necessary implication, a contrary intention a statute divesting vested rights is to be construed as prospective. A statute, merely procedural is to be construed as retrospective and a statute while procedural in nature affects vested rights adversely is to be construed as prospective."*

It is not a case for enforcement of right but it is a case of exercise of power by the authority designated under the relevant statute. When the officer has taken recourse to the proceedings and exercised his power, it has to be in accord with the provisions at the time the authority under the statute seeks to exercise power conferred by the statute. It goes without saying that such exercise of power has to be in accordance with the conditions under which such power can be exercised. There is no vested right in any authority to exercise powers in future. In ***State of UP v. Aryaverth Chawl Udyog***, (2015) 17 SCC 324 the Supreme Court of India referring to ***S.C. Prashar v. Vasantsen Dwarkadas***, (1964) 1 SCR 29, observed as follows:

> *"35. It would be relevant here to notice the observations of the Constitution Bench of this Court in S.C. Prashar Vrs. VasantsenDwarkadas, (1964) 1 SCR 29 = (1963) 49 ITR 1. Kapur, J., in a separate judgment, quoting the Privy Council in Delhi Cloth & General Mills Co. Ltd.Vrs. ITC, (1926-27) 54 IA 421 = 1927 SCC OnLine PC 76 has brought home the point that if after change in law, the period of time prescribed for action by the Tax Authorities has already expired, then subsequent change in the law does not make it so retrospective in its effect as to revive the power of the Tax Authority to take action under the new law. The relevant observations are as follows: [S.C. PrasharVrs. VasantsenDwarkadas, (1964) 1 SCR 29 = (1963) 49 ITR 1, SCR pp. 73-74]*
>
> *"*** In Delhi Cloth & General Mills Co. Ltd.Vrs. ITC, (1926-27) 54 IA 421 = 1927 SCC OnLine PC 76, it was held that no appeal lay against the decision of a High Court if it was given before appeals to the Privy Council were provided for. In that connection Lord Blanesburgh observed at p. 425: (IA p. 425 = SCC OnLine PC)*
>
> *'*** their Lordships can have no doubt that provisions which, if applied retrospectively, would deprive of their existing finality orders which, when the statute came into force, were final are provisions which touch existing rights.'*
>
> *In all these cases the Privy Council proceeded on the principle that* ***if the right of action had become barred according to the law of limitation in force, subsequent enlargement of the period of time does not revive the remedy to enforce the rights already barred.*** *The same principle, in my opinion, would apply to the periods specified in Section 34 of the Act and if the period prescribed for taking action had already expired, subsequent change in the law does not make it so retrospective in its effect as to*

> *revive the power of an Income Tax Officer to take action under the new law.* ***It is one of the canons of construction of statute of limitation that in the absence of express words, a necessary intendment, no change in the period of limitation can revive the right to sue which has become barred nor can it impair the immunity from any action which had become final after the lapse of a specified period of time.****"*

When a statute confers any power on a statutory authority, howsoever wide the discretion may be, it should be exercised with circumspection; such power must not smack arbitrariness, mechanical application of mind and backed by whims and caprice. In such cases, the power so exercised cannot be said to withstand the test of judicial scrutiny.

In the present case, as is apparent from the record, the Collector, Khurdha initiated proceeding on 08.08.2014 which is around 36 years after from the date of order of the Tashasildar, i.e., 26.08.1978, is flagrant violation of the provisions ignoring purport of the second proviso to Section 7A(3) of the OGLS Act, as it stood at the relevant point of time. In such view of the matter, the exercise of power of revision is beyond the period stipulated under the second proviso to Section 7A(3) of the OGLS Act.

8.2. Reliance was placed on behalf of the petitioner on ***Purna Ch. Pradhan*** (supra), wherein this Court took note of the fact that in case fraud committed on the authority for obtaining a lease, the date of detection of such fraud would be the relevant date for calculation of the period of limitation. The second proviso to Section-7-A(3) of the OGLS Act, 1962 provides that no proceeding under the said Section shall be initiated after expiry of 14 years from the date of order. Therefore, the initiation of the proceeding against the petitioner by the authority is wholly without jurisdiction.

8.3. In ***Bata Krushna Nayak*** (supra), this Court also held that the original lease was granted long back in 1974 whereas the order of the revisional authority was passed in 1998, i.e. about 24 years after the grant of lease. Therefore, under the second proviso to Section-7-A(3), no proceeding can be initiated after expiry of fourteen years from the date of the order granting lease.

8.4. In ***Nirmal Kumar Pattanaik*** (supra), this Court held that *suo motu* lease revision initiated under Section 7-A(3) of the OGLS Act, 1962 after a lapse of 25 years is without jurisdiction.

9. No doubt, there was no question of any fraud or misrepresentation on the part of the petitioner for settlement of land in his favour nor is it the case of the opposite parties that the petitioner had committed any fraud or misrepresentation in settling the land in his favour. Law is well settled that fraud vitiates every solemn action and thereby the entire proceeding. As such, in absence of any allegation of fraud on the part of the petitioner and misrepresentation by the petitioner, the impugned order cannot be sustained in the eye of law.

10. As it appears, the Collector, Khurdha, on perusal of the connected records received from the Tahasildar and the report of the Sub-Collector, Khurdha, found irregularities. The relevant part of the order impugned containing the findings of the Collector, Khurdha to the above effect are extracted hereunder:-

> *"1) No proper enquiries were conducted about the eligibility and availability of the land in the name of the lessee and family members.*
>
> *2) Priority has not been maintained as per Section 3(2) of the Act where it has been stipulated that 70% of the land should be settled in favour of the STs & SCs.*
>
> *3) Enquiry has also not been conducted properly about the income of the lessee and her wife as per the section 5(3) of the rules.*
>
> *4) Proclamation has not been made as per the rules 5(4) by beat of drum in village as well as in the panchayat.*
>
> *5) The most and vital point is that an area of Ac 0.450 dec of land also been sanctioned in the name of the wife of the lessee Kamala Dei from the same plot vide the W.L. case no.1133/78-79 in the same manner and same procedure."*

From the above, it can be safely inferred that, while passing order dated 08.08.2014 for issuing notice to the petitioner, nothing was pointed out as to what irregularities were committed and, as such, irregularities have been taken note of by the Collector, Khurdha on perusal of the records and report of the Sub-Collector, Khurdha, that too without giving opportunity of hearing to the petitioner. The Collector, without independent application of mind, simply directed to issue notice under Section 7A(3) of the OGLS Act, 1962 based on review note of Sub-Collector.

11. The first proviso to Section 7A(3) makes it clear that no order shall be passed under this sub-section unless the person affected by the proposed order has been given a reasonable opportunity of being heard in the matter. Therefore, if some irregularities were pointed out on perusal of the records, it was incumbent upon the Collector, Khurdha to point out the same to the petitioner by giving opportunity of hearing. Without doing so, the finding arrived at by the Collector, Khurdha, that irregularities were committed in the matter of settlement of the land in favour of the petitioner, cannot be sustained in the eye of law. Therefore, the impugned order has been passed without complying with the principles of natural justice.

11.1. The soul of natural justice is 'fair play in action'.

In ***HK*** (***An Infant***) ***in re***, 1967 1 All ER 226 (DC), ***Lord Parker***, CJU, preferred to describe natural justice as '*a duty to act fairly'*.

In ***Fairmount Investments Ltd. V. Secy of State for Environment***, 1976 2 ALL ER 865 (HL), Lord Russel of Killowen somewhat picturesquely described natural justice as '*a fair crack of the whip*'.

In ***R. v. Secy. Of State for Home Affairs, ex p. Hosenball, Geoffrey Lane, LJ***, 1977 3 All ER 452 (DC & CA), preferred the homely phrase '*common fairness*' in defining natural justice.

Natural justice, another name of which sense justice, is the name of those principles which constitute the minimum requirement of justice and without adherence to which justice would be a travesty. Natural justice accordingly stands for that "*fundamental quality of fairness which being adopted, justice not only be done but also appears to be done*".

12. In ***Swadeshi Cotton Mills v. Union of India***, AIR 1981 SC 818, the meaning of natural justice came up for consideration and the apex Court held as follows:-

> *"The phase is not capable of a static and precise definition. It cannot be imprisoned in the straight-jacket of cast-iron formula. Historically, "natural justice" has been used in a way, "which implies the existence of moral principles of self evident and unarguable truth","natural justice"by Paul Jackson, 2nd Ed. Page-1, In course of time, judges nurtured in the traditions of British jurisprudence, often invoked it in conjunction with a reference to "equity and good conscience". Legal experts of earlier generations did not draw any distinction between "natural justice" and "natural law". "Natural justice" was considered as "that part of natural law which relates to the administration of justice".*

13. In ***Bhagwan v. Ramchand***, AIR 1965 SC 1767, the apex Court held that the rule of law demands that the power to determine questions affecting rights of citizens would impose the limitation that the power should be exercised in conformity with the principles of natural justice.

14. In ***Union of India v. Mohd. Ramzan Khan***, AIR 1991 SC 471 : (1991) 1 SCC 588, the Three-Judge Bench of the apex Court clarified that non-furnishing of the report would amount to violation of the rules of natural justice and make the final order liable to challenge.

15. The aforesaid question had ultimately came up for consideration before a Constitutional Bench in the case of ***Managing Director, ECIL v. B. Karunakar***, AIR 1994 SC 1074 : (1993) 4 SCC 727, wherein relying upon the Five-Judge Bench view in ***Union of India v. Tulsiram Patel***, AIR 1987 SC 1919 : (1986) 3 SCC 35, the apex Court considered the question whether after Forty-second Amendment the charged employee was entitled to demand a second opportunity and came to the conclusion that whatever right such an employee had of a second opportunity to show cause against the proposed punishment had been taken away by the Forty-second Amendment and there was no provisions of law under which a Government servant could claim that right. But in ***B. Karunakar*** (supra), the apex Court explained that in ***Tulsiram Patel*** (supra) the Court had not dealt with the procedure to be followed by the disciplinary authority after the inquiry officer's report is received by it. The question whether the delinquent employee should be heard by the disciplinary authority to prove his innocence of the charges levelled against him when they were held to have been proved by the enquiry officer, although he need not be heard on the question of the proposed penalty, was neither raised nor answered in ***Tulsiram Patel*** (supra). The Constitution Bench in ***B. Karunakar***

(supra) approved the approach taken in ***Union of India & Ors. v. E. Bashyan***, AIR 1988 SC 1000 and the decision in ***Mohd. Ramzan Khan*** (supra) to the effect that whenever the enquiry officer is other than the disciplinary authority and the report of the enquiry officer held the employee guilty of all or any of the charges with proposal for any punishment or not, the delinquent employee was entitled to a copy of the report to enable him to make a representation to the disciplinary authority against it and the non-furnishing of the report amounted to violation of the principles of natural justice. Though the aforementioned matter is decided in the context of a service dispute, the underlying principle is very much applicable so far as compliance of the principle of natural justice is concerned.

16. In view of the discussions made above, this Court is of the considered view that very initiation of the proceedings under Section 7A(3) of the OGLS Act by the Collector, Khurdha in OGLS Revision No.2 of 2014, without specifying the details of the irregularities said to have been committed in the matter of settlement of the land in favour of the petitioner, amounts to non-compliance of the principles of natural justice and the action taken in the said revision case is barred by limitation provided under second proviso to Section 7A(3). Therefore, the order dated 02.01.2015 passed by the Collector, Khurdha in OGLS Revision No.2 of 2014 cancelling the lease sanctioned in favour of the petitioner as per Section 7A(3) of the OGLS (Amendment) Act, 2013, having been passed after a long lapse of 36 years, cannot be sustained in the eye of law. Accordingly, the order impugned is liable to be quashed and is hereby quashed.

17. In the result, the writ petition stands allowed, but, however, under the circumstances of the case there shall be no order as to costs.

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2023 (II) ILR – CUT - 1020

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

W.P.(C) NO. 12599 OF 2017

SUSANTA KUMAR GOUDA & ANR. …….Petitioners

.V.

STATE OF ODISHA, (DEPT. OF G.A. ODISHA SECRETARIAT), BHUBANESWAR & ORS. …….Opp. Parties

(A) ODISHA GOVERNMENT LAND SETTLEMENT ACT, 1962 – Section 2(b-1), r/w 3 – Petitioner takes a plea that his mother was a landless person and as such fell within the scope of the term "Landless Agricultural Labourer" as defined in sec 2(b-1) of the Act and eligible for settlement of Government Land U/s. 3 of the OGLS Act – Admittedly the mother was earning her livelihood by working as daily

labourer not agricultural labourer – Whether she is eligible for settlement of Government Land U/s. 3 of OGIS Act – Held, No. – Mere averments that late mother was landless person does not satisfy the eligibility criteria envisaged U/s 2(b-1) for settlement of Government land U/s 3 of the Act.

(B) FRAUDULENT CONCEALMENT OF MATERIAL FACT – Effect of – Explain with reference to case law. (Para 7.1-8)

(C) NECESSARY PARTY AND PROPER PARTY – Difference – Explained. (Para 9.3-9.5)

Case Laws Relied on and Referred to :-

1. (1914) 1 KB 608 : The King Vs. Williams & Ors.
2. (2004) 7 SCC 166 : S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar & Ors.
3. AIR 1951 Allahabad 746 (Full Bench) : Asiatic Engineering Co. Vs.Achhru Ram & Ors.
4. AIR 1994 SC 579 : Chancellor Vs. Bijayananda Kar.
5. (2011) 7 SCC 69 : Amar Singh Vs. Union of India.
6. (2003) 8 SCC 319 : Rama Chandra Singh Vs. Savitri Devi.
7. (2003) 8 SCC 311 : Ram Preeti Yadav Vs. U.P. Board of High School & Intermediate Education & Ors.
8. AIR 1992 SC 1555 = (1992) 1 SCC 534 : Shrisht Dhawan Vs. Shaw Brothers.
9. 1994 (1) SCC 1 : S.P. Chengalvaraya Naidu Vs. Jagannath.
10. (2012) 6 SCR 75 : Badami Vs. Bhali.
11. AIR 1963 SC 1558 : Hari Narain Vs. Badri Das.
12. (1983) 4 SCC 575 : Welcome Hotel Vs. State of A.P.
13. (1991) 3 SCC 261 : G. Narayanaswamy Reddy Vs. Govt. of Karnataka.
14. (2007) 4 SCC 221 : A.V. Papayya Sastry Vs. Govt. of A.P.
15. (2012) 10 SCR 603 : V. Chandrasekaran Vs. Administrative Officer.
16. (2007) 6 SCC 120 : Arunima Baruah Vs. Union of India (UOI) & Ors.
17. AIR 1963 SC 786 : Udit Narain Singh Malpaharia Vs. Additional Member Board of Revenue, Bihar & Anr.
18. AIR 1958 SC 88 : Razia Begum Vs. Sahebzadi Anwar Begum & Ors.
19. 1892 (1) Ch. 487 : Moser Vs. Marsden.
20. (1993) 1 SCC 608 : Union of India Vs. Sher Singh.
21. (2017) 3 SCC 702 : Executive Engineer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar Vs. Chandran & Ors.
22. AIR 1963 SC 1558 : Hari Narain Vs. Badri Das.
23. (2010) 14 SCC 38 : Ramjas Foundation Vs. Union of India & Ors.

For Petitioners : M/s. Ananta Narayan Pattanayak, Paresh Kumar Mohanty, Niranjan Das, & S.Mahakuda.

For Opp. Parties : Sri Jyoti Prakash Patnaik, Govt. Adv.

JUDGMENT Date of Hearing: 22.06.2023 : Date of Judgment: 27.06.2023

MURAHARI SRI RAMAN, J.

1. Assailing the Order dated 20th May, 2017 passed by the learned Additional District Magistrate, Bhubaneswar in Revision Case No.201 of 1981 *vide* Annexure-12 in exercise of powers conferred under Section 7A(3) of the Odisha Government

Land Settlement Act, 1962 (for brevity hereinafter referred to as "OGLS Act"), whereby lease of land measuring Ac.2.000 decimals bearing Plot No.2723 under Khata No.805 in Mouza: Andharua, Bhubaneswar as granted in favour of Late Manorama Gouda, vide Order dated 31.10.1978 of the Tahasildar in W.L. Case No.1002 of 1978 was directed to be cancelled, the petitioners, sons of original lessee-Manorama Gouda, approached this Court by way of filing writ petition under Article 226/227 of the Constitution of India with the following prayers:

> *"It is, therefore, prayed that this Hon'ble Court may be graciously pleased to issue a rule Nisi calling upon the opp. parties to show cause as to why—*
>
> *(i) The order dated. 20.05.2017 in Revision Case No. 201 of 1981 (Under Annexure-12) passed by the learned A.D.M, Bhubaneswar (Opp. Party No.3) shall not be quashed being declared as illegal and arbitrary.*
>
> *(ii) A specific direction shall not be issued the learned A.D.M, Bhubaneswar (Opp. Party No.3) to settle the lease land in favour of the petitioners as per Orissa Government Land Settlement Act.*
>
> *(iii) If the Opposite Parties fail to show cause and or show insufficient cause writ application may be allowed by directing the Additional District Magistrate, (Opposite Party No.3) to settle the lease land in favour of the present Petitioners and prepare the Record-of-Right in the name of the Petitioners.*
>
> *(iv) And/or to pass such other order/Order(s)/ direction/direction(s) as deem fit and proper shall not be granted."*

FACTS OF THE CASE AS NARRATED BY THE PETITIONERS AND REVEALED FROM THE DOCUMENTS FORMING PART OF THE WRIT PETITION:

2. It has been outlined by the writ petitioners that on consideration of application of their mother, Late Manorama Gouda, described as a landless agricultural labourer, for settlement of Government land in the Village: Andharua, Bhubaneswar the Tahasildar after causing enquiry through Revenue Inspector, Chandaka and inviting public objection, in the year 1978 passed Order dated 31.10.1978 in W.L. Case No.1002 of 1978 settling land to the extent of Ac.2.000 dec. in Plot No.2723 under Khata No.805 in Andharua Mouza for agriculture purpose on free of salami.

2.1. However, while the lessee-Late Manorama Gouda was possessing the said land, the learned Additional District Magistrate initiated proceeding being Revision Case No.201 of 1981 invoking power for revision vested under Section 7A(3) of the OGLS Act on the ground that "Government land has been settled by the Tahasildar under a mistake of fact/owing to fraud/ misrepresentation/on account of material irregularity of procedure". The learned Additional District Magistrate set aside the Order dated 31.10.1978 of the Tahasildar and cancelled the lease by an Order dated 16.02.1982.

2.2. Aggrieved by said Order dated 16.02.1982, a writ petition being O.J.C. No.1815 of 1990 was preferred before this Court which came to be disposed of in the following lines vide Order dated 16.12.1992:

> *"*** That apart, the order-sheet annexed as Annexure-5 would reveal that there has been no valid service of notice and yet the final order of cancellation has been passed. Learned Additional Government Advocate appearing for the opposite parties fairly conceded to the aforesaid position. Under Section 7A(3) of the Act, no order of cancellation can be passed unless the person affected by the proposed order has been given a reasonable opportunity of being heard in the matter has been afforded to the petitioners and consequently the impugned order is vitiated on account of infraction of the proviso to Section 7A(3) of the Act as well as on account of the fact that there has been gross violation of the principles of natural justice.*
>
> *We accordingly set aside the order of the Additional District Magistrate may serve a copy of the notice upon the petitioners indicating the detailed grounds of material irregularity or fraud or misrepresentation committed by the petitioners, requiring the petitioners to file their show-cause in respect of the same and thereafter shall proceed with the matter in accordance with law.*
>
> *The writ applications are accordingly disposed of with the aforesaid directions."*

2.3. After the death of Manorama Gouda on 02.04.2004, the petitioners, her sons, approached this Court by way of another writ application being W.P.(C) No.5768 of 2016 with a prayer to direct the Additional District Magistrate for disposal of Revision Case No.201 of 1981 within stipulated period. This Court vide Order dated 06.04.2016 directed the said Authority to dispose of said revision case "within a period of two months from the date of production of the certified copy of the order" since the matter was pending since 1981.

2.4. Pursuant to such direction and in order to comply the order of this Court, the learned Additional District Magistrate after affording due opportunity of hearing to the petitioners, concluded the proceeding in Revision Case No.201/1981 and passed the following Order dated 20.05.2017 (Annexure-12) [for brevity, relevant portions of the order is extracted herein below]:

> *"Heard the learned advocate on behalf of the opposite parties.*
>
> ***
>
> *With a view to examining the genuineness and legality of the Lease, it requires to go into details of the concerned lease case. On perusal of the WL Case No 1002/1978 wherein the land was settled in favour of the OP, it is noticed that the lease case record was processed on 10.08.1978 basing on the application for settlement of land filed by Smt. Manorama Gouda of village Andharua. On 10.08.1978, the Tahasildar, Bhubaneswar initiated the lease case record and issued istahar inviting public objection with instructions to the Revenue Inspector, Chandaka to enquire and report on this matter alongwith sketch map.*
>
> ***
>
> *From the above order, it is clear that the eligibility aspect of the lessee for availing Govt. land in lease, has not been verified before passing such order, wherein two acres of valuable Government land at the vicinity of Bhubaneswar Municipal Corporation area is settled. Before settlement of Government land on lease, the Tahasildar must have to examine the following aspects as per the provisions of Odisha Land Settlement Act and Rules:*

(i) Whether the applicant is a landless agricultural labourer;

(ii) If he or she is eligible for such lease as per his or her income;

(iii) Whether the applicant belongs to the village or neighbouring Village where the land is to be leased out in his/her favour;

(iv) Whether the land is leasable or not;

(v) Compliance of other legal procedures as envisaged under OGLS Act and rule like proper proclamation of notice.

(i) As per the provisions under 3(3)(b) of O.G.L.S. Act 1962, settlement of land for agricultural purpose will be made in favour of any landless agricultural labourers of the village in which the land is situated or in neighbouring village. ***The lessee did not belong to village Andharua or any neighbouring village where the case land had been leased out in her favour. She belonged to village Asuraipalli, P:S: Aska in Ganjam District.***

The R.I. in his enquiry report had also mentioned that the lessee did not come within the revenue circle area. Neither the RI nor the Tahasildar, had enquired about the extent of landed property the lessee owned or possessed before settlement of the lease. No other report in that support is available with the case record. ***Since no report as regards the landed property of the lessee was submitted by the Revenue Inspector nor any report to that effect was made available with the case record, the decision taken by the Tahasildar, to consider the applicant as a landless person is not correct and justified without having any evidence.***

(ii) Another important aspect needs to be examined before sanction of lease is the eligibility of the applicant on the basis of Income. ***During enquiry, neither the Revenue Inspector nor the Tahasildar, had ascertained anywhere as regards the income of the lessee. In the lease settlement order also, nothing as regards income of the family of the lessee has been mentioned****. Settlement of lease without examination of this aspect does not seem to be proper and in conformity with the provisions of law, the then in force.*

(iii) As per the provisions of O.G.L.S. Act, the lease needs to be settled in favour of agricultural labourer of the village, in which the land is situated or in neighbouring village. ***The lessee in the instant case belongs to Ganjam District whereas the lease has been settled in her favour at village Andharua under Bhubaneswar Tahasil****. So there has been gross violation of the provisions of O.G.L.S. Act while settlement of lease in favour of the O.P.*

(iv) As regards eligibility of land for the purpose of lease, the Tahasildar has properly verified and the R.I. in his report has categorically mentioned that the land is free from encroachment having no forest growth over it. So no irregularity or illegality is noticed as regards the nature of the land for the purpose of lease.

(v) As per the provisions of Rule 5(5) of O.G.L.S. Rules, a copy of the proclamation shall be published by affixing in the notice board of Tahasil Office and Gram Panchayat Office. ***No evidence in support of affixing the copy of notice in Tahasil Office and Gram Panchayat Office Notice Board for wide publicity is available****. It is therefore revealed that the procedure for proclamation of notice as laid down under the Rules has not been adhered to, while deciding the lease case in favour of the lessee.*

(vi) The case land is situated just at the periphery of Bhubaneswar Municipal Corporation area which comes under the CDP area of Bhubaneswar Development

Authority. Bhubaneswar City being the State Capital has enough scope for expansion in the course of development and as such Tahasildar, Bhubaneswar, as the custodian of Government land should keep the big patches of land at convenient locations, reserved for future development. ***But here Tahasildar had taken resort to settlement of big patches of valuable land in favour of private individuals, without thinking a little on preservation of land for the purpose of expansion of the city & future development.***

In view of the above discussion, it is observed that, the Tahasildar, Bhubaneswar has not examined all the parameters, as laid down under Odisha Government Land Settlement Act and Rules while settling the lease of the case land in favour of the lessee. As such, the lease, of the case land involves certain material irregularity, legal deformity and procedural lapses. Hence, the lease of the case land is cancelled. Send a copy of this order alongwith L.C.R. to the Tahasildar, Bhubaneswar for necessary correction."

2.5. The petitioners, sons of Late Manorama Gouda, challenged aforesaid order in suo motu revision proceeding by way of petition invoking provisions of Article 226/227 of the Constitution of India inter alia on the following grounds:

i. After observing due process inviting objection and publication of notice, the Tahasildar having granted lease in the year 1978, the same could not be cancelled by way of suo motu revision proceeding purported to have been initiated under Section 7A of the OGSL Act.

ii. The original lessee-Manorama Gouda, belonging to backward class and a landless person, lived on the leasehold land as granted by the Tahasildar till she breathed her last on 02.04.2004, as such the finding of the Additional District Magistrate that she did not belong to the area in which the land is situated or of any neighbouring village is contrary to material available on record.

iii. Despite the fact that there was requirement to find out whether Manorama Gouda was a raiyat; her annual income stood below the prescribed limit at the relevant point of time; and the plot allotted was "kept reserved for tenants" belonging to "backward class and landless agricultural labourer", the decision of the Tahasildar in granting lease of the land in question could not be said to have been faulted with.

OBJECTION OF THE OPPOSITE PARTY NOS.3 AND 4 BY WAY OF COUNTER-AFFIDAVIT:

3. Supporting the Order dated 20.05.2017 passed in Revision Case No.201 of 1981 by the Additional District Magistrate, it is reiterated that as the lessee-Manorama Gouda, being of the Village: Asuraipalli in the District: Ganjam within the Balisira Revenue Circle of Aska Tahasil, did not belong to the locality (Bhubaneswar) where the land in question is situated, which fact could come to fore on due enquiry being made from Tahasildar, Aska in Ganjam District. Furthermore, no evidence was available on record of the Tahasildar of Bhubaneswar with regard to her annual income at the relevant point of time.

3.1. Relying on the decisions, namely *Laxmipriya Tripathy Vrs. State, W.P.(C) No.3749 of 2013, vide Judgment dated 07.08.2013 reported at 2013 SCC OnLine Ori 215 and Asha Hans Vrs. State of Odisha, W.P.(C) No.33349 of 2011 &c., vide*

Judgment dated 06.04.2022, it is submitted by the opposite parties that land was settled with the lessee in clear violation of the provisions of the OGLS Act with the fraud being played by the petitioners upon the Court, no interference in the present case is warranted.

REJOINDER AFFIDAVIT OF THE PETITIONERS:

4. Enclosing copy of Legal Heir Certificate, dated 08.02.2004 issued by the Tahasildar, Bhubaneswar, the petitioners claimed that they, being sons of Late Manorama Gouda, are the legal heirs.

4.1. It is submitted that consequent upon direction to afford opportunity to adduce evidence vide Judgment dated 18.12.1992 rendered by this Court in the case of *Sankar Charan Patra & Others, O.J.C. No.2421 of 1990*, etc., etc., similarly circumstanced persons have been granted lease in the village: Andharua, Bhubaneswar by virtue of Order dated 28.08.2005 of the Additional District Magistrate.

ARGUMENTS ADVANCED BY COUNSEL FOR THE RESPECTIVE PARTIES:

5. Sri Ananta Narayan Pattanayak, learned Advocate appearing for the petitioners reiterating the stand taken in the writ petition, contended that there was no jurisdiction vested in the Additional District Magistrate to initiate proceeding for suo motu revision of the lease granted in 1978. The Tahasildar having followed the essential procedure envisaged under the OGLS Act and rules framed thereunder, there was no scope for the authority to exercise power under Section 7A(3) of the OGLS Act. It is vehemently contested by urging that Late Manorama Gouda after her marriage with Gopinath Gouda left Asuraipalli in Ganjam District and both came to stay in Andharua, Bhubaneswar in the year 1960. To buttress such contention, he has referred to copy of document showing one of the petitioners, namely Susanta Kumar Gouda passed High School Certificate Examination as ex-Regular candidate in the year 1986 from Government Boys' High School, Unit-8, Bhubaneswar. Sri Ananta Narayan Pattanayak, learned Advocate laid emphasis on the averments contained in paragraph-7 of the Rejoinder-affidavit sworn to by Susanta Kumar Gouda-petitioner No.1, which is to the following effect:

> *"*** It is submitted that original lessee after being settled in village Andharua were* ***working as daily labourer and maintaining their livelihood with that earning.*** *It is a fact that though the original lessee was a landless person and there is no shelter over their head she applied for a piece of land on lease before the Tahasildar, Bhubaneswar in the year 1978. ***"*

5.1. Sri Jyoti Prakash Patnaik, learned Government Advocate appearing for the opposite parties, in order to demolish such an argument of the advocate for the petitioners, submitted that mere contention that Late Manorama Gouda was "daily labourer" would not suffice for consideration of grant of lease under Section 3 of the OGLS Act. Rather, as per pre-amended provision contained in Section 2(b-1) of the

OGLS Act, the applicant-intending lessee was required to demonstrate that she was "a landless agricultural labourer" who had "no profitable means of livelihood other than agriculture".

5.2. The learned Government Advocate Sri Jyoti Prakash Patnaik drew attention of this Court to the Order dated 04.01.2023 and Order dated 13.01.2023 passed in the instant writ petition:

> *"04.01.2023*
>
> ***
>
> *2. Perused impugned order. Of the reasons for cancellation we find, two of them were that original allottee was not a resident of the locality but resident of district Ganjam and secondly, income status had not been inquired into by the Revenue Inspector at the time of granting the allotment.*
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> ***
>
> *13.01.2023*
>
> *1. Mr. Pattanayak, learned advocate appears on behalf of petitioners and draws attention to order dated 4th January, 2023. Mr. Rout, learned advocate, Additional Standing Counsel appears on behalf of State and with reference to aforesaid order submits, enquiry report has been received regarding residence of original allottee. He serves copy of enquiry report dated 7th January, 2023 to Mr. Pattanayak."*

5.3. Enclosing such enquiry report to the counter-affidavit dated 23.01.2023 filed by the opposite party Nos.3 and 4, the learned Government Advocate pressed into service the following text contained in said report of the Revenue Inspector, Balisira:

> *"With reference to your above order, I am to submit the inquiry report regarding the status of Domicile/Nativity/ Resident, as per your direction. I put field inquiry in Asuraipalli Mouza and also verified the record it revealed as follows:*
>
> *Manorama Gouda W/o: Gopinath Gouda is a native resident of village Asuraipalli, but now she resides at Bhubaneswar. Her husband is a recorded tenant of mouza Asuraipalli i.e. Khata No: 64, plot No. 725, Area:0.054 Ac. The local statement of the villagers is enclosed here with for your kind information and necessary action."*

5.4. Enclosing said report, the Tahasildar, Aska of Ganjam District communicated it to the Tahasildar, Bhubaneswar *vide* Letter No.73, dated 07.01.2023 by stating thus:

> *"Sub.: Confirmation of nativity of one Late Manorama Gouda W/o Gopinath Gouda of Village- Asuraipalli, P.S.- Aska in the District of Ganjam in connection with W.P.(C) No.12599/2017.*
>
> ***
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> *In inviting a reference to the letter on the subject cited above, I am to inform that the fact of nativity of above-named person is verified in the field through the Revenue Inspector, Balisira of this Tahasil and it is reported that Smt. Monarama Gouda and her family are native of village- Asuraipalli under Balisira RI Circle of this Tahasil on verification of RoR of the said village. Further RI, Balisira has reported that Smt. Gouda belongs to village Asuraipalli and a dilapidated house of Smt. Gouda is present in the said village as she has left Asuraipalli since long days back as evident from the local statement attached to the report of the RI Balisira. The report of RI, Local Statement of villagers and copy of the RoR in the name of the husband of Smt. Gouda are enclosed herewith for ready reference."*

5.5. Sri Jyoti Prakash Patnaik, learned Government Advocate vehemently opposing the contention and averment of Sri Ananta Narayan Pattanayak, learned Advocate for the petitioners urged that having not placed any material before the learned Additional District Magistrate after being given scope by virtue of Order dated 16.12.1992 passed in O.J.C. No.1815 of 1990, to the effect that at the material period Late Manorama Gouda fell within the definition of "landless agricultural labourer" as envisaged under Section 2(b-1) of the OGLS Act so that she was entitled to claim settlement of Government land in terms of Section 3.

5.6. Advancing further argument the learned Government Advocate submitted that the writ petition is incompetent for non-joinder of necessary and proper parties. Having not impleaded other legal heirs, as is manifest from the Legal Heir Certificate (Annexure-14) enclosed to the Rejoinder-affidavit dated 05.05.2023 filed by the petitioners, the writ petitioners have played fraud on the Court, as such the writ petition is liable to be dismissed with exemplary cost.

CONSIDERATION OF RIVAL CONTENTIONS AND ARGUMENTS:

6. From the pleadings it is manifest that the petitioners have not denied that their father is "recorded tenant" of Plot No.725, Khata No.64 measuring area Ac.0.054dec. in Mouza Asuraipalli in the district of Ganjam, which fact emanates from the report of the Revenue Inspector of Balisira Circle submitted in compliance of Order of this Court in the present writ petition. Copy of report being confronted to the petitioners, pursuant to which they have filed rejoinder dated 05.05.2023. To support the said fact contained in the report, copy of Record-of-Right published on 22.04.1999 is placed on record by the opposite parties which shows that landed property stands in the name of Gopinath Gouda, the father of the petitioners, indicating landed property is situated at Asuraipalli Mouza under Aska P.S. in the District: Ganjam. Therefore, the petitioners' claim of being "landless person" is not only false but also appears to be fabricated.

6.1. Delving further into the matter, it is revealed that no scrap of document is adduced to show that the case of Manorama Gouda fell within the scope of the term "landless agricultural labourer" as defined in Section 2(b-1) of the OGLS Act. For better understanding, said definition, as it existed prior to amendment in 1990, is reproduced herein below:

> *"(b-1)'LANDLESS AGRICULTURAL LABOURER' means a person who has no profitable means of livelihood other than agriculture and who owns no land excluding his homestead."*

6.2. It is well-settled in *Krushna Chandra Pattanayak Vrs. Additional District Magistrate, 90 (2000) CLT 877* that "the aforesaid pre-amended provision shows that the applicant must be a landless agricultural labourer who has no profitable means of livelihood other than agriculture". None of the documents enclosed to the writ petition demonstrates that at any point of time when the application for

settlement of Government land was made, Late Manorama Gouda was not only "landless", but also she was "agricultural labourer". Further the pleadings fall short of fact that "other than agriculture" she had no "profitable means of livelihood". The petitioners have filed Rejoinder-affidavit dated 05.05.2023 by affirming the following fact:

> *"7. *** It is submitted that original lessee after being settled in village Andharua were* ***working as daily labourer*** *and maintaining their livelihood with that earning."*

Further perusal of record, it is glaring from paragraph 4 of the further affidavit dated 07.02.2023 filed by the petitioners that "the original lessee after being settled in village Andharua were working as daily labourer and maintaining their livelihood with that earning". The petitioners have stated in their affidavit that "the original lessee was a landless person". Hence, it is undoubted that Late Manorama Gouda was earning her livelihood as *"daily labourer",* but not *"agricultural labourer*". Mere averment that Late Manorama Gouda was "landless person" does not satisfy the eligibility criteria envisaged under Section 2(b-1) for settlement of Government land under Section 3 of the OGLS Act.

6.3. Late Gopinath Gouda, shown as husband of Late Manorama Gouda in the Legal Heir Certificate issued in the year 2004, has landed property at Asuraipalli under Aska P.S. of Ganjam District as per copy of Record-of-Right, which was published in the year 1999, enclosed to counter-affidavit of the opposite parties. For convenience, paragraph 10 of the counter-affidavit is extracted herein below:

> *"10. That in response to the said query the Tahasildar Aska conducted enquiry through R.I., Balisira Circle and reported vide Letter No.73 dtd. 07.01.2023 that, the original lessee late Manorama Gouda W/o. Gopinath Gouda was a native of Village: Asuraipalli under Balisira R.I. Circle of Aska Tahasil and her family ordinarily resides there. This is also evident from the address mentioned in RoR of the said village. Thus, it is amply clear that the original lessee was not at all a native of village Andharua under Bhubaneswar Tahasil at the time of Settlement of lease. Further, the lessee owns land to the extent of Ac.1.000 at her native place. So, it shows that the lessee was not landless person at the time of settling of lease in her favour which is a gross violation to the provision of OGLS Act. The report of the Tahasildar, Aska along with its enclosure are annexed herewith as Annexure-A/4."*

The fact as narrated in paragraph 10 of the counter-affidavit filed by the opposite parties has not been disputed nor denied by the petitioners in the Rejoinder-affidavit dated 05.05.2023 save and except saying that "the original lessee Smt. Gouda and her family members have already left the paternal village since long and settled in Mouza Andharua and thereafter they have no connection or connectivity with the parental village since time immemorial". This Court on examination of documents is of the considered opinion that the petitioners have made misleading and false statement before this Court by contending in the Rejoinder-affidavit that Gopinath Gouda and Manorama Gouda "have left the parental village and district since long, i.e. in the year 1960 and permanently settled in Mouza Andharua, Bhubaneswar" is

misleading and misstatement of fact inasmuch as the petitioners have not objected to the existence of entries in the Record-of-Right published in the year 1999 standing in the name of Gopinath Gouda in Asuraipalli under Aska P.S. of Ganjam District.

6.4. Further fact that non-joinder of necessary and proper party would lead to hold that the petitioners have played fraud not only on the Court but also the authorities. It is evident from the copy of the Legal Heir Certificate issued only for the purpose of "Bank Dues" in the year 2004 that besides the petitioners, sons of Late Gopinath Gouda and Late Manorama Gouda, two other legal heirs namely Snehanjali Gouda and Geetanjali Gouda are available. On specific query from this Court as to why other two legal heirs were left from being impleaded as parties, the learned Advocate for the petitioners could not give any reply. The position of their appearance before the Additional District Magistrate in the proceeding for revision could also not be clarified by said Advocate. It is also very queer to notice that an enquiry report enclosed to Letter No.7789, dated 26.05.2016 issued by the Tahasildar, Bhubaneswar forming part of writ petition at Annexure-10 shows that the Revenue Inspector noted down that Sri Saroj Kumar Gouda-petitioner No.2 is an "Advocate". The conduct of the petitioners is tell-tale. It is their own document which discloses about other legal heirs. Being sisters of the petitioners, this Court feels that they are necessary parties. The petitioners' concerted effort to grab valuable property situated at densely populated area of Capital City of Bhubaneswar shows that they have not approached this Court with clear heart and clean hand, but with poisoned mind.

LEGAL POSITION AS TO INVOCATION OF WRIT JURISDICTION AGAINST THE MISSTATEMENT AND MISLEADING OF MATERIAL FACT AND CONSCIOUS OMISSION OF THE PETITIONERS TO IMPLEAD NECESSARY PARTIES:

7. Therefore, question that arises in this writ petition is whether sitting in its writ jurisdiction, this Court should take note of the material suppression by the writ petitioners and dismiss this writ petition. It is trite law that a petitioner has to come with clean hands and has to disclose the relevant materials and act in good faith. Any departure from the same may lead to a dismissal of a writ petition at the very threshold.

7.1. At this juncture, this Court, therefore, embarks on examination of the terms "fraud", "fraudulent concealment" and the necessity of approaching this Court with clean hands, clear mind and clear heart.

7.2. 'Fraud', according to Black's law Dictionary, 10th Edition, is knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment; a reckless misrepresentation made without justified belief in its truth to induce another person to act; a tort arising from a knowing or reckless misrepresentation or concealment of material fact made to induce another to act to his or her detriment.

7.3. "Fraudulent concealment" as defined in Black's law Dictionary, 10th Edition, is the affirmative suppression or hiding, with the intent to deceive or defraud, of a material fact or circumstance that one is legally (or, sometimes, morally) bound to reveal.

7.4. According to the Law Lexicon, Third Edition (2012), the Latin Maxim "*suppressio veri, suggestio falsi*" defines that the suppression of the truth is equivalent to the suggestion of falsehood. The suppression or failure to disclose what one party is bound to disclose to another, may amount to fraud. Where a person is found to be guilty of suppressio veri suggestio falsi for having concealed material information from scrutiny of the Court, he is not entitled for any equitable relief. [*Refer, Arbind Kumar Pal Vrs. Hazi Md. Faizullah Khan, AIR 2007 (NOC) 1035 (Pat) = (2006) 1 BLJR 430*].

7.5. The maxim that one who comes to Court must come with "clean hands" is based on conscience and good faith. The maxim is confined to misconduct in regard to, or at all events connected with, the matter in litigation. "Clean hands" means a clean record with respect to the transaction with the defendant, and not with respect to any third person.

7.6. In *The King Vrs. Williams and Others, (1914) 1 KB 608* it has been pointed out that:

> *"*** In my view the writ is discretionary. A party may by his conduct preclude himself from claiming the writ ex debito justitiae, no matter whether the proceedings which he seeks to quash are void or voidable. If they are void it is true that no conduct of his will validate them; but such considerations do not affect the principles on which the Court acts in granting or refusing the writ of certiorari. This special remedy will not be granted ex debito justitiae to a person who fails to state in his evidence on moving for the rule nisi that at the time of the proceedings impugned he was unaware of the facts on which he relies to impugn them."*

7.7. It is axiomatic that any petitioner seeking a writ of *mandamus*, has to approach the court with clean hands and to produce before the court all material facts that are relevant for adjudication of the said matter. The principle of uberrima fides—abundant good faith—as stated in *The King Vrs. The General Commissioners* for the purposes of the Income Tax Acts for the District of Kensington, (1917) 1 KB 486, that a petitioner who does not bring on record the relevant true facts before the court, does not deserve to get any relief from the court, has application to the present context.

7.8. In *S.J.S. Business Enterprises (P) Ltd. Vrs. State of Bihar and others, (2004) 7 SCC 166* suppression of material fact by a litigant disqualifies such litigant from obtaining any relief. The relevant portion is reproduced below:

> *"13. As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it. But the*

suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material from the consideration of the court, whatever view the court may have taken."

7.9. In *Asiatic Engineering Co. Vrs.Achhru Ram and others, AIR 1951 Allahabad 746 (Full Bench),* the Court observed that no relief can be granted in a writ petition under Article 226 which is based on misstatement or suppression of material facts. The Court observed in paragraph 51, at page 767 as follows:

"51. In our opinion, the salutary principle laid down in the cases quoted above should appropriately be applied by Courts in our country when parties seek the aid of the extraordinary powers granted to the Court under Art. 226 of the Constitution. A person obtaining an ex parte order or a rule nisi by means of a petition for exercise of the extraordinary powers under Art. 226 of the Constitution must come with clean hands, must not suppress any relevant facts from the Court, must refrain from making misleading statements and from giving incorrect information to the Court. Courts, for their own protection, should insist that persons invoking these extraordinary powers should not attempt, in any manner, to misuse this valuable right by obtaining ex parte orders by suppression, misrepresentation or misstatement of facts."

7.10. In *Chancellor Vrs. Bijayananda Kar, AIR 1994 SC 579,* the Supreme Court held that a writ petition is liable to be dismissed on the ground that the petitioner did not approach the Court with clean hands.

7.11. In *Amar Singh Vrs. Union of India, (2011) 7 SCC 69*, it has been observed as follows:

"53. Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the courts, initiated proceedings without full disclosure of facts. Courts held that such litigants have come with 'unclean hands' and are not entitled to be heard on the merits of their case.

54. In Dalglish Vrs. Jarvie, 2 Mac. & G. 231, 238, the Court, speaking through Lord Langdale and Rolfe B., laid down:

'It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any fact which he has omitted to bring forward.'

55. In Castelli Vrs. Cook, 1849 (7) Hare, 89, 94, Vice Chancellor Wigram, formulated the same principles as follows:

'A plaintiff applying ex parte comes under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or not property brought forward, the plaintiff is told that the Court will not decide on the merits, and that, as has broken faith with the Court, the injunction must go.'

56. In the case of Republic of Peru Vrs. Dreyfus Brothers & Company, 55 L.T. 802, 803, Justice Kay reminded us of the same position by holding:

**** If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to*

impress upon all persons who are suitors in this Court the importance of dealing in good faith with the Court when ex parte applications are made.'

57. In one of the most celebrated cases upholding this principle, in the Court of Appeal in R. Vrs. Kensington Income Tax Commissioner, 1917 (1) K.B. 486 Lord Justice Scrutton formulated as under:

'and it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts— facts, not law. He must not misstate the law if he can help it— the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement.'

58. It is one of the fundamental principles of jurisprudence that litigants must observe total clarity and candour in their pleadings and especially when it contains a prayer for injunction. A prayer for injunction, which is an equitable remedy, must be governed by principles of 'uberrima fide'."

7.12. In *Rama Chandra Singh Vrs. Savitri Devi, (2003) 8 SCC 319* it is stated as follows:

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwell together.

16. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentations may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

19. In Derry Vrs. Peek, [1889] 14 A.C. 337, it was held:

'In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person make it liable to an action of deceit.'

20. In Kerr on Fraud and Mistake at page 23, it is stated:

'The true and only sound principle to be derived from the cases represented by Slim Vrs. Croucher, (1860) 1 DeGF&J 518 is this: that a representation is fraudulent not only when the person making it knows it to be false, but also when, as Jessel, M.R., pointed

out, he ought to have known, or must be taken to have known, that it was false. This is a sound and intelligible principle, and is, moreover, not inconsistent with Derry Vrs. Peek, (1889) 14 AC 337 = (1886-90) AllER Rep 1. A false statement which a person ought to have known was false, and which he must therefore be taken to have known was false, cannot be said to be honestly believed in. 'A consideration of the grounds of belief', said Lord Herschell, 'is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so'.'

21. In Bigelow on Fraudulent Conveyances at page 1, it is stated:

'If on the facts the average man would have intended wrong, that is enough.'

It was further opined:

'This conception of fraud (and since it is not the writer's, he may speak of it without diffidence), steadily kept in view, will render the administration of the law less difficult, or rather will make its administration more effective. Further, not to enlarge upon the last matter, it will do away with much of the prevalent confusion in regard to 'moral' fraud, a confusion which, in addition to other things, often causes lawyers to take refuge behind such convenient and indeed useful but often obscure language as 'fraud upon the law'. What is fraud upon the law? Fraud can be committed only against a being capable of rights, and 'fraud upon the law' darkens counsel. What is really aimed at in most cases by this obscure contrast between moral fraud and fraud upon the law, is a contrast between fraud in the individual's intention to commit the wrong and fraud as seen in the obvious tendency of the act in question.'

22. Recently this Court by an order dated 3rd September, 2003 in Ram Preeti Yadav Vrs. U.P. Board of High School & Intermediate Education & Ors. reported in (2003) 8 SCC 311 held:

'13. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by words or letter. Although negligence is not fraud but it can be evidence on fraud. (See Derry Vrs. Peek [1889] 14 A.C. 337).

14. In Lazarus Estate Vrs. Berly [1971] 2 W.L.R. 1149 = (1956) 1 QB 702 the Court of Appeal stated the law thus:

'I cannot accede to this argument for a moment 'no Court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything'. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever.'

15. In S.P. Chengalvaraya Naidu Vrs. Jagannath, 1994 (1) SCC 1 this Court stated that fraud avoids all judicial acts, ecclesiastical or temporal.'

23. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous.

24. In Arlidge & Parry on Fraud, it is stated at page 21:

'Indeed, the word sometime appears to be virtually synonymous with 'deception', as in the offence (now repealed) of obtaining credit by fraud. It is true that in this context 'fraud' included certain kind of conduct which did not amount to false pretences, since the definition referred to an obtaining of credit 'under false pretences, or by means of any other fraud'. In Jones, for example, a man who ordered a meal without pointing out that he had no money was held to be guilty of obtaining credit by fraud but not of obtaining the meal by false pretences: his conduct, though fraudulent, did not amount to a false pretence. Similarly it has been suggested that a charge of conspiracy to defraud may be used where a 'false front' has been presented to the public (e.g. a business appears to be reputable and creditworthy when in fact it is neither) but there has been nothing so concrete as a false pretence. However, the concept of deception (as defined in the Theft Act 1968) is broader than that of a false pretence in that (inter alia) it includes a misrepresentation as to the defendant's intentions; both Jones and the 'false front' could now be treated as cases of obtaining property by deception.'

25. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata.

26. In Shrisht Dhawan Vrs. Shaw Brothers, AIR 1992 SC 1555 = (1992) 1 SCC 534, it has been held that:

'Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct.'

27. In S.P. Chengalvaraya Naidu Vrs. Jagannath, 1994 (1) SCC 1, this Court in no uncertain terms observed:

*'*** The principles of 'finality of litigation' cannot be passed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. We are constrained to say that more often than not process of the Court is being abused. Property-grabbers, tax-evaders, bank-loan dodgers and other unscrupulous persons from all walks of life find the court- process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation.... A fraud is an act of deliberate deception with the design of security something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage... A litigant, who approaches the Court, is bound to produce all the documents executed by him, which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite party.'*

28. In Indian Bank Vrs. Satyam Fibres (India) Pvt. Ltd., (1996) 5 SCC 550, this Court after referring to Lazarus Estates Ltd. Vrs. Beasley, (1956) 1 All ER 341 and other cases observed that

'since fraud affects the solemnity, regularity and orderliness of the proceedings of the Court it also amounts to an abuse of the process of the Court, that the Courts have inherent power to set aside an order obtained by practising fraud upon the Court, and that where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order'.

It was further held:

'The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on Court. In the case of fraud on a party to the suit or proceedings, the Court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers, which are resident in all Courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or Courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the Court's business.'

29. In Chittaranjan Das Vrs. Durgapore Project Limited & Ors., (1995) 99 CWN 897, it has been held:

'57. Suppression of a material document which affects the condition of service of the petitioner, would amount to fraud in such matters. Even the principles of natural justice are not required to be complied within such a situation.

*58. It is now well known that a fraud vitiates all solemn acts. Thus, even if the date of birth of the petitioner had been recorded in the service returns on the basis of the certificate produced by the petitioner, the same is not sacrosanct nor the respondent company would be bound thereby.' ***"*

7.13. In *Badami Vrs. Bhali, (2012) 6 SCR 75* the Hon'ble Court observed as follows:

"19. Presently, we shall refer as to how this Court has dealt with concept of fraud. In S.B. Noronah Vrs. Prem Kumari Khanna, AIR 1980 SC 193 while dealing with the concept of estoppel and fraud a two-Judge Bench has stated that it is an old maxim that estoppels are odious, although considerable inroad into this maxim has been made by modern law. Even so, 'a judgment obtained by fraud or collusion, even, it seems a judgment of the House of Lords, may be treated as a nullity'. (See Halsbury's Laws of England, Vol. 16 Fourth Edition para 1553). The point is that the sanction granted under Section 21, if it has been procured by fraud or collusion, cannot withstand invalidity because, otherwise, high public policy will be given as hostage to successful collusion.

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21. In the said case it was clearly stated that the courts of law are meant for imparting justice between the parties and one who comes to the court, must come with clean hands. A person whose case is based on falsehood has no right to approach the Court. A litigant who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If a vital document is withheld in order to gain advantage on the other side he would be guilty of playing fraud on Court as well as on the opposite party.

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24. Yet in another decision Hamza Haji Vrs. State of Kerala & Anr., AIR 2006 SC 3028 it has been held that no Court will allow itself to be used as an instrument of fraud and no court, by way of rule of evidence and procedure, can allow its eyes to be closed to the fact it is being used as an instrument of fraud. The basic principle is that a party who secures the judgment by taking recourse to fraud should not be enabled to enjoy the fruits thereof.

*25. *** The whole thing was buttressed on the edifice of fraud and it needs no special emphasis to state that what is pyramided on fraud is bound to decay. In this regard we may profitably quote a statement by a great thinker:*

> *'Fraud generally lights a candle for justice to get a look at it; and rogue's pen indites the warrant for his own arrest.' ***"*

7.14. The aforesaid requirement of coming to Court with clean hands has been repeatedly reiterated by the Hon'ble Supreme Court of India in a large number of cases. Similar view has also been expressed in the cases of *Hari Narain Vrs. Badri Das, AIR 1963 SC 1558; Welcome Hotel Vrs. State of A.P., (1983) 4 SCC 575; G. Narayanaswamy Reddy Vrs. Govt. of Karnataka, (1991) 3 SCC 261; A.V. Papayya Sastry Vrs. Govt. of A.P., (2007) 4 SCC 221; Prestige Lights Ltd. Vrs. SBI, (2007) 8 SCC 449; Behari Kunj Sahkari Avas Samiti Vrs. State of Uttar Pradesh, (2008) 12 SCC 306; Sunil Poddar Vrs. Union Bank of India, (2008) 2 SCC 326, K.D. Sharma Vrs. SAIL, (2008) 12 SCC 481, G. Jayashree Vrs. Bhagwandas S. Patel, (2009) 3 SCC 141; and Dalip Singh Vrs. State of U.P., (2010) 2 SCC 114*.

7.15. It has been consistent view that one who approaches the Court must come with clean hands. It is the bounden duty of the Court to keep the stream of justice absolutely clean. Anyone who approaches must give full and fair disclosure of all the materials. The Courts must not allow anyone to abuse the court process. In case the petitioner conceals anything that is known to be material such an action would lead to an inference of fraud, and even if not fraud, definitely would lead to a presumption that the petitioner has not approached the court with clean hands. [See *Bhriguram De Vrs. State of West Bengal, 2018 SCC OnLine Cal 8141*]

7.16. This Court has no hesitation in saying that the doors of justice would be closed for a litigant whose case is based on falsehood or suppression of material facts. Fraud and justice never dwell together. They are alien to each other. Fraud pollutes the sanctity, regularity, orderliness and solemnity of the judicial proceedings. It is the bounden duty of the Court to keep the stream of justice absolutely clean.

8. In *V. Chandrasekaran Vrs. Administrative Officer, (2012) 10 SCR 603*, it has been held as follows:

> *"The judicial process cannot become an instrument of oppression or abuse, or a means in the process of the court to subvert justice, for the reason that the court exercises its jurisdiction, only in furtherance of justice. The interests of justice and public interest coalesce, and therefore, they are very often one and the same. A petition or an affidavit containing a misleading and/or an inaccurate statement, only to achieve an ulterior purpose, amounts to an abuse of process of the court."*

9. One must be even more careful when one approaches this Court in its extraordinary jurisdiction for seeking a writ of *mandamus* and no person can be permitted to adopt dubious, dishonest and fraudulent means and make false averments or conceal the facts while submitting such a writ petition. If a person does so, not only is the petitioner not entitled to any relief from the Court but should be subject to exemplary costs so as to deter future litigants from pursuing a similar course of action.

9.1. In ***Arunima Baruah Vrs. Union of India (UOI) and Ors., (2007) 6 SCC 120***, question raised was: How far and to what extent suppression of fact by way of non- disclosure would affect a person's right of access to justice. The Court held thus:

> *"It is trite law that so as to enable the Court to refuse to exercise its discretionary jurisdiction suppression must be of material fact. What would be a material fact, suppression whereof would disentitle the appellant to obtain a discretionary relief, would depend upon the facts and circumstances of each case. Material fact would mean material for the purpose of determination of the lis, the logical corollary whereof would be that whether the same was material for grant or denial of the relief. If the fact suppressed is not material for determination of the lis between the parties, the Court may not refuse to exercise its discretionary jurisdiction. It is also trite that a person invoking the discretionary jurisdiction of the Court cannot be allowed to approach it with a pair of dirty hands. But even if the said dirt is removed and the hands become clean, whether the relief would still be denied is the question."*

9.2. The pleadings and documents forming part of pleadings of the writ petition clearly indicate that though the petitioners were conscious about existence of other legal heirs, namely Snehanjali Gouda and Geetanjali Gouda, being not made parties to the proceeding, in order to gain unjust gain ignored to implead them as parties. Though they are directly affected by the result of the lis, the petitioners have omitted them by not impleading in the proceeding(s).

9.3. While drawing the distinction between a necessary party and a proper party, the Supreme Court in *Udit Narain Singh Malpaharia Vrs. Additional Member Board of Revenue, Bihar & Anr., AIR 1963 SC 786* held that a necessary party is one without whom no order can be made effectively and a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

9.4. In a three Judges' Bench decision reported in *Razia Begum Vrs. Sahebzadi Anwar Begum & Ors., AIR 1958 SC 886* wherein taking note of the decision in *Moser Vrs. Marsden, 1892 (1) Ch. 487* it was held that a party who is not directly interested in the issues between the plaintiff and the defendant, but is only indirectly or commercially affected, cannot be added as a defendant because the Court has no jurisdiction to bring him on the record even as a proper party. It was held to have been firmly established as a result of judicial decisions that in order that a person may be added as a party to a suit, he should have a direct interest in the subject-matter of the litigation whether it raises questions relating to movable or immovable property.

9.5. In the decision reported in *Union of India Vrs. Sher Singh, (1993) 1 SCC 608* it was held by the Supreme Court that the definition of a person interested being of inclusive one, the same must be liberally construed so as to implead person who may be directly or indirectly interested either to the title or to the quantum of compensation when dealing with land acquisition reference. Thus going by the settled law, it is not in dispute that a necessary party in a proceedings is one, without

whom no order can be made effectively. Similarly, a proper party is one in whose absence, an effective order can be made, but whose presence is necessary for a complete and final decision on the question involved in the proceedings.

9.6. In the case at hand, the sisters are found to be necessary party as they have direct nexus with the lis involved in this case. In their absence, if any favourable order or otherwise is passed, it would affect valuable right in share of the property.

9.7. In view of the fact that the learned Advocate for the petitioners refrained himself from commenting upon non-joinder of parties (sisters of the petitioners), in the instant case), this Court has no option left but to hold that the writ petition is not maintainable, as no order adversely affecting other legal heirs can be passed behind their back. This Court takes cognizance of the fact that the copy of Legal Heir Certificate has been filed by the petitioners and such document mentioned that besides the sons-petitioners, names of two sisters are recorded as legal heirs of Late Manorama Gouda-original lessee. Scrutiny of said document further reveals that one of the petitioners, namely Saroj Kumar Gouda, has been stated to be "Advocate".

9.8. The remedy under Article 226 of the Constitution of India is equitable and discretionary and specific query from the Bench during the course of hearing in this regard being not replied by the learned counsel for the petitioners, this Court declines to consider the prayers of the petitioners. This Court may refer to what has been observed in *Executive Engineer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar Vrs. Chandran & Ors., (2017) 3 SCC 702* with respect to consequence of non-joinder of necessary parties:

> *"29. As noted above, one of the issues framed is, as to whether the suit is bad for non-joinder of necessary party. The said issue was answered against the plaintiff and it was held that suit is bad for non-joinder of Janaki Ammal a necessary party, whose name was recorded against Survey No.188/2. Without adverting to the said findings of the trial Court and the appellate Court, the High Court has erroneously decreed the suit of the plaintiff."*

10. Further from the averment of the petitioners that their mother, Late Manorama Gouda, it is well understood that, was not "agricultural labourer" so as to be embraced within the meaning of definition contained in Section 2(b-1) of the OGLS Act. Further affirmation of fact that both Gopinath Gouda (father of the petitioners) and Manorama Gouda (mother of the petitioners) having left Asuraipalli under Aska P.S. in Ganjam District in the year 1960, did not have any connection with said place is out and out false in view of the factum of existence of house (may be dilapidated) there and entry of the property being recorded in the Record-of-Right.

11. Feeble attempt was made by the advocate for the petitioners that the Additional District Magistrate, Bhubaneswar acted without jurisdiction. Going by Order dated 19.10.1981 passed in Revision Case No.201 of 1981 vide Annexure-6 to the writ petition, it transpires that the power under Section 7A(3) of the OGLS Act has been exercised on examination of records and finding that "Government lands

has been settled by the Tahasildar under a mistake of fact/owing to fraud/misrepresentation/on account of material irregularity of procedure".

11.1. The petitioners have, in their application filed on 12.04.2016 before the Additional District Magistrate, Bhubaneswar vide Annexure-9, stated that the mother of the petitioners (lessee) challenging the order dated 16.02.1982 in revision approached this Court in O.J.C. No.1815 of 1990 which came to be disposed of on 16.12.1992 with a direction that "the Additional District Magistrate may serve a copy of the notice upon the petitioners indicating the detailed grounds of material irregularity or fraud or misrepresentation committed by the petitioners, requiring the petitioners to file their show-cause in respect of the same and thereafter shall proceed with the matter in accordance with law". It appears from Annexure-11 to the writ petition that the petitioners have filed show-cause reply before the Additional District Magistrate in Revision Case No.201 of 1981 pursuant to Order dated 16.12.1992 in O.J.C. No.1815 of 1990. Therefore, the ground of attack set up at paragraph 26 of the writ petition that "the entire suo motu proceeding is totally without jurisdiction" falls to ground as the learned Additional District Magistrate has addressed each of the points of argument advanced by the petitioners by ascribing reasons. The well-reasoned Order dated 20th May, 2017 passed by the learned Additional District Magistrate does not warrant indulgence of this Court.

12. The argument of Sri Ananta Narayan Pattanayak, learned Advocate for the petitioners that similarly placed persons in the Andharua Mouza of Bhubaneswar have been extended the benefit by the Additional District Magistrate, Bhubaneswar pursuant to Judgment dated 18th December, 1992 of this Court in O.J.C. No.2421 of 1990 & other tagged cases: *Sankar Charan Patra & Others Vrs. State of Odisha & Ors*. Perusal of said Judgment and consequential order passed by the Additional District Magistrate as at Annexures-15 and 16 respectively does not disclose misstatement/fraud on the part of the petitioner(s) therein. On the contrary, in the present case the facts and circumstances lead to show that fraud as also misstatement has been perpetrated by the petitioners as well as the original lessee. In such case shelter enshrined under Article 14 of the Constitution of India cannot be extended to the petitioners.

13. It may be noteworthy to point out that Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. It is of utmost importance that in making material statements and setting forth grounds in writ petition under Article 226/227 of the Constitution of India, care must be taken not to make any statements which are inaccurate, untrue and misleading. While dealing with the writ petition, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. Regard may be had to *Hari Narain Vrs. Badri Das, AIR 1963 SC 1558.* Before parting with the case it may be apt to refer to observations made in

Ramjas Foundation Vrs. Union of India & others, (2010) 14 SCC 38 wherein it has been enunciated that it is obligatory for a petitioner/appellant/applicant to approach any court or judicial forum with clean hands or face the ire of the courts/judicial forums who will not hesitate in applying the Doctrine of Clean Hands and rejecting his appeal/revision.Thus statement of untrue & misleading facts in the petition/appeal not only before the Supreme Court and High Court but also before the District Courts, Tribunals or Authorities could entail rejection of the petition/appeal on this ground alone.

CONCLUSION AND DECISION:

14. Facts as narrated above and circumstances under which the lease of land is claimed and granted to the original lessee-mother of the petitioners reveal that valuable property of the Government is sought to be grabbed by practising fraud. Even though landed property stands in the name of father of the petitioners at Asuraipalli under Aska P.S. in Ganjam District, false statement has been made that they have no connection with said village. This Court remarked that the petitioners consciously ignored their own sisters by not impleading them as necessary and proper party to the proceeding. Such non-joinder of necessary and/or proper party speaks volumes about the conduct of the petitioners. This Court wants to make an observation, which is well-accepted and noted in very many Judgments of various Courts, that an action at law is not a game of chess. A litigant who comes to Court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions. It is, therefore, clear that the writ petition is not maintainable in the eye of law.

15. For the discussions made above and the reasons ascribed *supra*, taking note of governing principles, this Court does not deem it appropriate to intervene and accordingly, sustains the Order dated 20.05.2017 passed by the Additional District Magistrate, Bhubaneswar in Revision Case No.201 of 1981 [arising out of Order dated 31.10.1978 of the Tahasildar, Bhubaneswar in W.L. Case No.1002 of 1978].

15.1. In consequence thereof, the writ petition is, accordingly, dismissed, but in the circumstances, with no order as to costs.

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2023 (II) ILR – CUT - 1041

ARINDAM SINHA, J.

W.P.(C) NO. 22024 OF 2022

M/s. SATYASAI ENGINEERING COLLEGE, BALASORE ……Petitioner

.V.

ESIC, BBSR & ORS. …….Opp. Parties

EMPLOYEE'S STATE INSURANCE ACT, 1948 – Section 45-A and 45-G – Duty of the corporation being quasi-Judicial authority while issuing recovery proceeding by garnishee order – Held,function of a quasi-Judicial authority is not simply to follow the mandate of provision to give notice, it must also act in a manner, that is fair and reasonable, especially when it is moving ex-parte – It is absolutely necessary for corporation to act in such a way that there should not arise allegation of arbitrariness. (Para-12)

Case Law Relied on and Referred to :-

1. 2007 LAB. I. C. 597 : E.S.I.C. Vs. C. C. Santhakumar.

For Petitioner : Mr. Somanath Mishra

For Opp. Parties : Mr. A. P. Ray

JUDGMENT Date of Hearing & Judgment: 07.07.2023

ARINDAM SINHA, J.

1. Mr. Mishra, learned advocate appears on behalf of petitioner. He submits, his client runs a college. By letter dated 30th March, 2017 (annexure-1) his client was told that the establishment falls within purview of section 1(5) in Employees' State Insurance Act, 1948 with effect from 30th March, 2017. By the letter petitioner was also told, inter alia, number of employees are 13.

2. The corporation issued impugned orders, both dated 6th November, 2018 under section 45-A pursuant to notices issued beginning with notice dated 9th July, 2018. His client though attended two hearings, admittedly did not attend subsequent hearings. He was not aware of the orders passed under section 45-A. The corporation initiated recovery proceedings and issued garnishee order on his banker, to recover in excess of Rs.50 lakhs. It is then petitioner came to know of and was able to obtain impugned determination orders, under challenge.

3. He submits, the corporation has filed counter. In it is disclosed inspection report dated 26th August, 2011 alleging 101 employees. This was purported basis for impugned determination orders, resulting in finding that contribution of Rs.21,12,289/- for period 10/2013 to 12/2016 and Rs.12,13,212 for period 01/2017 to 04/2018, were finally determined. He reiterates, it being an admitted position his client did not attend the hearing on subsequent noticed dates, thereafter, not only has the demand been recovered, the recovery proceeding dropped and the garnishee order lifted. Petitioner also suffered bereavement of losing his only son in COVID-19 pandemic. Hence, his client's prayer that there be direction for fresh determination on actuals upon setting aside and quashing impugned determination orders.

4. Mr. Ray, learned advocate appears on behalf of the corporation and submits, coverage notice dated 22nd December, 2011, giving number of employees at 101 was

duly served on petitioner. He was given sufficient opportunity, not availed. On conclusion of recovery proceedings there has been initiated proceeding under section 85-B, for damages. He refers to paragraph 9 in the counter to submit, dispute stands raised regarding annexure-1 in the writ petition.

5. Mr. Ray, relies on judgment of the Supreme Court in **E.S.I.C. vs. C. C. Santhakumar, 2007 LAB. I. C. 597**. Relied upon passage in paragraph 29, is reproduced below.

> *"29. The Legislature has provided for a special remedy to deal with special cases.* ***The determination of the claim is left to the Corporation, which is based on the information available to it****. It shows* ***whether information is sufficient or not or the Corporation is able to get information from the employer or not, on the available records, the Corporation could determine the arrears****. xxx xxx xxx"*
>
> (emphasis supplied)

He submits, the writ petition be dismissed.

6. The corporation disputes letter dated 30th March, 2017 alleged by petitioner to have been issued by it for implementation of registration of employees, giving number of employees at 13. Keeping aside the dispute, it does appear that the determination was initiated by notice dated 9th July, 2018 for period 10/2013 to 4/2018, covered by impugned orders both dated 6th November, 2018. At this stage, Mr. Ray points out from annexures 'C' and 'C'/1 that there stood issued show-cause notice dated 5th November, 2012 covering period 8/2011 to 3/2012. This period could not be included in impugned determination orders as had to be excluded on amendment made to the Act barring claim beyond period of five years.

7. There was gross delay on part of the corporation to have acted in respect of petitioner/the establishment. Nevertheless, the corporation has recovered in excess of Rs.50 lakhs on issuing garnishee order, pursuant to determinations made at aggregate of Rs.33,25,501/-. In the circumstances, equity will be served if petitioner is given an opportunity to present his case for determination on actuals. Court proceeds on this basis because inspection report of year 2011, on number of employees was relied upon by the corporation in causing determination initiated on notice dated 9th July, 2018 and there is nothing on record to show that there was a subsequent enquiry, considering the corporation was moving ex parte against the establishment. The report pre-dates a period barred! More so, because the corporation has launched proceeding for damages against petitioner. The act of the corporation in proceeding to determine ex parte against petitioner, admittedly on his noticed absence, resulted in determined aggregate of Rs.33,25,501 to be outstanding contribution for aggregate period 10/2013 to 4/2018, the period before excluded by law on gross delay of the corporation. Relied upon material, as has been asserted in the counter, is the initial inspection report dated 26th August, 2011. On this period demand of aggregate Rs.33,25,501/- the corporation has recovered, as aforesaid little over Rs.50 lakhs. In the circumstances, the corporation's justification by reliance on law must be that the law is to be construed strictly against it.

8. In **Santhakumar** (supra), declaration of law was, the determination is duly made, when on the available records and it cannot be interfered with. The question before the Supreme Court was whether proviso to section 77 (1-A)(b) provides limitation of five years for claiming contribution and restricts the corporation's right to recover the arrears of the contribution as arrears of land revenue under section 45-B, in pursuance to order made under section 45-A. Two conflicting views, of the Kerala and Madras High Courts, were under consideration. The Kerala High Court had taken view that limitation provided under section 77 (1A) (b) was in relation to period of maintenance of record by the employer. A claim for contribution made beyond that period would render the employer remediless in not being able to produce the record for purposes of the determination. The Madras High Court took view otherwise. The Supreme Court expressed its view in paragraph 26, reproduced below.

> *"26. If the period of limitation, prescribed under proviso (b) of Section 77(1A) is read into the provisions of Section 45A, it would defeat the very purpose of enacting Sections 45A and 45B.* ***The prescription of limitation under Section 77(1A)(b) of the Act has not been made applicable to the adjudication proceedings under Section 45A by the legislature, since such a restriction would restrict the right of the Corporation*** *to determine the claims under Section 45A and the right of recovery under Section 45B* ***and, further, it would give a benefit to an unscrupulous employer****. The period of five years, fixed under Regulation 32(2) of the Regulations, is with regard to maintenance of registers of workmen and the same cannot take away the right of the Corporation to adjudicate, determine and fix the liability of the employer under Section 45A of the Act, in respect of the claim other than those found in the register of workmen, maintained and filed in terms of the Regulations."* (emphasis supplied)

The judgment in **Santhakumar** (supra) was delivered on 21st November, 2006 and second proviso under section 45-A(1), providing for limitation, was by amendment w.e.f. 1st June, 2010.

9. The law declared in **Santhakumar** (supra) was, inter alia, there could not be limitation prescribed for the purpose of the corporation determining under section 45-A. In that context the Supreme Court went on to say that when a determination is made under section 45-A and the employer fails to challenge the determination under section 75 of the Act, then the determination under section 45-A becomes final against the employer and as such there is no hurdle for recovery of the amount determined under section 45-B of the Act, by invoking the mode of recovery as contemplated under section 45-C to 45-I.

10. This Bench is bound by the declaration of law relied upon, keeping aside the view taken of no prescribed period in section 45-A as has ceased to operate consequent to the amendment. The declaration of the determination being final is for purpose of recovery. Here recovery has been made on the determination deemed to have become final and the demand recovered. However, facts and circumstances in the case are such that there must be interference to allow an opportunity to petitioner

for placing the documents, if he can, for establishing a determination on actuals. The corporation in exercising its power to determine under section 45-A has taken as its basis the inspection report dated prior to the excluded period. The interpretation of section 45-A, by the Supreme Court, in not having the restriction of limitation was said as otherwise it would give benefit to an unscrupulous employer. Petitioner in this case does not appear to be unscrupulous inasmuch as the corporation was able to and has recovered.

11. Reliance by the corporation was on above quoted passage from paragraph 29 in **Santhakumar** (supra). Contention is, the Supreme Court declared that determination of the claim is left to the corporation, which is based on the information available to it. Whether information is sufficient or not or the corporation is able to get information from the employer or not, on the available records, the corporation could determine the arrears. Parliament in enacting the amendment with effect from 1st June, 2010, providing for limitation by second proviso under section 45-A(1) went with view taken by the Kerala High Court, as was under consideration in **Santhakumar** (supra). In the circumstances, basis for the determinations being inspection report dated 26th August, 2011, as aforesaid, pre-dating the excluded period, said document cannot qualify as providing information available to the corporation or to be available record, for the corporation to have determined as by impugned orders. This goes to root of the controversy and makes the determinations bad. The corporation, pursuant to the determinations went ahead and recovered by issuing order under section 45-G, the garnishee order.

12. It does appear from impugned orders that opportunity of hearing was given. Petitioner admits so. The authority then went on to determine. The provision for determination requiring the authority to give the establishment opportunity of hearing makes the authority to function at determination as a quasi judicial authority. Function of a quasi judicial authority is not simply following mandate of the provision to give notice. It must also act in a manner that is fair and reasonable, especially when it is moving ex parte. By relying on extraneous material, the authority did not do so in determining the arrears of contribution. It then went ahead and caused recovery by garnishee order, on such determination. Garnishee proceedings are provided for in order XXI of Code of Civil Procedure, 1908. The proceeding is part of obtaining or securing execution, satisfaction and discharge of decree obtained from Court. Under the Act, the corporation raises a claim. Provisions are there for determination by the corporation itself. Thereafter, power for the corporation to execute its determination by recovery, inter alia, on issuing garnishee order. All this makes it absolutely necessary for the corporation to act in such a way that there should not arise allegation of arbitrariness.

13. Impugned orders are set aside and quashed. The determination proceeding is restored.

14. Petitioner will present himself with all documents before the authority on 24th July, 2023 at 3:00 P.M. The authority may deal with the determination on that

day itself or proceed to deal with it as per convenience. It is made clear, in event petitioner does not appear as directed on 24th July, 2023, the omission will automatically restore impugned determination orders. It is further made clear, in event petitioner is successful in obtaining a lesser amount on the determination, there must be restitution of excess recovery. In that event the restitution must be within four weeks of the determination, to the bank account, in respect of which the garnishee order was issued.

15. The writ petition is disposed of.

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2023 (II) ILR – CUT - 1046

ARINDAM SINHA, J.

W.P.(C) NO.1897 OF 2015

M/s. INDUSIND BANK LTD.,CHENNAI ……....Petitioner

.V.

MAHESWAR ROUT & ANR. …….Opp. Parties

ARBITRATION AND CONCILIATION ACT, 1996 – Section 34 – Execution of Arbitration Award – Jurisdiction – Whether the court which have Jurisdiction over the arbitral proceeding has only power to adjudicate the execution proceeding – Held, No – Enforcement of an award through its execution can be filed anywhere in the country, where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the court, which would have Jurisdiction over the arbitration proceeding.

Case Law Relied on and Referred to :-

1. (2000) 3 SCC 755 : Khaleel Ahmed Dakhani Vs. The Hatti Gold Mines Co. Ltd.

For Petitioner : Mr. Prakash Kumar Mishra

For Opp. Parties : Mr. Chiranjaya Mohanty

JUDGMENT Date of Hearing and Judgment: 19.07.2023

ARINDAM SINHA, J.

1. The writ petition was moved on contention by petitioner that it was claimant in the reference and award was made in its favour. Thereupon, it sought to file for execution before the Court below, rejected by impugned order dated 27th December, 2014 on direction for his client to move the principal civil Court having jurisdiction over seat of the arbitration, in Chennai.

2. There was direction for issuance of notice to opposite parties and Mr. Mohanty, learned advocate appears on behalf of opposite party no.1, respondent in the reference.

3. Mr. Mishra, learned advocate appears on behalf of petitioner and relies on **judgment dated 15th February, 2018** of the Supreme Court in **Civil Appeal no.1650 of 2018 (Sundaram Finance Limited vs. Abdul Samad)**. He submits, said Court concluded that enforcement of an award through its execution can be filed anywhere in the country, where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the Court, which would have jurisdiction over the arbitral proceeding.

4. Mr. Mohanty draws attention to paragraph 12 in impugned order. He submits, the Court below correctly formulated manner in which execution is to be obtained of an arbitral award. The Court said firstly, where place of arbitration has been specified, principal civil Court of that particular place has got power to entertain challenge under section 34 in Arbitration and Conciliation Act, 1996 and subsequently, same Court has got power to enforce the award as a decree, under section 36. Secondly, where there is no such mention, the arbitration agreement will yield place of arbitration as per section 20. Accordingly, principal civil Court of that place would execute the award as a deemed decree. Thirdly, where any application with regard to the arbitral proceeding has already been filed, such Court will only have jurisdiction to include subsequent applications including execution petition, as per section 42. Lastly, in above three circumstances, concerned principal civil Court upon receiving execution petition may transfer the proceeding under section 39 of the Code of Civil Procedure, 1908.

5. He relies on judgment of the Supreme Court in **Khaleel Ahmed Dakhani vs. The Hatti Gold Mines Co. Ltd.,** reported in **(2000) 3 SCC 755** to submit, in that case execution petition had been filed before the principal District Judge, Raichur in Karnataka. The executing Court had issued warrants of attachment and, thereafter, refused to lift the orders of attachment at instance of award debtor. Award debtor filed for revision before the High Court of Karnataka, who set aside the orders of the executing Court. The Supreme Court dismissed the appeal against judgment of the High Court. Hence, by **Khaleel Ahmed** (supra) Supreme Court had confirmed quashing of order made in execution by the Court at Raichur, on contention that the principal Court at Bangalore had jurisdiction.

6. In **Sundaram Finance** (supra) ratio is that section 32 in providing termination of arbitral proceedings, makes provisions of the Act traverse a different path from earlier Arbitration Act, 1940. The latter mandated filing of an award in Court for decree to be passed in accordance therewith. In that context the Supreme Court said that section 42 operates in respect of arbitral proceedings and when the proceedings stand concluded on passing of award, there being no application made under sub-section (4) of section 34, execution petition can be filed anywhere in the country.

7. The earlier decision in **Khaleel Ahmed** (supra) does not go contrary to the later decision in **Sundaram Finance** (supra). There were two factual elements noticed by the Court in the earlier decision. Firstly, the arbitration agreement between the parties in that case had by clause 35, stipulation that only the Courts Bangalore would have jurisdiction to entertain any claim for enforcement of the award. However, the Court did not dismiss the appeal based on said fact. The appeal was dismissed because there was application pending in the civil Court at Bangalore on the question of its jurisdiction, in proceeding filed earlier in time than the execution petition at Raichur, Karnataka. The proceeding was challenge under section 34 by award debtor himself. As such, not only is **Khaleel Ahmed** (supra) in line with subsequent declaration of law in **Sundaram Finance** (supra) but also there were distinguishing facts found for the High Court of Karnataka to have quashed the orders of executing Court at Raichur.

8. It is noticed **Sundaram Finance** (supra) was not cited in the Court below though **Khaleel Ahmed** (supra) was.

9. For reasons aforesaid, impugned order is set aside and quashed and the execution case restored. The Court below is directed to proceed with the execution case.

10. The writ petition is disposed of.

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2023 (II) ILR – CUT - 1048

D. DASH, J & G. SATAPATHY, J.

CRLA NO.710 OF 2018 & CRLA NO. 219 OF 2021

KUNA @ SUSHANT SWAIN …….Appellant

.V.

STATE OF ORISSA …….Respondent

AND

CRLA NO. 219 OF 2021

NARAYAN PRASAD MALLICK
@ KEMPA @ GURIA …….Appellant

.V.

STATE OF ORISSA …….Respondent

CRIMINAL TRIAL – Offence punishable U/ss. 302/34 of IPC r/w U/s. 3(2)(V) of Scheduled Caste and Scheduled Tribe(Prevention of Atrocities) Act – Dying Declaration – Evidence of PWs.1 to 4 clearly suggest about deceased making an oral dying declaration before them attributing the authorship of the crime to the accused persons –

Whether in absence of any certification made by doctor, the oral dying declaration made by the deceased can be taken into consideration – Held, Yes – Reason explained with reference to case laws. (Para 14-17)

Case Laws Relied on and Referred to :-

1. (2013) 54 OCR(SC) 809 : Parbin Ali and Anr. Vs. State of Assam.
2. (2002) 6 SCC 710 : Laxman Vs. State of Maharashtra.

For Appellants : Mr.S.Mohanty

For Respondent : Mr.S.K.Nayak, AGA
Mr.D.Panigrahi

JUDGMENT Date of Hearing :06.02.2023:Date of Judgment:28.03.2023

G. SATAPATHY, J.

1. Since the appellants in these two appeals being represented by the same learned counsel challenge their conviction and sentence passed by one and the same Court of Sessions in C.T. Case No. 59 of 2014; both the appeals were heard together for better appreciation and to avoid confusion, for their disposal by this common judgment with the consent of the parties.

2. The Appellants (accused persons), in the above two appeals, challenge the judgment of conviction and order of sentence passed on 28.08.2018 by the learned Sessions Judge, Jagatsinghpur in C.T. Case No. 59 of 2014 convicting the appellants for offence punishable U/S. 302/34 of the Indian Penal Code, 1860 (for short, 'the IPC') and sentencing each of them to undergo rigorous imprisonment for life with direction to set off the pre-conviction incarceration period against the substantive sentence of imprisonment, while acquitting the appellants of the charge U/S. 3(2)(v) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocity) Act, 1989 (for short, 'the SC & ST (POA) Act').

3. The prosecution case in brief is on 23.08.2013 at about 11 P.M. in the night when Somanath Behera(hereinafter referred to as, the "deceased") of village Marichapada was in his house; these accused persons, namely, Kuna @ Susanta Kumar Swain and Narayan Prasad Mallick @ Kempa @ Guria of village Makundpur, who happen to be his friends, called him outside and they talked near the front door of the house. In the course of that, when accused Kuna abused him in filthy language, the deceased resisted and they all proceeded towards 'Chapel' (Thakura Ghara) of village by pushing and pulling each other. The wife of deceased namely, (Itisree Pradhan) then followed them. At that time, the convicts were expressing to set the motor cycle on fire and to lodge a false case against the deceased and saying so, one of the accused set the motor cycle on fire and thereafter, the accused persons took the deceased near the house of Durga Prasad Das by saying that they would finish him. Accordingly, there the accused Kuna Swain pounced

over the deceased by holding his neck in one hand and both the accused persons then attacked the deceased by means of sharp cutting weapons repeatedly. At this time, the mother of the deceased also reached there and the wife and mother of the deceased went on fervently requesting them to leave the deceased, but they did not pay heed to it. When accused Kuna was instructing to cut the neck, so as to not leave the deceased alive any more, the wife and mother of the deceased raised hullah and when the villagers reached at the spot, the accused persons decamped by leaving the deceased lying on the road in a severely injured condition with profuse bleeding. The deceased was then screaming and praying Gadi Gosain (Village God) to save him. He was then telling that the convicts had killed him. The villagers shifted the deceased to hospital wee after some time he succumbed to the injuries.

The wife of the deceased lodged a written report before the Inspector-in-Charge (I.I.C.) of Jagatsinghpur P.S. at about 1.30 A.M. in the midnight of 24.08.2013 narrating the above incident which was treated as the First Information Report (FIR-Ext.1). On receipt of Ext.1, the I.I.C. registered Jagatsingppur P.S. Case No. 201(31) dated 24.08.2013 and entrusted the investigation to P.W.8-Sri Suchitra Birya Dash, the Sub-Inspector of Police (I.O.-P.W.8). He, in course of investigation, had examined the informant and witnesses rushed to DHH, Jagatsinghpur and commanded the Constable P.W.10 to guard the dead body and also commanded Havildar and another Constable to guard the spot at village Marichapada. On the same day, P.W.8 conducted inquest over the dead body of the deceased at DHH, Jagatsinghpur and prepared inquest report under Ext.4. He also sent the dead body for post-mortem examination by issuing necessary requisition. He prepared the spot map under Ext.10 on the same day by visiting the place of occurrence. On the same day, P.W.8 also seized the burnt motor cycle, sample earth and blood stained earth with seizure list under Ext.3 so also seized the wearing apparels of the deceased vide separate seizure list under Ext.11. On 25.08.2013, P.W.8 arrested the accused persons and seized their wearing apparels under separate seizure lists vide Exts. 12 & 13 and forwarded them in custody to the Court after their medical examination as well as collection of their blood sample and nail clippings. The accused Kuna @ Susanta Swain while in custody gave recovery of the knife pursuant to his disclosure statement recorded by P.W.8 by leading to the place where it had been kept concealed. The knife vide separate seizure list under Ext.5 was then seized. Thereafter, P.W.8 obtained the post mortem report under Ext.25 so also the opinion of the doctor about possibility of infliction of injuries on the deceased by the said knife under M.O.I vide Ext. 23. P.W.8 also sent the M.O. VIII and M.O.IX (T-shirt and full pant of the convict Guria @ Narayan Prasad Mallick) and M.O.X and MO XI (check shirt and trouser of the convict Kuna @ Susanta Swain) along with other materials to State Forensic Science Laboratory (SFSL), Bhubaneswar through Court under forwarding report vide Ext. 20 for chemical examination and received the chemical examination report under Ext.24. Subsequently, the Deputy Superintendent of Police (P.W.7) took charge of the investigation and he after collecting the caste

particulars of the accused persons and the informant under Ext.7 and getting the statement of P.W.1 and P.W.13 recorded by learned Sub-Divisional Judicial Magistrate (SDJM), Jagatsinghpur U/S. 164 of Cr.P.C. vide Exts. 2 and 7 submitted the Final Form placing the accused persons for trial for commission of the offences under section 302/34 of the IPC and section 3(2)(V) of the SC & ST (POA) Act,

4. Learned S.D.J.M., Jagatsinghpur, on receipt of the Final Form, took cognizance of the above 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 the accused persons.

5. In the trial, the prosecution has examined as many as 13 witnesses (P.Ws. 1 to 13) and proved several documents, which have been admitted in evidence and marked Exts. 1 to 26. Material Objects, being proved, those have been marked as MO.I to MO.IX.

The defence, having taken the plea of denial, has examined D.Ws. 1 to 3. Of the witnesses examined by the prosecution, P.Ws. 1 and 13 are the wife and mother of the deceased and they have been projected by the prosecution as eye witnesses to the occurrence, P.Ws. 2 to 5 are post occurrence witnesses, P.Ws. 7 and 8 are IOs, P.W.9 is the doctor conducting PM examination of the deceased and P.Ws. 6 and 10 to 12 are witnesses to the seizures. In the course of trial, the specific plea of the convicts was denial simplicitor.

6. On examination of the evidence, the learned trial Court by the impugned judgment convicted the accused persons mainly by relying upon the evidence of P.W. 1 and P.W.13 and the factum of recovery of M.O.I (blood stained knife) pursuant to the disclosure statement of accused Susanta @ Kuna as well as the evidence on record that the wearing apparels of both the accused persons had the stains of blood of the deceased. Accordingly, the accused persons have been convicted for the offence under section 302/34 of the IPC and sentenced as afore stated.

7. Mr.S.Mohanty, learned counsel for the appellants (accused persons) has submitted that the learned trial Court has mainly relied upon the evidence of P.Ws. 1 and 13. He submitted that when P.W.1 has stated that accused Kuna dealt blows to the neck of her husband by means of a knife after taking it from other accused Guria, the post mortem report (Ext.25) does not disclose any injury on the neck of the deceased and since the alleged occurrence had taken place at about 11 P.M. in the night and P.W.1 having admitted in cross-examination to have arrived when the deceased was lying and she being unable to say precisely the length and breadth of the weapon of offence, her version ought not to have been taken as trustworthy. He submitted that the same being the state of affairs in the evidence of P.W.13, her evidence cannot be relied upon to convict the accused persons. It is further argued that accused Kempa is a physically disabled person and thereby, his physical

deformity would believe the act attributed to him in assaulting the deceased. Alternatively it was argued that the deceased had forcibly taken away the motor cycle of accused Kuna and both had been to the house of the deceased to take back the said motor cycle which led to a hot exchange of word when deceased refused to hand over the bike and thereby, sudden quarrel ensued and the deceased attacked the accused persons as would be evident from their injury reports and there was sudden fight in a heat of passion upon sudden quarrel which might have resulted in death of deceased and thereby, the act of convicts were squarely covered by exception 4 to Section 300 of IPC for which the conviction of the accused persons for the offence U/s. 302 of IPC is unsustainable and at best the commission would be for the offence U/S. 304-II of IPC.

8. Mr.S.K.Nayak, learned Additional Government Advocate submitted that not only there is evidence of eye witnesses, but also there is clinching circumstantial evidence against the accused persons which is further strengthened by the oral dying declaration of the deceased as available in the evidence on record and, therefore, the conviction of the accused persons for commission of the offence under section 302 IPC be returned by the Trial Court is not liable to be interfered with. He further submitted that the plea of physical deformity of accused Guria having been advanced for the first time in the appeal and for a moment believing the same to be true, it cannot be considered to disbelieve the overwhelming evidence as to his role in the incident.

9. Mr.D.Panigrahi,learned counsel for the informant reiterating the contentions of the learned AGA further submitted that the medical evidence together with serological report complete the chain of events unerringly pointing the guilt of the accused persons in killing the deceased in addition to the eye witness account of P.Ws. 1 and 13 which conclusively establish that the accused persons are the authors of the crime.

10. Proceeding to judge the sustainability of the finding of guilt recorded by the Trial Court against the accused persons in addressing the rival submission, it be first stated that in the instant case, there appears no difficulty in finding that the death of the deceased was homicidal for the reason not being absence of challenge by the defence to such finding of the Trial Court, on the face of the evidence of the doctor-P.W.9 conducting post mortem examination over the cadaver of the deceased, who apart from deposing the nature of injury sustained by the deceased has positively answered the query of the Court that the deceased died a homicidal death, which opinion was never challenged by the defence in any manner, even by suggesting the witness to the effect that the deceased had not suffered homicidal death.

Now, the question comes for consideration as to who was responsible for causing such homicidal death to the deceased. In pursuit of answering such question, Trial Court has believed the evidence of eye witnesses P.Ws. 1 and 13 as well as has relied upon the circumstantial evidence brought on record by the prosecution to hold

the accused persons guilty of the offence of murder of the deceased. The learned counsel for the accused persons, however, advanced some reasoning to consider P.Ws 1 & 13 as post occurrence witnesses and to accept his contention that their evidence are not reliable. Therefore, we would like to examine the evidence of these witnesses. Careful reading of the evidence of P.W.1 goes to show that she has vividly and minutely described the occurrence. What is most important is that P.W.1 has stated in paragraph-02 of her evidence that accused Kuna pounced on the neck of her deceased husband and accused Guria went on inflicting blows on the person of her deceased husband by means of sharp cutting knife and she and her mother-in-law requested both the accused persons not to assault, but they did not pay heed to such request. It is her further evidence that after infliction of blows by the accused Guria, accused Kuna @ Susanta also assaulted her husband by means of a knife after taking the same from accused Guria and her husband sustained bleeding injuries on his person and when they shouted for help, the sahi people rushed to the spot and seeing them, the accused persons fled away. It is clear from her evidence that the deceased was then unarmed. Although, the defence had challenged the evidence of P.W.1 by cross-examining at length, but she stood firm on the role played by the accused persons in killing the deceased, which has been further explained during cross-examination that the accused Kuna pounced on the neck and accused Guria inflicted blows on the neck of the deceased by knife. It is true that P.W.1 during her cross-examination, has explained her inability to specifically say the size of each injury sustained by her husband. But, that in our view, is not of so significant when the manner of happening of the incident is seen. Although, no injury has been detected on the neck of the deceased, yet the evidence of doctor-P.W.9 discloses that he had noticed nine incised wounds on the left shoulder joint of the deceased, besides other injuries on the person of the deceased. When a person hits/attacks another by using his hand standing in front of such person, normally the assault by such person would hit on the left side of the victim/injured inasmuch as the right hand would more than often strike on left side of the victim-cum-injured and in this case, number of incise wounds were detected on the left shoulder of the deceased. In this situation, P.W.1, having made some error with regard to the seat of injury, is quite natural. It is, therefore, clear that the challenge to discard the evidence of P.W.1 is not acceptable. P.W.1 has also stated in her evidence that she followed her husband and accused persons and her mother-in-law had also followed her and, therefore, the evidence of her mother-in-law who was examined in this case as P.W.13 is also of much significance.

11. Turning our attention to the evidence of P.W.13, it appears that she has stated in her evidence that she had accompanied the informant (P.W.1) and the accused persons abused the deceased in obscene language and they killed her deceased son by a sharp flesh cutting knife and the deceased fell on the ground. The defence, having directed scathing cross-examination to this P.W.13, has not been able to demolish the same by eliciting anything running in great variance with the

evidence of P.W.1 and on the other hand, the evidence of P.Ws.1 and 13 corroborate each other on the score of the accused persons attacking and inflicting blows by means of a sharp cutting knife. P.W.1 has also proved the FIR under Ext.1 which also in the absence of any such variance to it being noticed in the evidence of P.W.1 provide corroboration to her evidence not only in respect of assault by the accused persons on the deceased, but also as to the presence of P.W.13 during the occurrence.

12. It would not be place to mention here that P.W.2 has stated in his evidence that on 23.08.2013 at about 11 to 11.30 P.M. while he was returning home after attending a feast, he saw a bike on fire and the (deceased) was lying on the road in front of the house of Debiprasad Das with bleeding injuries and the injured disclosed that the accused persons had assaulted him by means of a knife and the deceased was then screaming offering invocation to the God to save him by saying "GADI GOSAIN GADI GOSAIN MATE RAKHYA KARA". He has further stated that, he along with Deba Sahoo, Debiprasad Das examined as P.W.4 and others had shifted the deceased to D.H.H., Jagatsinghpur. This P.W.4 then has also stated during the Trial, exactly the same as what has been stated by P.W.2.

13. Above being the oral evidence of material witnesses, who are either eye witness to the occurrence or reached at the spot immediately after the occurrence, let us now advert to the other item of evidence. In sequence, the evidence of P.W.1 also transpires that the deceased was screaming for help by saying "MARI GALI MARI GALI GADI GOSAIN MOTE BANCHAI DIA, MOTE KUNA AND GURIA MARI DELE" which means that the deceased was praying to the village God (GADI GOSAIN) to give him life, while stating the accused persons to have seriously assaulted him. The defence, of course, has made a feeble attempt to contradict this evidence, but the same is otherwise corroborated by the averments made in the FIR. Besides, P.W.2 in his evidence has also stated that the victim disclosed that accused persons namely, Kuna and Guria had assaulted him by means of knife. Similar is the evidence of P.W.4 in this regard as he is found to have stated that the deceased was screaming by saying "KUNA AND GURIA MOTE MARIDELE, GADI GASAIN MOTE BANCHAI DIA". No such material surfaces to raise any doubt in mind that P.Ws. 2 and 4 reached the spot immediately after the assault made by the accused persons. In addition, P.W.2 has also stated in his evidence that he along with P.W.4 and others shifted the deceased to DHH, Jagatsinghpur in an Auto of one Sandeep Mohanty who has been examined as P.W.3 and he has stated in evidence that when he arrived at the spot and enquired from the deceased, it was disclosed by the deceased before him that accused Kuna and Guria had assaulted him. Similarly, P.W.4 has also stated that P.W.1 disclosed before him that accused Kuna and Guria assaulted the deceased. P.Ws. 1 to 4 in their evidence have stated the presence of each other at the spot at the time of occurrence or short while after the occurrence. P.Ws. 2 to 4 are independent witnesses and they have no

axe to grind against the accused and the defence has not been able to bring out any probable reason to show any bias of these witnesses against the accused person. The defence, of course, has tried to contradict P.W.1 with respect to her evidence as to who pounced upon the neck of the deceased, but the IO has affirmatively stated in his cross-examination that although P.W.1 has not stated about Kuna pouncing on the neck of the deceased, she has stated before him that accused Guria pounced on the neck of the deceased. Similarly, the defence has also tried to contradict P.W.3 that on his query, the deceased disclosed before him, but P.W.3 has stated before him about deceased voluntarily disclosing before P.W.3 that accused Kuna and Guria had killed the deceased. It, therefore, cannot be considered to be a valid contradiction and there may be some amount of error in the evidence of witness like as it has occurred in this case and P.W.3 stating about "on his query" instead of "voluntarily" the deceased disclosed about occurrence that is not a circumstance standing to be considered as significant omission to bring in the ambit of contradiction, more particularly when there is ample direct evidence available against the accused person for the assault on the deceased.

14. Evidence of P.Ws. 1 to 4 clearly suggest about deceased making an oral dying declaration before them attributing the authorship of the crime to the accused persons. There appears no doubt in the mind of the Court that the above evidence of P.Ws. 1 to 4 clearly disclose about the oral dying declaration made by the deceased before them stating that the accused persons had assaulted him, which resulted in his death.

Dying declaration is an exception to the admissibility of hearsay evidence. Since generally hearsay evidence is not admissible, yet judicial notice can be taken of the fact that a person expecting his death may not speak untruth as to cause of his death. Dying declaration is based on the maxim "nemo moriturus praesumitur mentire" which means "a man will not meet his maker with a lie in his mouth". The dying declaration, when proved alone is sufficient to convict the assailants provided said dying declaration is found to be free from suspicion and it is seen that the deceased having the occasion to speak had stated so without being tutored. Law is also very fairly well settled that any statement made by a person as to his cause of death or as to any circumstance of transaction which resulted in his death is relevant. In this case, of course, a question may also come whether in absence of any certification made by doctor, the oral dying declaration made by the deceased can be taken into consideration. In this regard, this Court feels it profitable to refer the decision in ***Parbin Ali and Another Vrs. State of Assam; (2013) 54 OCR (SC) 809*** wherein a similar situation where the wife, father-in-law and two others relatives of the deceased had clearly stated that the deceased had informed about the name of the assailants, the Apex Court after referring to various authorities on the subject has held in paragraph-20 as under:-

"Coming to the case at hand, the wife, the father-in-law and the two other relatives have clearly stated that the deceased had informed them about the names of the assailants. Nothing worth has been elicited in the cross-examination. They have deposed in a categorical manner that by the time they arrived at the place of occurrence, the deceased was in a fit state of health to speak and make a statement and, in fact, he did make a statement as to who assaulted him. Nothing has been suggested to these witnesses about the condition of the deceased. As has been mentioned earlier, PW-4, the doctor, who had performed the post mortem, has not been cross-examined. In this backdrop, it can safely be concluded that the deceased was in a conscious state and in a position to speak. Thus, it is difficult to accept that the wife, the father-in-law and other close relatives would implicate the accused-appellants by attributing the oral dying declaration to the deceased. That apart, in the absence of any real discrepancy or material contradiction or omission and additionally non cross-examination of the doctor in this regard makes the dying declaration absolutely credible and the conviction based on the same really cannot be faulted."

15. In ***Laxman Vrs. State of Maharashtra; (2002) 6 SCC 710*** a Constitution Bench of five Judges of Apex Court had laid down thus:-

"3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross examination are dispensed with. Since the accused has no power of cross-examination, the Courts insist that the dying declaration should be of such a nature as to inspire full confidence of the Court in its truthfulness and correctness. The Court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The Court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite."

16. Moving on to the other item of evidence; the evidence of I.O. is vital. In this case, it transpires from the evidence of I.O-P.W.8 that on the intervening night of 23/24.08.2013, the IIC registered the case, directed him to take up the investigation and on 26.08.2013, he apprehended the accused persons and seized their nail clippings and blood samples. Accused Susanta Kumar Swain is said to have given the recovery of weapon, i.e., M.O.I pursuant to his disclosure statement from the

bush near the Store fixed at village Marichapada after making the statement. M.O.I was accordingly seized by P.W.8 under Ext.5. The evidence of I.O further transpires that M.O.I was sent to Doctor (P.W.9) for opinion about possibility of injuries under Ext.22 on the person of the deceased by its use and accordingly, P.W.9 furnished his opinion under Ext.23. The vital link evidence of P.W.8 is that he having sent the wearing apparels of both the accused persons under M.Os.VIII to XI as also that M.O.I as well as blood stained earth and sample earth to SFSL under a forwarding report of the learned S.D.J.M. vide Ext.20 for chemical examination, the report of the chemical examiner under Ext.24 has come that all those contain the human blood of the same group as that of the deceased. This provides further corroboration to the evidence of those witnesses already discussed.

17. On conspectus of the analysis of all the evidence, as noted, We are of the considered view that the Trial Court has rightly held that the prosecution case as to the role played by these accused persons in the said incident in assaulting the deceased and thereby inflicting injuries upon him which has lead to his death has been established beyond reasonable doubt.

18. Then the next question comes for discussion as advanced alternatively that they can at best the held liable for offence U/S. 304-II of the IPC as their acts to be coming under exception-4 to Sec. 300 of IPC, which speaks about commission of culpable homicide without pre-meditation in a sudden fight in the hit of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner. The explanation appended to the aforesaid exception states that it is immaterial in such cases which party offers the provocation or commits the first assault. In this case the evidence transpires that the accused persons were already carrying the weapon of offence MO-I while coming to the house of the deceased which itself against their intention and the evidence that they inflicted around fourteen number of injuries including eleven numbers of incised wounds upon the deceased speaks volume about their said action in a cruel or unusual manner. All these evidence on record when cumulatively viewed with the manner in which the accused persons acted in the incident clearly make out a case of culpability under section 302 of the IPC. Therefore, we confirm the impugned judgment of conviction and order of sentence.

19. In the result, both the appeals stand dismissed.

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2023 (II) ILR – CUT -1058

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

CRLA NO. 40 OF 2019

JAGADISH MOHANTA …….Appellant

.V.

STATE OF ODISHA …….Respondent

(A) INDIAN PENAL CODE, 1860 – Section 304B – Essential ingredients to attract the offence of dowry death – Explain with reference to case laws. (Para 35-43)

(B) CRIMINAL TRIAL– Conviction for the offence U/ss. 302/201 of the Indian Penal Code – There are no eye witnesses to the alleged act – There is no mention of the alleged act in the depositions of the prosecution witnesses – The medical report is inconclusive – There is no chain of circumstances which lead to the conviction of the appellant against section 302 of IPC – Effect of – Held, the evidence led by the prosecution is not sufficient to hold accused persons liable for offence U/s. 302 of the IPC. (Para-46)

Case Laws Relied on and Referred to :-

1. AIR 1991 SC 1226 : Shanti Vs. State of Haryana.
2. AIR 1997 SC 3255 : Ajit Sawant Majagavi Vs. State of Karnataka.

For Appellant : Smt. Bharati Dash

For Respondent : Mr. S.K. Nayak, AGA

JUDGMENT Date of Hearing:03.01.2023 : Date of Judgment:26.06.2023

Dr. S.K. PANIGRAHI, J.

1. This appeal is directed against the judgment and order, dated 20.11.2018, passed by the 1st Additional Sessions Judge, Baripada, Mayurbhanj in S.T. Case No. 53 of 2014 (arising out of G.R. Case No.1481/2013 corresponding to Rasagobindpur P.S. Case No. 96 of 2013) convicting the Appellant for the offences punishable under Sections 302/201 of the IPC and sentencing him to undergo imprisonment for life and to pay a fine of Rs.10,000/- i.d. to undergo further R.I. for six months for under Section 302 I.P.C. and further to undergo R.I. for 3 years and to pay fine of Rs.5,000/- only and i.d. to undergo R.I. for three months for under Section 201 of the I.P.C.

I. CASE OF THE PROSECUTION:

2. The case of the prosecution is that Ramani Mohanta ("the deceased") married Jagdish Mohanta ("Accused No.1") as per custom and rites of their community in 2009. After six months of the marriage, Jagdish and his in-laws

("accused persons") started to physically and mentally abuse her to get her to bring more valuable belongings as dowry. On the night of 16.09.2013, Jagdish and his family members killed Ramani and jettisoned her dead body in the pond of one Pradhan Babu.

3. Shyamsundar Mohanta, who happened to be the mediator of their pre-nuptial arrangement, heard the quarrel in the house of the accused persons. Next morning, Shyamsundar approached Jagdish and his family and asked them about the wellbeing and whereabouts of Ramani. However, Jagdish and his mother informed that Ramani had gone somewhere. Later, Shyamasundar apprised Umesh Mohanta, father of Ramani, of the situation. They proceeded to the village of Jagdish and found the dead body of his daughter floating in the aforementioned pond.

4. Thereafter, Umesh Mohanta ("the informant") reported the matter to Rasagobindpur P.S. and tendered a written report. The complaint was registered by Amit Kumar Biswal, IIC Rasagobindpur, and the investigation began.

5. During the investigation, the police examined the complainant, other witnesses, visited the spot, and sent the dead body of the deceased for post mortem examination after holding inquest over the dead body. They also seized the wearing apparel of the deceased after post mortem examination. The apparel, nail clippings and sample of blood of the accused persons were also sent for chemical examination. On completion of investigation police submitted charge sheet against Jadgish Mohanta and his parents, namely, Banshidhar Mohanta and Smt. Sulochana Mohanta under Section 498A/304B/302/201/34 IPC read with Section 4 of the Dowry Prohibition Act.

6. The appellant and the other accused persons took the plea of complete denial and pleaded not guilty to the charges framed against them.

7. The prosecution examined twenty-one witnesses and led evidence with several documents and material objects. The Defence, on the other hand, did not examine any witness.

II. TRIAL COURT JUDGMENT

8. The Court noted that even though the prosecution claims that the nature of death suffered by the deceased, Ramani Mohanta, is homicidal; there are no ocular witnesses to the purported act and the case of the prosecution solely hinges on circumstantial evidence.

9. The trial Court began the analysis of the case by with the examination of the testimonials of the P.Ws.

10. Umesh Mohanta, ("Informant and P.W.11") stated that the marriage of his deceased daughter was solemnized with the appellant Jagadish. At the time of marriage, the accused persons demanded many valuable articles in the pre-nuptial

transaction. After six months of marriage, the accused persons started abusing and assaulting the deceased and demanded cash for the ordeal to stop. In 2011, the accused no. 1 and the deceased had come to his house and the accused still assaulted the deceased demanding cash from him. A meeting was convened in their village and a settlement deed was executed in writing in favour of accused No. 1. In 2013, he deposed that got information from Shyamsundar (P.W.5) that the deceased was missing from her in-laws house. On further enquiry, he disclosed that he had been to the village of the accused persons to sell bangles where he had an impromptu meeting with the accused persons.

11. Shyamsundar Mohanta (P.W.5) corroborated the deposition of P.W.11 and testified that the deceased had approached him and requested that he intimated her father about her perilous condition. He also deposed that he saw blood oozing out of the nose of the deceased to which the deceased revealed that the accused no. 1 had assaulted her. Next day, after his meeting with the accused persons, he came to this village along with the informant and others to look for the deceased when they found the dead body of the deceased; floating in the pond.

12. The version of P.W.11 is supported by P.W.6, P.W.7, P.W.8, P.W.9, P.W.10 and P.W.12.

13. Dr. Kishore Kumar Panda (P.W.20), the medical officer, conducted post mortem examination of the dead body of the deceased and found injuries on the body of the deceased and opined that the cause of death was due to asphyxia on the vital organs due to drowning. He also found a haematoma in the right-perital region of the deceased. He opined that the said injury could be caused by an assault on the head or by jumping in the pond. It was however clarified that the injury is not sufficient to cause death by itself.

14. The trial court took into consideration the depositions of P.W.5 and P.W.11 and affirmed that other prosecution witnesses have also corroborated that the accused no. 1 used to assault the deceased and demand cash for dowry for which a settlement deed was finally entered into. However, the court noticed that the said settlement deed did not mention that the accused used to assault the deceased for his demand of cash. Even though other P.Ws. have stated that a demand for excess dowry was made by the accused persons, they differed in their statement and the said agreement does not corroborate the demand of dowry made by the accused persons. Moreover, the trial court commented that when P.W.5 had met the deceased, even though he found blood oozing out of her nose, the deceased did not make it explicit whether the accused had assaulted her for his demand of cash or any other reason.

15. From the aforesaid facts, the trial court could not reach to a conclusion that the accused persons used to demand dowry from the deceased and assaulted her for that reason. Nonetheless, taking into account all the facts, the trial court concluded that the accused Jagadish used to assault the deceased at various instances.

16. Further, the trial court relied on the deposition of P.W.20 and shed light of the injuries on the body of the deceased even though the cause of death was due to asphyxia on the vital organs and due to drowning. All the facts narrated above, complete chain of circumstantial evidence and lead to a conclusion that the accused Jagdish assaulted the deceased and threw the dead body into the Pradhan pond, as the prosecution witnesses P.W.11, P.W.5 and other witnesses consistently stated about the incident which leads to a conclusion that the accused Jagadish has caused the death of the deceased.

17. On the conjoint reading of the evidence of the prosecution witnesses including the doctor and Investigating Officer, the trial court observed that there was a clear intention as well as the motive to cause death. The appellant has been unequivocally implicated with the charge death of the deceased. Accordingly, the accused has been convicted for the offence punishable under Section 302 IPC with a sentence described hereinbefore. However, the appellant has not been found guilty for the offences Under Section 498-A/304-B/34 of the I.P.C. and Under Section 4 of the Dowry Prohibition Act,1961 and the accused persons namely Bansidhar Mohanta and Sulachana Mohanta are found not guilty for the offences.

III. APPELLANT'S SUBMISSIONS:

18. Learned counsel for the Appellant completely denied the charges pressed herein and decried false implication. It was submitted that the entire prosecution case is based on circumstantial evidence and the prosecution has miserably failed to prove the case beyond all reasonable doubt and to prove the chain of circumstances but, the trial court arbitrarily and illegally convicted the appellant under section 302 IPC.

19. The appellant was falsely charged under Section 302 of Indian Penal Code. The investigation was callous perfunctory and deliberately made to scapegoat the appellant when there is no direct evidence available on record indicating the death of the victim. The trial court ignored the material facts while delivering the judgment, more particularly when none of the witnesses had seen the appellant committing the alleged offence.

20. The learned Trial Court had acquitted the accused person including the present appellant from charges under Section 498A, 304B, 34 IPC read with under Section 4 of Dowry Prohibition Act. The learned Trial Judge came to a finding that it cannot be concluded that the accused persons were demanding further dowry from the deceased and for that the accused Jagdish the present appellant assaulted deceased. However, suddenly after this finding which is based on evidence on record, the learned Trial Court came to a finding that taking into account all the facts and circumstances, it can be said that the accused Jagdish used to assault the deceased on various matters for which a settlement was made. This finding of the learned Trial Court is berefit of any evidence on record.

21. It was argued that the trial court failed to appreciate the fact that no one has stated anything about the contents of the said settlement deed. Therefore, nothing can be inferred from the said deed and the circumstances leading up to the signing of an agreement.

22. It was also submitted that the Trial Court ignored the material evidence on record and came to a perverse finding based on which the appellant has been convicted. Tusarkant Mohanta (P.W.3) in his cross-examination has stated that the deceased was residing happily in her in-laws' house. Similarly, Bisweswar Mohanta (P.W.4) in his cross-examination stated that the deceased, since her marriage, resided happily in her in-law's house with the accused persons. This kind of contradiction in the prosecution evidence renders the chain of circumstantial evidence and the subsequent finding of the learned Trial Judge completely obsolete and absurd.

23. It was submitted that the acquittal of the appellant of charges under Section 498A and 304B of Indian Penal Code and with the aforementioned contradictory testimonies on record are symptomatic of the fact that the conviction of the appellant under Section 302 of the Indian Penal Code is absolutely illegal and is not sustainable in the eyes of law. The conclusion that the appellant killed the deceased by assaulting her and throwing her body into the Pradhan pond is absolutely perverse and contrary to the materials available on record including the medical report.

24. The case of the prosecution is heavily dependent on the deposition of P.W.5. However, even in his deposition, he has not in any manner implicated the appellant in committing the offence under which he was convicted. Neither in his examination-in-chief nor during his cross-examination has P.W.5 stated that the deceased was assaulted by the appellant in any manner, she disclosed the reasons for assault on her by the appellant. Further, there is no direct evidence to the effect that the dead-body of the deceased was thrown into the pond by the appellant and other accused persons. In other words, there is no material evidence regarding the assault on the deceased by the appellant. Therefore, the conviction of the appellant under Section 302 of Indian Penal Code is completely unwarranted in law. The trial judge has gravely erred in law and facts in convicting accused-appellant under Section 302 IPC in the absence of essential ingredients constituting the above offence.

25. The learned counsel also relied on the findings of the medical report to argue that the post mortem conducted on the body of the deceased indicate that it did not have any external injury and ligature mark or any fracture. Therefore, the theory of assault as alleged by the prosecution is completely ruled out. Moreover, the medical officer has stated that the haematoma found on the right fronto-perital region could be caused by an assault or by jumping into the pond. It was explicitly clarified that the injury is not likely to cause death of a person. In view of such clinching medical evidence, appellant could not have been prosecuted under Section

302 of Indian Penal Code and the judgment which is impugned in this appeal is otherwise bad, illegal and against both oral and medical evidence on record.

26. It was submitted that the prosecution has not been able to prove by any material evidence that the deceased was harassed or tortured soon before the incident in case of any demand of dowry. There are many contradictions and improvements in the statement of other P.Ws. with respect to this.

27. It was also argued that the other accused persons have been exonerated on the basis of same set of evidence which has been relied upon against the accused-appellant, therefore, conviction and sentence recorded against accused is also deserved to be set aside.

IV. RESPONDENT'S SUBMISSIONS:

28. Learned counsel for the respondent/ State supported the case of the prosecution *in toto*, while, contending that based on the situs and nature of injuries, the Court can draw an inference that the appellant had the intention to kill his wife, Ramani.

29. It was submitted that the prosecution has proved by oral as well as circumstantial evidence the charges against the accused persons on the basis of which the appellant has been convicted but then as to how on the basis of same material the other accused persons have been acquitted. This sort of quandary has not been addressed by the trial court properly.

30. The prosecution has fully proved its case on the strength of the evidence of Shyamsundar Mohanta (P.W.5), Umesh Mohanta (P.W.11) and the corroboration from the depositions of P.W.6, P.W.7, P.W.8, P.W.9, P.W.10, and P.W.12.

31. It was submitted that the Trial Court has assigned no reasons for acquitting other accused persons. The Trial Court has misread the evidence.

V. COURT'S ANALYSIS AND REASONING:

32. Keeping in view the submissions made, we have carefully read the judgment passed by the Trial Court. We have also bestowed our due attention to the evidence on record, both oral and documentary.

33. We'll take note of the charges severally and scrutinize the judgment of the trial court on the backdrop of rival contentions of the counsels.

34. It is an undying fact that the deceased has died an unnatural death with suspicious circumstances. But the fact of the matter is that the prosecution to show the element of director in direct evidence emanating from the action of the accused. In order to attract 304B of the I.P.C., the Court is required to examine those ingredients in a systematic manner. Several judgments of the Apex Court have succinctly dealt with such issues.

35. In ***Shanti v. State of Haryana***,[1] the Supreme Court had an occasion to explain the ingredients of Section 304B, IPC. Justice Jayachandra Reddy said 'A careful analysis of Section 304B, IPC shows that this section has the following essentials :-

a) That death of a woman should be caused by burns or bodily injury or otherwise than under normal circumstances.

b) Such death should have occurred within seven years of her marriage.

c) She must have been subjected to cruelty or harassment by her husband or any relative of her husband.

d) Such cruelty or harassment should be for or in connection with demand for dowry.

36. Section 304B, IPC requires that the death of the woman should be unnatural. ***Shanti*** (supra), the Supreme Court has clearly held that Section 304B, IPC raises a presumption of culpability against the husband or relative hitherto unknown to our jurisprudence. The question whether unnatural death of a woman was homicidal or suicidal is irrelevant. The prosecution must prove with some positive evidence that there must be material to show that soon before death; the victim was subjected to cruelty or harassment.

37. In the cases of dowry death or suicide emanating from such circumstances, circumstantial evidence plays an important role and inferences can be drawn on the basis of such evidence that could be direct or indirect. In this respect, conduct of the husband and other relatives also plays an important role in coming to the conclusion of the guilt.

38. It must also be noted that the motive for a murder may or may not be. But in dowry deaths, it is inherent. And hence, what is required of the Court to examine is as to who translated it into action as motive for it is not individual, but of family.

39. It may be stated here that where death of a woman is unnatural; caused by other than in the normal circumstances within 7 years of the marriage and the evidence reveals that she was subjected to cruelty or harassment by her husband or any of his relatives in connection with any dowry, such death is described as dowry death under Section 304B IPC. By Section 113B of the Evidence Act, the Court has to raise a presumption of dowry death if the same has taken place within 7 years of marriage and there is evidence on the fact of woman having been subjected to cruelty and/or harassment.

40. The point that the death of the deceased took place within 7 years of the marriage is not in dispute. Therefore, the first ingredient of Section 304B has been proved by the prosecution.

1. AIR 1001 SC 1226

41. This fact has also been proved by the prosecution that the deceased died an unnatural death in suspicious circumstances. If that is so, another essential ingredient of Section 304B of the IPC has been proved.

42. Now, we shall examine the important last points regarding cruelty and harassment emanating from demand for dowry.

43. It is evident from the undiscredited testimony of P.W.11 that the deceased was indeed getting frequently assaulted and abused by the appellant for the demand of dowry to an extent that a settlement deed was signed to ameliorate the situation. This fact has been duly corroborated by the depositions of other P.Ws. The defence has relied on ambiguities in the depositions of the P.Ws to prove that the marriage of the couple in question was happy and peaceful. However, we realize that when a large number of witnesses depose during a trial, there are bound to be discrepancies which cannot be a justification for giving benefit of doubt to the accused. While some P.Ws. were close family members and friends of the impugned family, some were acquaintances and might not have thorough insight into the purported state of relations between the appellant and the accused. Ergo, all the ingredients of Section 304B IPC are duly satisfied.

44. The principles which govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the Trial Court have been set out in innumerable cases by the Supreme Court. In the case of ***Ajit Sawant Majagavi v. State of Karnataka***,[2] the Supreme Court laid the following principles :

> *"(i) In an appeal against an order of acquittal, the High Court possesses all the powers and nothing less than the powers it possesses while hearing an appeal against an order of conviction.*
>
> *(ii) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by Trial Court, if the said findings are against the weight of the evidence on record, or in other words, perverse.*
>
> *(iii) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds not subscribed to the view expressed by the Trial Court that the accused is entitled to acquittal.*
>
> *(iv) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the Trial Court.*
>
> *(v) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.*

2. AIR 1997 SC 3255

(vi) The High Court has also to keep in mind that the Trial Court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court, especially in the witness box.

(vii) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such that a reasonable person would honestly and conscientiously entertain as to the guilt of the accused."

45. In respectful consideration of the above principles, we do not agree with the findings which have been recorded by the trial Judge so far as it relates to the accused Banshidhar Mohanta and Sulochana Mohanta for the offence under Sections 304B and 498A IPC are concerned. We are reversing their acquittal for the trial Judge came to the conclusion of guilt against the appellant-accused and on the very same set of evidence disbelieved the same evidence in relation to the father and mother of the accused who were also residing in the same house and have been an active/passive participant in the continuous harassment and demand of dowry soon before the death of the deceased as would appear from the statement of P.W.11.

46. We are also of the opinion that the evidence led by the prosecution is not sufficient to hold accused persons liable for offence under Section 302 of the IPC. Such conclusion of the trial court was absurd at best. There are no eye witnesses to the alleged act. There is no mention of the alleged act in the depositions of the prosecution witnesses. Also, the medical report is inconclusive. Resultantly, there was no chain of circumstances which led to the conviction of the appellant against Section 302 of the IPC.

47. However, the evidence adduced by the prosecution during the course of trial for offences under Sections 304B and 498A of the IPC is reliable and trustworthy against the appellant Jagadish Mohanta.

48. As stated hereinabove, in dowry death and suicide cases, the circumstantial evidence plays an important role and an inference can be drawn on the basis of such evidence that can be direct or indirect. In this respect, the conduct of accused persons becomes relevant. The accused persons took the plea of ignorance, which they miserably failed to prove. The circumstances where the accused did not inform P.W.5 about the whereabouts of the deceased and the later discovery of dead body in suspicious circumstances gives a definite impression of foul play against the appellant.

49. As against the appellant, his conviction under Section 302 of the IPC is however liable to be set aside due to dearth of reliable evidence to that effect. The death of the deceased is indeed suspicious; however, it does not automatically inculpate the appellant for its committal. But the appellant must be incriminated against his acts of abuse and assault towards the deceased for demand of dowry under Sections 304-B and 498-A of the I.P.C.

VI. CONCLUSION:

50. There is no reason to believe that the appellant has been falsely implicated in this case. No such suggestion was made by the witnesses or the investigating officer. All the circumstances relied on by the prosecution have been proved and they form a chain which leads to the only conclusion that the offence must have been committed by the appellant persons.

51. The result is that the appeal is without merits and the same is liable to be dismissed. We do so, confirming the conviction and sentence passed by the court below.

52. The CRLA is, accordingly, dismissed.

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2023 (II) ILR – CUT - 1067

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

JCRLA NO. 66 OF 2016

KALA @ KISHORE GHADEI ……Appellant

.V.

STATE OF ODISHA ……Respondent

CRIMINAL TRIAL – Conviction for commission of offence U/s. 302 of the IPC, 1860 – The Trial Court upon examination of evidence of the doctor and evidence of eye witnesses have arrived at the conclusion of conviction – The immediate witness PW.21 is not stating regarding any role of the accused or even as to his presence – It is not placed through evidence from the side of the prosecution in the trial that the PW.21 is stating falsehood – Whether the evidence of PW.6 and PW.7 stating that they had seen the accused inflicting injuries upon the deceased is admissible? – Held, No. – These evidence get pushed into thick cloud of doubt – Therefore we are not in a position to say that, the prosecution has proved that it is the accused who is the perpetrator of the crime. (Para-13)

For Appellant : Ms. Anima Kumari Dei

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

JUDGMENT Date of Hearing: 30.06.2023 : Date of Judgment:24.07.2023

D.DASH, J.

The Appellant, by filing this Appeal, from inside the jail, has challenged the judgment of conviction and order of sentence dated 20.10.2016, passed by the

learned Additional Sessions Judge, Athgarh in Sessions Trial Case No.396 of 2012 arising out of C.T Case No. 434 of 2012, corresponding to Tigiria P.S. Case No.102 of 2012 of the Court of the learned Sub Divisional Judicial Magistrate (SDJM), Athgarh.

The Appellant (accused) thereunder has been convicted for commission of offence under section 302 of the Indian Penal Code, 1860 (in short, 'IPC') and accordingly, he has been sentenced to undergo imprisonment for life and pay fine of Rs.5000/- in default to undergo rigorous imprisonment for one month.

2. Prosecution case is that sometime past the midnight of 24.07.2012, Jadu Ghadei (P.W.21) informed the brother of the deceased (P.W.1) that this accused, who is his son (Jadu's son), caused the death of his wife Indumati Ghadei (deceased). The brother of the deceased, namely, Arakhita Behera (P.W.1) then lodged a written report with the Inspector-in-Charge (IIC) of Tigiria Police Station.

3. The I.I.C., receiving the said written report, treated the same as FIR (Ext.1) and registering the case, took up investigation. The I.O (P.W.27) in course of investigation, examined the informant (P.W.1), visited the spot and examined other witnesses. He then held inquest over the dead body of the deceased in presence of the witnesses and prepared the inquest report (Ext.2). He also seized the blood stained and sample earth from the spot with some broken bangles and white napkin stained with blood, faded yellow colour chadar stained with blood and one mat stained with blood under the seizure list to that effect. The dead body of Indumati was then sent for post mortem examination by issuing necessary requisition. The accused was arrested and his wearing apparels were seized. It is stated that the accused while in police custody, made a statement as regards the keeping of Katari in his house and pursuant to the said statement, he is said to have led the I.O (P.W.27) as well as other witnesses in giving recovery of the said Katari from his house which had been kept underneath a loaded bag. The accused was then forwarded in custody to the Court. That weapon Katari being sent to the Doctor (P.W.29) for examination, his report is that with the said Katari, the injuries sustained by the deceased was possible. The incriminating articles were then sent for chemical examination through Court.

4. On completion of investigation, Final Form was submitted placing the accused to face the Trial for commission of offence under section 302 of the IPC.

5. Learned SDJM, Athagarah on receipt of the Final Form, took cognizance of the offence under section 302 of the IPC and after observing the formalities, committed the case to the Court of Sessions. That is how the Trial commenced by framing the charge for the said offence against the accused.

6. In the Trial, the prosecution in total has examined twenty nine (29) witnesses. As already stated, P.W.1 is the informant whereas P.W.6, P.W.7 and P.W.14 have been projected as the eye witnesses to the occurrence. Post occurrence

witnesses have been examined as P.W.8, P.W.10, P.W.15 to P.W.20 and P.W.22 to P.W.25.

P.W.3, P.W.4 and P.W.5 are the witnesses to the inquest whereas the Doctor, who had conducted Post Mortem examination over the dead body of the deceased has been examined as P.W.29 and I.O has come to the witness box as P.W.27.

Besides leading the evidence by examining above the witnesses, the prosecution has also proved several documents which have been admitted in evidence and marked as Ext.1 to Ext.18. Out of those, the important are the FIR, Ext.1, Inquest Report, Ext.2, Post Mortem Report, Ext.31, Spot Map, Ext.13. The answer to the query made by the I.O (P.W.28) which has been given by P.W.29 is Ext.17.

7. The defence in support of his plea of denial and false implication has not tendered any evidence.

8. The Trial Court upon examination of evidence of the Doctor (P.W.29) and on going through the report as also other evidence on record including that of P.W.27 and the so called eye witnesses P.W.6, P.W.7 and P.W.14, have arrived at a conclusion that Indumati met a homicidal death. In fact this aspect of this case was not under the challenge before the Trial Court and this is also the situation before us.

9. The Doctor (P.W.29), who had conducted autopsy over the dead body of the deceased, has stated to have noticed seven external injuries. All such injuries are said to be ante mortem in nature and caused by a sharp cutting weapon. According to him, the lacerated injury covering left auxila of size 20 x 10 c.m. is sufficient in ordinary course of nature to cause death. All such injuries have been noted in the post mortem report (Ext.31).

The I.O (P.W.27) during inquest has seen such injuries and had noted all those in his report Ext.2 in his own language. The eye witnesses P.W.6, P.W.7 and P.W.14 as well as other witnesses have deposed to have seen the deceased lying dead with injuries. With such overwhelming evidence on record remaining unchallenged, we are wholly in agreement with the finding of the Trial Court that Indumati's death was homicidal.

10. Learned Counsel for the Appellant (accused) submitted that the evidence of the witnesses, who have been examined as to have seen the incident wherein the accused caused injuries upon the deceased which led to her death are not at all believable. In support of the same, he has taken the depositions of P.W.6, P.W.7 and P.W.21. He further submitted that when P.W.6 & P.W.7 having heard the alarm of P.W.21, had gone to the place, the version of P.W.21 is otherwise and therefore, when the evidence of P.W.21 does not inspire confidence that he had at all seen the accused inflicting the injuries upon his wife (deceased); the evidence of P.W.6 and

P.W.7 cannot be believed and there the Trial Court has completely faulted in accepting the version of P.W.6 and P.W.7., having not appreciated the same in the touchstone of the evidence of P.W.21. He therefore, submitted that the finding of guilt returned by the Trial Court basing upon the evidence of prosecution witnesses mainly, P.W.6, P.W.7 and P.W.21 cannot be sustained.

11. Learned Counsel for the Respondent-State again inviting our attention to the depositions of P.W.6, P.W.7 and P.W.21 submitted that the Trial Court on detail analysis of the same has rightly come to the conclusion that there is no material on record to discredit their testimony and therefore, it has rightly been said by the Trial court that through the evidence of P.W.6 and P.W.7, the act of the accused in causing the death of his wife (deceased) has been proved beyond reasonable doubt.

12. Keeping in view the submissions made, we have carefully read the impugned judgment of conviction. We have also extensively travelled through the depositions of the witnesses (P.W.1 to P.W.29) and have perused the documents admitted in evidence and marked as Ext.1 to Ext.31.

13. Starting from the evidence of P.W.21, it is seen that in the relevant night, he heard the groaning sound of Indumati in her bed room and so he raised alarm to attract the attention of the villagers. He further states to have seen Indumati lying dead on the ground in pool of blood. It is not his evidence that this accused (Kala) was sleeping with his wife (deceased) in the relevant night in that very room. He is also not stating that on his arrival hearing the groaning sound of Indumati and after raising the alarm, he had seen accused Kala in that room or even seen accused Kala to be running away or leaving the place. During cross-examination, he has stated that the said room was ten (10) feet apart from his shop-cum-house. He further states that hearing the cry of Indumati, he raised alarm and immediately, rushed to the bed room. It is his evidence that the door of that room was open and accused Kala was not present at that room. He has further expressed his inability to say that if on his arrival any other person fled away from that room. His clear evidence is that as to who murdered Indumati, was not known to him.

When it is the prosecution case that hearing the alarm of P.W.21, P.W.6, and P.W.7 went there, that P.W.6 has said that he found the room of accused to be locked from inside and light was on in that room. He therefore through the window saw that accused Kala was assaulting his wife Indumati by means of a Katari. He has further stated that all of a sudden the accused opened the door and pushing them, fled away from the spot. It has been stated by him that hearing the hullah of P.W.21, who is the father of accused, he woke up from sleep and rushed to the spot and by that time ten (10) to twelve (12) persons had already gathered. He further states that when accused left the house, five (5) to then (10) persons were also present and they could not catch him despite chasing him up to the end point of backyard. He states to have seen the accused assaulting the deceased inside the room from the window. He has further stated that he was disclosing all said facts for the first time in the

Court i.e. on 19.02.2013 when the incident admittedly had taken place in the night of 24.07.2012. Thus, when P.W.21, the first witness who having heard the cry of Indumati and raising alarm had rushed to the room which according to him was open and then accused was not there; the evidence of P.W.6 is in complete variance of the evidence of P.W.21. Therefore, doubt arises in mind as to how far the version of P.W.6 is true. The very reason of P.W.6 going to the place is the alarm of P.W.21 and when he does not implicate the accused in any way not even by saying that the accused ran away from the spot when he went and he simultaneously saw the deceased with injuries lying on the ground in pool of blood, it would be highly hazardous to accept the evidence of P.W.6 that he had gone, saw the door locked from inside and saw from the window that the accused was inflicting blows upon the deceased by sharp cutting weapon and then all of a sudden, he came out and pushing them, left the place. The same is the evidence of P.W.7, who states that hearing the shout in the house of the accused, he rushed there and saw accused and his wife in the room whose doors were locked from inside. So the immediate witness i.e P.W.21 when is not stating regarding any role of the accused or even as to his presence and it is not placed through evidence from the side of the prosecution on that score that P.W.21 in the Trial is stating falsehood, the evidence of P.W.6 and P.W.7 that they had seen the accused inflicting injuries upon the deceased get pushed into the thick cloud of doubt. Therefore, we are not in a position to say that the prosecution has proved that it is the accused who is the perpetrator of the crime through the evidence of these three witnesses i.e. P.W.6, P.W.7 and P.W.21. When the account given by the witnesses P.W.6 and P.W.7, who have been projected by the prosecution as the eye witnesses, do not appear to be credible being analyzed in the backdrop of the evidence of the first eye witness P.W.21, even accepting for a moment that the accused had given recovery of the Katari from his house which is ordinarily available in the house of the villagers and when that Katari has not been further connected through clear cogent and acceptable evidence to have been used in causing the injuries upon the deceased, we are led to hold that the finding of guilt against the accused as has been returned by the Trial Court is vulnerable and thus cannot be sustained.

14. In the result, the Appeal stands allowed. The judgment of conviction and order of sentence dated 20.10.2016 passed by the learned Additional Sessions Judge, Athgarh in Sessions Trial Case No.396 of 2012 are hereby set aside.

The Appellant (accused) be set at liberty forthwith, if his detention is not warranted in connection with any other case.

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2023 (II) ILR – CUT- 1072

BISWANATH RATH, J.

W.P.(C) NO.13857 OF 2023

ANADI PARUA & ORS. .....Petitioner

.V.

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

CONSTITUTION OF INDIA,1950 – Articles 226,227 – Petitioner being successful in civil suit filed mutation application – Which kept pending – Petitioner filed the mutation appeal before the sub-collector for seeking direction for completion of the mutation proceeding at the earliest – But the Appellate authority entered into merit and dismissed the Appeal and advised the Tahasildar to obtain the views of the Government pleader to file Appeal against the Civil Court order – Effect of – Held, the order of appellate authority is without jurisdiction and authority of law. (Para - 6)

For Petitioner : M/s. P.K.Nayak, H.B.Dash, A.C.R. Das & K.K. Jena

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

JUDGMENT Date of Hearing & Judgment: 26.06.2023

BISWANATH RATH, J.

1. On consent of the Parties, this matter is taken up for final hearing other wise there is only one issue on the question of law involved herein, as such the matter can be decided without involvement of counter.

2. Learned counsel for the Petitioners brings to the notice of this Court that on the Petitioners' remaining successful in Civil Suit No.58/2013, the Petitioners moved a Mutation Application, which is being kept pending on the premises of attempt by the Tahasildar concerned to obtain opinion from the Government Pleader, for which the Petitioners were constrained to file an Appeal. The Appeal was registered as Mutation Appeal No.2/2018 on the File of the Sub-Collector, Kuchinda. The Sub-Collector upon hearing the Parties dismissed the Appeal on the ground that first of all, there was no Civil Court decree declaring the right, title and interest of the Appellants therein by the Civil Court and secondly, the Mutation Proceeding pending before the Tahasildar, Bamra awaiting some opinion. In dismissal of the Appeal, the Sub-Collector also appeared to have advised the Tahasildar, Bamra in the same judicial pronouncement to obtain views of the Government Pleader to file Appeal against the Civil Court order. It is taking this Court to the manner of dismissal of the Appeal reading together to the extent of declaration in the Civil Court, learned counsel for the Petitioners contends, once

there is Civil Court decree remained un-assailed and Mutation Application being filed, the Tahasildar has the only one way to proceed in the mutation proceeding and allow the same but however in terms of the Civil Court direction.

3. Coming to the manner of disposal of the Appellate Authority, it is alleged that the Application was filed before the Appellate Authority for seeking direction for completion of the mutation proceeding at the earliest but the Appellate Authority surprisingly entered into merit, which was outside of its jurisdiction.

4. To the contrary, learned Additional Government Advocate while not disputing that the Appellate Authority has exceeded its jurisdiction and has no right to give advice to the Tahasildar in its judicial exercise of power, however submitted, dismissal of the Appeal may not affect the Petitioners, as there is no final conclusion therein. The Additional Government Advocate claims, the Petitioners still pursue the Mutation Authority.

5. Considering the rival contentions of the Parties and the foundation of the Mutation Application, this Court on perusal of the Civil Court judgment finds the judgment finally held as follows :-

> "The suit be and the same is decreed in part and the possessory title of the plaintiff in respect of the suit land is hereby declared.
>
> Pleader's fee as per contested scale."

6. This Court from the above finds, there is no doubt that there is declaration of title on possession of the Petitioners. Therefore, once the Mutation Application has come on Board of the Tahasildar, nothing prevented the Tahasildar in taking a lawful decision on the same keeping in view the extent of judgment and decree in favour of the Petitioners herein. Be that as it may, taking a decision in the impugned order, vide Annexure-5 passed by the Appellate Authority, this Court keeping in view the rival contentions finds, the Appeal Memorandum was simply for a direction to the Tahasildar for early decision in the Mutation Application pending there. In such background of the matter, it is observed, there was no authority with the Sub-Collector except considering the Appeal Memorandum to the extent finding possibility of a direction to the Tahasildar, if any, for early disposal of the mutation proceeding and nothing beyond that. It is in the above context, this Court finds, the observation of the Appellate Authority beyond of any observation on early disposal of mutation proceeding and finding of the Tahasildar that the Civil Court has declared only possession of title in favour of the Appellants therein and there is no otherwise right, title and interest in favour of the Appellants therein, further even advising the Tahasildar, Bamra to obtain the views of the Government Pleader to file Appeal against the Civil Court order are all without jurisdiction and authority, particularly keeping in view the stage of the proceeding before the Mutation Authority.

7. Accordingly, in interfering with the order of the Appellate Authority, vide Annexure-5 and setting aside the same, this Court in allowing the Mutation Appeal simply directs the Tahasildar, Bamra for giving a lawful disposal to Mutation Case No.3 of 2017 pending at the instance of the Petitioners with it while also keeping in view the extent of relief in favour of the Petitioners herein.

8. With this observation and direction, the Writ Petition succeeds but in the circumstance, there is no order as to costs.

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2023 (II) ILR – CUT- 1074

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

W.P.(C) NO.18280 OF 2023

M/s. JINDAL INDIA THERMAL POWER LTD.,ANGUL ……Petitioner

.V.

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

CONSTITUTION OF INDIA,1950 – Article 226 – Implementation of award passed in industrial dispute case – The Petitioner is the principal employer – The workmen involved in the issue were all under the employment of contractor/ the immediate employer – In the meantime the contract with the immediate employer being over, the contractor has vanished – Whether the principle employer is liable to implement the award – Held, Yes. – The principal employer has a statutory obligation to take up the responsibility on account of immediate employer as a fall out of the direction in the industrial adjudication of the award. (Para 9)

For Petitioner : Mr. D.P.Nanda, Sr.Adv.,
Mr. S.Mohanty & Mr. D.P.Sahu

For Opp. Parties : Mr. Sonak Mishra, ASC

JUDGMENT Date of Hearing & Judgment :12.07.2023

BISWANATH RATH,J.

1. The matter is taken up for fresh admission. Mr.Nanda,learned Senior Advocate assisted by Mr.D.P.Sahu, learned counsel for the petitioner taking this Court to the reference involved read together with the award dated 23.03.202 passed in I.D.Case No.05 of 2019 at Annexure-10, taking to the plea available herein in the writ petition contests the award.

2. Mr. Nanda, learned Senior Advocate while admitting that the present petitioner is the principal employer involving the workmen involved and the immediate employer already involved in the industrial adjudication is opposite party no.5. Taking to the plea in the writ petition, Mr.Nanda, learned Senior Advocate submitted that in the meantime contract with the immediate employer being over, the contractor has vanished. There is no amount lying with the principal employer to facilitate the recovery of the awarded amount from the immediate employer on implementation of the award involved.Mr.Nanda, learned Senior Advocate also claims that there is also no scope available to the principal employer to recover such amount in the event the principal employer discharges his role by way of payment to the workmen involved herein. Further submission of Mr.Nanda, learned Senior Advocate appears to be the ultimate award directing payment of compensation to each of the workmen and the amount therein as directed should not exceed the wages to such workmen in course of employment. It is on the above premises, Mr.Nanda, learned Senior Advocate attempted to challenge the award involved herein and requests this Court for interfering in the award so far it relates principal employer, the present petitioner is concerned. There is clear admission that immediate employer not only did not contest the Industrial Adjudication even did not challenge the award involved herein as of now.

3. Mr.Sonak Mishra, learned Additional Standing Counsel in his support to the award involved herein submits that the petitioner has the simple role of principal employer being the 2nd party Management incorporated in the Industrial Adjudication involved herein being the principal employer, the petitioner has a limited role to discharge i.e. only the liability on account of immediate employer, in the event immediate employer fails to discharge its responsibility as an outcome in the industrial adjudication involved herein. Further submission of Mr.Mishra, learned Additional Standing Counsel appears to be once an award is already involved directing discharge of responsibility by the immediate employer holding that there has been illegal termination of the workman involved by immediate employer and unless the immediate employer assails such order or award, the award becomes final and unasailable even by the principal employer. For Mr.Mishra, learned Additional Standing Counsel, the only course opened here appears to be discharge of its responsibility by the principal employer. It is also claimed that there is sufficient provision under the Industrial Disputes Act for working out the payment discharge by the principal employer, as a burden on the immediate employer. It is in the premises, Mr. Mishra, learned Additional Standing Counsel supported the award involved herein and objects entertaining the writ petition at the admission stage itself.

4. Considering the rival contentions of the parties, this Court records the submission of Mr.Nanda, learned Senior Advocate that the petitioner herein appearing as 2nd Party Management in the Industrial adjudication, undoubtedly the

principal employer. Getting into the reference, this Court finds, Government in its appropriate authority by its referral order dated 05.09.2019 had the following reference:

> *"SCHEDULE*
>
> *Whether the refusal of employment of Sri Nabakishore Jena & 4others by the management of M/s.Kazstory Infrastructure India Pvt. Ltd.,presently known as M/s. KSS Petron Pvt, Ltd., Derang, Kaniha, HeadOffice-Swastik Chamber, 6th Floor, Sion Trimby Road, Chembur,Mumbai,Maharastra-400071 (CIN)-U4510MH2007,PTC-234297 under thePrincipal Employer M/s.Jindal India Thermal Power Ltd.,Deranga,Kanhai w.e.f.31.07.2014 is legal and/or justified? If not, to what relief SriJena & 4 others are entitled?"*

5. The principal employer as Management No.2 in its appearance filed the written statement admitting therein that the workmen involved herein were all under the employment of the contractor, the immediate employer involved herein. There is also admission to the effect that they have all worked at the site of Management No.2., M/s. Jindal India Thermal Power, Ltd., Kaniha. The present petitioner but however being engaged by the immediate employer. The further plea of the Management in the written statement appears to be the Management petitioner herein, being the principal employer, was not liable to serve any notice prior to refusal of employment to the Workmen by the Contractor, the immediate employer. It is further pleaded that the Management No.2 being the principal employer has already paid the dues to the workmen pursuant to the order of the learned S,.D.J.M., Talcher in terms of provision of the Payment of Wages Act, as the immediate employer did not turn up to pay such dues to the workmen. This position clears that there is instance petitioner herein taking up the responsibility on account of immediate employer though unrelated to the present issue. The last submission through the written statement of the present petitioner appears to be since the workmen were employed by the contractor, the immediate employer, the workmen here are not entitled to reinstatement with full back wages under the Management No.2.

6. Keeping this in view and the statement of claim, further evidence laid before the Industrial Adjudicator, there has been framing of following issues:

> "i. Whether the refusal of employment of Sri Naba Kishore Jena and 04 others by the Management of M/s.Kazstory Infrastructure India Pvt. Ltd.,presently known as M/s. KSS Petron Pvt, Ltd., Derang, Kaniha, Head Office-Swastik Chamber, 6th Floor, Sion Trimby Road, Chembur, Mumbai, Maharastra-400071(CIN)-U4510MH2007, PTC-234297 under the Principal Employer M/s.Jindal India Thermal Power Ltd, Deranga, Kaniha w.e.f. 31.07.2014 is illegal and/or justified.
>
> ii. If not, to what relief Sri Jena & 4 others are entitled?"

7. Reverting back to the submission of Mr.Nanda, learned Senior advocate in his objection to the implementation of the award as against the Management No.2,

petitioner herein on the premises that the Management-principal employer's responsibility should not exceed to the labour component admittedly operating under the contract itself, this Court finds the written statement of the Management, petitioner herein absolutely silent on this aspect. There is no pleading nor advancement of evidence to support all such contentions. Contentions being raised in a writ petition involving an industrial adjudication examining propriety in award under an Industrial Adjudication, writ Court has no jurisdiction to enter into the cases outside the purview of the industrial adjudication. This Court, therefore out rightly rejects the contention of Mr.Nanda,learned Senior Advocate on behalf of the petitioner.

8. Coming back to other aspects, there is no denial that the petitioner herein is the principal employer and has clear responsibility to discharge the lawful dues in favour of workmen not being discharged by the immediate employer. Undisputedly, the immediate employer has run away even in the stage of industrial adjudication and was thus held ex-parte. Immediate employer since did not contest the principal employer in such proceeding has very very limited role.

9. It is in the circumstances, this Court finds the petitioner herein has a statutory obligation to take up the responsibility on account of immediate employer as a fall out of the direction in the industrial adjudication, the impugned award herein. Furthermore, this Court finds even at this stage also there is no challenge to such award by the immediate employer leaving no scope to the principal employer than to be abided by such award considering the statutory role and or legal liability on the principal employer involved herein. Question as to it is recoverable or not recoverable for any cooperation of the immediate employer, this Court is not assigned with role to advise to either of the parties. Party in loss cannot be prevented from undertaking appropriate proceeding for recovery of the amount involved and get it adjudicated by proper forum. This Court however makes it clear that Industrial Disputes Act makes sufficient provision to attend to such situation. Nothing prevents the party has its appropriate advise from the counsel engaged by him to pursue his further remedies in the circumstance. It is in the circumstance and for the limited role of the principal employer in an industrial adjudication compelled to discharge the responsibility of the immediate employer, this Court finds the direction of the Industrial Objector in I.D. Case No.05 of 2019, award dated 23.03.2022 is bound to be complied and the workmen should not suffer. Industrial Adjudicator had already made it clear that failure of the principal employer to discharge its responsibility towards workmen on account of failure by the 1st Party, the immediate employer, the amount will be charged @ 10% interest per annul till realization. This Court finds the award was passed in 2022. There is no discharge on the responsibility of the principal employer even after a year. However, considering the principal employer is pursuing this remedy in this Court by way of writ petition, while dismissing the writ petition, this Court observes in the event the compensation awarded by the Industrial

Adjudicator in I.D. Case No.05 of 2019 at Annexure-10 is not released with interest within a period of one month, the Workmen shall be entitled to interest @ 15% per annum after lapse of one month, being granted by this Court.

10. In the result, the writ petition stands dismissed. However, there is no order as cost.

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2023 (II) ILR – CUT - 1078

S.K. SAHOO, J.

CRLA NO.137 OF 2003

PRAHALLAD BEHERA & ORS. …….Appellants

.V.

STATE OF ORISSA …….Respondent

(A) INDIAN PENAL CODE, 1860 – Section 306 – When a married woman committed suicide within seven years of her marriage in her in laws house, whether ipso facto result in the presumption of abetment of suicide by her husband or his relative – Held, No – It cannot be ipso-facto, the prosecution has to establish the proximate link between the act of appellant with the commission of suicide of the deceased. (Para 12)

(B) INDIAN PENAL CODE, 1860 – Section 498-A – The essential ingredients requires to prove the cruelty made by husband or the relatives of the husband of the women to attract the offence U/s. 498A – Explained. (Para 13)

Case Laws Relied on and Referred to :-

1. (2004) 5 SCC 334 : Dalbir Singh Vs. State of U.P.
2. (2014) 11 SCC 516 : Ramesh Vithal Patil Vs. State of Karnataka & Ors.
3. (2017) 16 SCC 466 : Suresh Chandra Jana Vs. State of West Bengal & Ors.
4. (2017) 6 SCC 1 : Mukesh & Anr. Vs. State for N.C.T. of Delhi & Ors.
5. (2002) 6 SCC 710 : Laxman Vs. State of Maharashtra.
6. (2011) 48 OCR (SC) 961 : M. Mohan Vs. State represented by the Deputy Superintendent of Police

For Appellants : Mr. Gaurav Das

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

JUDGMENT Date of Hearing & Judgment: 20.07.2023

S.K. SAHOO, J.

The appellant no.1 Prahallad Behera is the husband, appellant no.2 Gobinda Behera is the elder brother in-law (husband's elder brother), appellant no.3 Draupadi

Behera is the mother-in-law, appellant no.4 Parameswar Behera is the uncle-in-law and appellant no.5 Kati @ Bharati Behera is the aunt-in-law of Laxmipriya Behera (hereafter 'the deceased') respectively. All the appellants faced trial in the Court of learned Additional Sessions Judge (F.T.C.), Baripada in S.T. Case No.50/214 of 2002 for offences punishable under sections 498-A/304-B/34 of the Indian Penal Code on the accusation that appellant no.1 being the husband and other appellants being the relatives of her husband, subjected her to cruelty by willful conduct which was of such a nature as was likely to drive the deceased to commit suicide by demanding more dowry and that the cause of death of the deceased was on account of burn injuries within seven years of marriage and that the deceased was subjected to cruelty by them in connection with demand for dowry in furtherance of their common intention.

The learned trial Court vide impugned judgment and order dated 14th May 2003 held that the prosecution has failed to establish the charge under section 304-B of the Indian Penal Code, however, it found all the appellants guilty under sections 498-A/306 of the Indian Penal Code and sentenced each of them to undergo R.I. for a period of two years and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo R.I. for a further period of six months each for the offence under section 498-A of the I.P.C. and to undergo R.I. for a period of five years each and to pay a fine of Rs.5,000/- (rupees five thousand) each, in default, to undergo R.I. for a further period of six months each for the offence under section 306 of the Indian Penal Code and the both the substantive sentences were directed to run concurrently.

2. The prosecution case, as per the first information report presented by Markand Behera (P.W.3), the father of the deceased Laxmipriya Behera before Inspector-in-charge, Baripada Town police station on 22.04.2000 is that the deceased was his third daughter and she had married to the appellant no.1 on 13.10.1999 in Khirachora Gopinath Temple, Remuna. There was a demand of Rs.70,000/- (rupees seventy thousand) towards dowry from the side of the bridegroom and the appellant no.4 was the mediator in the marriage. It is the further prosecution case as per the F.I.R. that on account of non-fulfillment of some dowry articles, particularly, gold ornaments, the deceased was subjected to physical and mental cruelty by the appellants. It is the further prosecution case as per the F.I.R. that on 21.04.2000 at about 8.00 a.m., the deceased informed her father (P.W.3) that her life was in danger and requested her father to take her back. Immediately, P.W.3 and his nephew Nakula Chandra Behera (P.W.7) came to the in-laws' house of the deceased and there, they found that the deceased had been assaulted and her bangles being broken and there was no vermilion on her forehead. When they asked the deceased about her condition, she told that since the further demand of dowry could not be fulfilled, she had been assaulted by the appellants. Looking at the condition of the deceased, when P.W.3 and P.W.7 wanted to take the deceased with them, the appellant no.2 and appellant no.4 assured them that they would leave the deceased Laxmipriya at her father's house on 22.04.2000. Accordingly, P.W.3 and P.W.7

returned back home but in the evening hours at about 7.00 p.m., a message came from an unknown telephone number that the deceased had sustained burn injuries and was hospitalized. Immediately, the informant (P.W.3) rushed to Baripada Government Hospital where he found that the deceased had sustained 60 to 70 per cent burn injuries. When the deceased was asked about the cause of burn injuries, she disclosed that the appellants poured kerosene on her body and set her on fire by using a matchstick. The deceased was immediately shifted to Tata Hospital by an ambulance where she was fighting with death and it is further stated that the in-laws' family members of the deceased had not even come to see her. Therefore, suspecting it to be a pre-planned attempt to kill the deceased on account of non-fulfillment of the dowry demand, the F.I.R. was lodged.

3. On receipt of F.I.R., Inspector in-charge of Baripada Town police station registered a case under sections 498-A/307/34 of the Indian Penal Code read with section 4 of the Dowry Prohibition Act against all the five appellants and directed P.W.8 Smt. Snigdha Bhanj to investigate the case. P.W.8 during course of investigation, examined the informant, other witnesses, issued requisition to S.D.M., Baripada for deputation of an Executive Magistrate to record the dying declaration. She further issued requisition to D.F.S.L. for deputation of scientific team for inspection of the spot. She further visited the spot and prepared the spot map vide Ext.12. She effected seizure of one tin daba, containing little amount of kerosene, one burnt match stick, half burnt wearing apparels of the victim, one imitation necklace from the spot and prepared the seizure list vide Ext.13. Further she seized a receipt and other documents granted by the authorities of Lord Khirachora Gopinath Temple, Remuna relating to performance of marriage in the temple premises vide Ext.3 and those documents were given in zima of the informant by executing zimanama vide Ext.5. P.W.4 Baidyanath Kar, who was working as Executive Magistrate -cum- Tahasildar, Baripada on 21.04.2000, as per the direction of S.D.M, Baripada, recorded the dying declaration of the deceased which has been marked as Ext.7 and sent the same to P.W.8.

On 27.04.2000, the I.O. arrested the appellants and they were forwarded to Court on 28.04.2000. She also seized the dowry articles as per the seizure list vide Ext.4 and gave the same in zima of the informant as per zimanama vide Ext.6. The deceased died on 26.04.2000 and inquest was held and the post mortem was conducted vide Ext.10 which indicates that the burn injuries were ante mortem in nature and death was due to septicemia and toxemia of burn. P.W.8 handed over the charge of investigation to P.W.9 who examined some witnesses, seized the bed-head ticket on 21.07.2001 from D.H.H., Baripada vide seizure list (Ext.14). He also seized one handwritten plain paper letter and seven sheets of admitted handwriting of the deceased on production by the informant (P.W.3) under seizure list Ext.1. On 01.08.2001, he seized the requisition of the I.I.C., Baripada Town P.S. for recording dying declaration of the deceased, made a query to the doctor in connection with the injury sustained by the appellant no.1. The plain paper letter and the admitted

handwriting were sent to S.F.S.L. for comparison along with the seized articles and received the report of the chemical examiner and on completion of investigation, he submitted chargesheet under sections 498-A/304-B/306/34 of the Indian Penal Code and section 4 of the Dowry Prohibition Act on 03.08.2001.

4. After submission of charge-sheet, charge was framed by the learned trial Court on 20th December 2002 under sections 498-A/304-B/34 of the Indian Penal Code and since the appellants refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute them and establish their guilt.

5. During course of trial, in order to prove its case, the prosecution examined as many as nine witnesses.

P.W.1 Sudhansu Kumar Giri, who is a co-villager of the informant (P.W.3) stated to have heard complain from the deceased regarding ill-treatment on her for non-giving of dowry articles during course of his visit to the house of the appellants.

P.W.2 Radhagobinda Behera, who is the brother of the deceased stated about the demand of dowry by the appellants and also stated that the victim succumbed to burn injury on 26.04.2000.

P.W.3 Markanda Behera, is the father of the deceased and he is the informant in this case and he stated about the demand of dowry and torture on the deceased due to non-fulfillment of demand of dowry and further stated that the appellants poured kerosene on her body and set her on fire.

P.W.4. Baidyanath Kar, who was the Executive Magistrate-cum-Tahasildar, Baripada stated that as per the direction of S.D.M., Baripada, he recorded the dying declaration of the deceased.

P.W.5 Dr. Sanjibani Agarwalla, who was the Gynecology Specialist attached to District Headquarters Hospital, Baripada intimated the I.I.C., Baripada Town P.S. about the admission of the deceased into hospital vide Ext.8.

P.W.6 Dr. Bhupati Bhusan Das, who was the Asst. Surgeon, attached to District Headquarters Hospital, Baripada examined appellant no.1 on police requisition and prepared the injury report vide Ext.9.

P.W.7 Nakula Chandra Behera, who is the nephew of the informant, stated that he had accompanied the informant (P.W.3) to the house of the appellants on receipt of information from the deceased about the ill-treatment.

P.W.8 Smt. Snigdha Bhanja, who was the initial Investigating Officer of the case, stated that as per the direction of the I.I.C., Baripada Town P.S., she took up investigation of the case and thereafter handed over the charge of Investigation to the I.I.C., Baripada P.S. and subsequently Mr. Nityananda Buda took up the investigation of the case.

P.W.9 Mr. Nityananda Buda is the Investigating Officer of the case who placed charge sheet.

One witness, namely, Amar Chandra Behera examined as D.W.1.

The prosecution exhibited nineteen documents. Ext.1 is the seizure list, Ext.2 is the written report, Ext.3 is the seizure list, Ext.4 is the seizure list, Ext.5 & Ext.6 are the zimanamas, Ext.7 is the dying declaration sheet of the deceased, Ext.8 is the report of P.W.5, Ext.9 is the injury report, Ext.10 is the P.M. report, Ext.11 is the requisition for recording dying declaration, Ext.12 is the spot map, Ext.13 is the seizure list, Ext.14 is seizure list, Ext.15 is the seizure list, Ext.16 is the query requisition, Ext.17 is also the query requisition, Ext.18 is the forwarding report and Ext.19 is the C.E. report.

No document has been marked on behalf of defence.

6. The defence plea of the appellant was one of denial and it was pleaded by appellant no.1 Prahallad Behera that the deceased had illicit relationship with one Siba Behera and on 21.04.2000, he caught hold both of them in a compromising position for which she committed suicide.

7. The learned trial Court after assessing oral as well as documentary evidence available on record came to hold that in view of the dying declaration marked as Ext.7, the immediate cause for her setting on fire was not due to any ill-treatment relating to demand of dowry in connection with marriage and there was no such disclosure made by the deceased before P.W.3 with regard to ill-treatment meted out to her concerning dowry articles prior to her setting on fire. Relying on the oral evidence, it was further held that the deceased was never ill-treated on the ground of non-fulfilment of the dowry articles and there is no positive evidence that the deceased Laxmipriya took the extreme step of burning her body by pouring kerosene due to torture and for not fulfilling the demand of dowry articles. Accordingly, the learned trial Court held that the prosecution has failed to establish the ingredients of offence under section 304-B of the Indian Penal Code. However, the learned trial Court held that on analysis of the entire evidence on record and having regard for the previous attending and subsequent conduct of the appellants that the appellants wanted the deceased to end her life and thus, the appellant no.3 and appellant no.5 used foul language against her character on 21.04.2000 morning and since the deceased was labelled as a woman of loose character, that caused provocation and therefore, the deceased took the extreme step to end her life. Hence, it was held that the ingredients of the offence under section 306 of the Indian Penal Code are proved against the appellants. Further the learned trial Court held that the prosecution has successfully established the charge under section 498-A of the Indian Penal Code against all the appellants.

8. Mr. Gaurav Das, learned counsel appearing for the appellants contended that in absence of charge framed against the appellants under section 306 of the Indian

Penal Code, their conviction under such offence is legally impermissible. The dying declaration recorded by the Executive Magistrate, Baripada (P.W.4) is totally silent about any role played by the male appellants i.e. appellant no.1, appellant no.2 and appellant no.4. Only thing that has been stated in the dying declaration was that the two lady appellants i.e. appellant no.3 and appellant no.5 were abusing the deceased since morning and that was also not proved to be in connection with demand of dowry and P.W.4 specifically stated that when he asked the deceased about the reason for the abuse, she did not disclose the reasons. Therefore, in view of such dying declaration recorded by P.W.4, the Court held that it cannot be said that there was any proximate link between the conduct of the two lady appellants i.e. appellant no.3 and appellant no.5 with the commission of suicide of the deceased and as such, the ingredients of the offence under section 306 of the Indian penal Code are not attributed.

Learned counsel further argued that the evidence relating to cruelty on the deceased to sustain charge under section 498-A of the Indian Penal Code is discrepant in nature and though it is the prosecution case that one letter was written by the deceased few days prior to her death which compelled her father (P.W.3) and a co-villager (P.W.1) to visit the house of the appellants and the said letter was also seized during course of investigation and it was sent to S.F.S.L. for examination with the admitted handwriting of the deceased but neither the report of the Scientific Officer nor that letter was proved during trial. Therefore, the prosecution has withheld a very vital document from the Court for which adverse inference should be drawn. Learned counsel further submitted that there is lack of evidence on record that the conduct of the appellants was of such a nature as was likely to drive the deceased to commit suicide or to cause grave injury or danger to her life, limb or health (whether mental or physical) and since the learned trial Court has held that the prosecution has failed to establish demand of dowry, the charge under section 498-A of the Indian Penal Code is also not established and it a fit case where the appellants should be extended the benefit of doubt.

9. Mr. S.S. Mohapatra, learned Additional Standing Counsel, on the other hand, supported the impugned judgment and submitted that even though charge was not framed against the appellants under section 306 of the Indian Penal Code, but they were charged under a higher offence like 304-B of the Indian Penal Code and also under section 498-A of the Indian Penal Code and they were aware of the ingredients of the offence under section 306 of the Indian Penal Code and thus it cannot be said that there was any failure of justice occasioned thereby for non-framing of such charge. He argued that the marriage of the deceased with the appellant no.1 was held on 13.10.1999 and it appears from the evidence on record that she was two months pregnant as on the date of occurrence i.e. 21.04.2000. He asserted that if everything was well, then there was no earthly reason for the deceased to commit suicide and that to by pouring kerosene on her and setting herself on fire which resulted in her death. Learned counsel further submitted that

even though in the recorded dying declaration, the deceased has not attributed any overt act against the male appellants, i.e. appellant no.1, appellant no.2 and appellant no.4, but the father of the deceased being examined as P.W.3 stated that in the hospital, when he tried to ascertain the cause of burn injury from the deceased, she implicated all the appellants in that regard.

Learned counsel further submitted that even though there are some discrepancies in the evidence of the witnesses but those are not of such a magnitude to discard and disbelieve the entire prosecution case relating to the cruelty on the deceased and therefore, the learned trial Court has rightly found the appellants guilty under sections 498-A/306 of the Indian Penal Code.

Section 306 of the Indian Penal Code:

10. Adverting to the contentions raised by the learned counsel for the respective parties, let me first deal with the conviction of the appellants under section 306 of the Indian Penal Code which prescribes punishment for 'abetment of suicide'. It is not in dispute that no charge under section 306 of the Indian Penal Code was framed against the appellants rather they were charged under section 304-B of the Indian Penal Code. Learned trial Court while acquitting the appellants of the charge under section 304-B of the Indian Penal Code, convicted them under section 306 of the Indian Penal Code. In view of section 464 of Cr.P.C., it is possible for the appellate or revisional Court to convict an accused for an offence for which no charge was framed unless the Court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. (Ref: **Dalbir Singh -Vrs.- State of U.P. : (2004) 5 Supreme Court Cases 334**). In the case in hand, the appellants were charged under section 304-B of I.P.C. and they clearly understood the nature of offence and case was clearly explained to them and they have been afforded fair opportunity of defending themselves, ensuring substantial compliance of provisions of law. In such facts and circumstances, in view of section 464 of Cr.P.C., it is possible for Court to convict the appellants for offence for which no charge was framed unless the Court is of the opinion that failure of justice would in fact occasion. When from statement of charge framed under section 304-B IPC and section 498-A of I.P.C., it is clear that all facts and ingredients for framing charge for offence under section 306 of I.P.C. existed in the case, the mere omission on the part of the trial Judge to mention of section 306 of I.P.C. does not preclude the Court from convicting the appellants for the said offence when found proved. In the case of **Ramesh Vithal Patil -Vrs.- State of Karnataka and others reported in (2014) 11 Supreme Court Cases 516**, it has been held as follows:-

> "18. It is true that the appellant was not charged under Section 306 IPC. The charge was under Section 304-B IPC. It was, however, perfectly legal for the High Court to convict him for offence punishable under Section 306 IPC. In this connection, we may usefully refer to **Narwinder Singh : (2011) 2 Supreme Court Cases 47**. In that case, the accused was charged under Section 304-B IPC. The death had occurred within seven years of the marriage. The trial court convicted the accused for an offence punishable under Section 304-B IPC. Upon reconsideration of the entire evidence, the High Court came to the conclusion that the deceased had not committed suicide on account of demand for dowry, but, due to harassment caused by the husband in particular. The High Court acquitted the parents of the accused and converted the conviction of the accused from one under Section 304-B IPC to Section 306 IPC. This Court dismissed the appeal filed by the accused. It was observed that it is a settled proposition of law that mere omission or defect in framing charge would not disable the court from convicting the accused for the offence which has been found to be proved on the basis of the evidence on record. In such circumstances, the matter would fall within the purview of Sections 221(1) and (2) of the Code of Criminal Procedure, 1973."

The learned trial Court while considering the point as to whether on 21.04.2000, the deceased committed suicide by pouring kerosene on her body and setting her ablaze came to hold that the marriage of the deceased with the appellant no.1 was held on 13.10.1999 and the deceased died on 26.04.2000 i.e. within six and half months of her marriage and she poured kerosene on her body and setting her ablaze in her matrimonial home on 21.04.2000. On 26.04.2000, she succumbed to burn injures while undergoing treatment at Tata Hospital. The post mortem report, which has been marked as Ext.10, discloses the reason of her death as septicemia and toxemia causing out of burn injuries. Therefore, it was held that the deceased committed suicide within seven months of her marriage. Neither the learned counsel for the appellants nor the learned counsel for the State challenged such finding of the learned trial Court. In view of the evidence on record, particularly, the P.M. report (Ext.10) and reply to the query made by the I.O. (P.W.9) to the A.D.M.O. vide Ext.17 that the injuries found on the victim might be due to suicidal attempt by pouring kerosene on herself and setting her on fire, I am of the humble view that the prosecution has proved that the deceased committed suicide and she died on account of burn injuries.

11. Dying declaration of the deceased has been recorded by none else than P.W.4, the Executive Magistrate -cum- Tahasildar, Baripada on 21.04.2000 as per the direction of the S.D.M., Baripada. He stated that he found the deceased was admitted in the female surgical ward and the entire body had been burnt and she was not in a condition to make any statement. However, he put some questions to the deceased to which she stated that she set her ablaze by pouring kerosene on her body. She also disclosed that her mother in-law (appellant no.3) and aunt-in-law (appellant no.5) were scolding her since morning and at about 8.00 p.m., she burnt herself. She further stated that her husband (appellant no.1) and father-in-law had not scolded her and that her marriage was performed seven months back and she was carrying two months pregnancy. She further stated that no one told with regard

to dowry articles, except scolding her. P.W.4 further stated that the deceased was not in a normal state of mind at the time of her statement and no medical officer was present at the time of recording of dying declaration. When he asked the deceased about the reason for the abuse meted out to her, she did not disclose the reasons. The dying declaration has been marked as Ext.7.

Law is well settled that a dying declaration is an important piece of evidence which, if found veracious and voluntary and appears to the Court to have made in a fit mental condition could be the sole basis for conviction and it can be relied upon even without seeking for any further corroboration. In this context, it is pertinent to reproduce the following observations made by the Hon'ble Supreme Court in **Suresh Chandra Jana -Vrs.- State of West Bengal & Ors., reported in (2017) 16 Supreme Court Case 466**:

> "It would not be out of place to discuss the importance of dying declaration under Section 32 of the Indian Evidence Act. The principle underlying Section 32 of the Indian Evidence Act is 'Nemo moriturus praesumitur mentire' i.e., man will not meet his maker with a lie in his mouth. Dying declaration is one of the exceptions to the rule of hearsay. It is well settled that there is no absolute rule of law 'that the dying declaration cannot form the sole basis of conviction unless it is corroborated'. The rule requiring corroboration is merely a rule of prudence [*refer* ***Paniben (Smt.) v. State of Gujarat***, **(1992) 2 SCC 474**; ***Munnu Raja and Anr. v. State of Madhya Pradesh***, **(1976) 3 SCC 104**; ***State of U.P. v. Ram Sagar Yadav and Ors.***, **(1985) 1 SCC 552**; ***Ramawati Devi v. State of Bihar***, **(1983) 1 SCC 211]."**

Notwithstanding the aforesaid position of law, while admitting a dying declaration, the Court must be vigilant towards the need for 'Compos Mentis Certificate' from a doctor and it must satisfy itself of the absence of any kind of tutoring. [Ref: **Mukesh & another -Vrs.- State for N.C.T. of Delhi & others, reported in (2017) 6 Supreme Court Cases 1**].

In case of **Laxman -Vrs.- State of Maharashtra reported in (2002) 6 Supreme Court Cases 710**, it was held that what is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement, even without examination by the doctor, the declaration can be acted upon provided the Court ultimately holds the same to be voluntary and truthful.

In the case at hand, P.W.4 has stated that the deceased was not in a condition to make any statement. He further stated that he had put several other questions to the deceased, but she did not give any answer and she complained that since she was having severe burning sensation, she was not prepared to make any other statement. P.W.4 further stated that the deceased was not in a normal state of mind at the time of making her statement and no medical officer was present at the time of recording of the declaration. Though, the learned defence counsel had suggested to the doctor that the deceased was in a fit and proper state of mind to

make the statement, the doctor denied the same. However, the learned trial Court held that the deceased had sustained 50% burn injuries and she had also signed the dying declaration rising from the bed and therefore, it must be held that she was conscious and in a fit state of mind to make the dying declaration and accordingly, reliance was placed on the dying declaration. P.W.4 admits in his cross-examination that he had not mentioned in his report that the deceased did not like to make any other statement to his questions as she was having severe burning sensation and he has also not mentioned in his report that the deceased was not in normal state of mind at the time of making statement. He further stated that the deceased had signed by rising from the bed.

From the plain reading of dying declaration (Ext.7), it appears that the deceased had stated her name and further stated that she set herself ablaze by pouring kerosene on her body as appellant no.3 and appellant no.5, the two lady accused scolded her. She further stated that her marriage had taken place seven months back and since last two months, she was pregnant. She further stated that she was only abused but nobody told her about dowry. It further appears that after recording of the dying declaration in presence of the parties, P.W.4 read over and explained to the deceased about its contents and she admitted to be correct and accordingly, put her signature which has been marked as Ext.7/2. The signature of P.W.4 has also been marked as Ext.7/1. In view of the materials available on record and the manner in which the dying declaration was recorded and it was read over and explained to the deceased to which she put her signature, I am of the humble view that the learned trial Court has rightly placed reliance on the dying declaration. In the dying declaration, there is nothing against the appellant no.1, appellant no.2 and appellant no.4. Only it is stated that the two female appellants i.e. appellant no.3 and appellant no.5 were scolding the deceased since morning but the deceased had not stated about the reason of such scolding.

P.W.3, the father of the deceased so also the informant of the case has stated that in the Tata Hospital, when he enquired from the deceased about the cause of her suffering, she revealed that she set herself on fire by pouring kerosene on her body as she could not tolerate the ill-treatment made by the appellants and thereafter, he lodged the F.I.R. In the F.I.R., the informant has not mentioned anything regarding the dying declaration stated to have been made by the deceased. Therefore, no importance can be attached to the so-called “dying declaration” made before P.W.4. I am of the humble view that the deceased committed suicide by setting herself ablaze due to scolding of the two lady appellants.

12. Now, the question crops up for consideration as to whether there are sufficient materials on record to show that the appellants abated the commission of suicide of the deceased.

Law is well settled that an offence under section 306 of the Indian Penal Code would stand only if there is an abetment for commission of suicide. Section

107 of the Indian Penal Code states that a person can be stated to have abated the doing of a thing, if he instigates any person to do that thing or engages with one or other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of such conspiracy, or the person intentionally aids, by any act or illegal omission, the doing of that thing. The abetment of suicide involves a mental process of instigating a person or intentionally aiding that person in doing of a thing. In cases of conspiracy also it would involve that mental process of entering into conspiracy for the doing of that thing. More active role which can be described as instigating or aiding the doing of a thing is required before a person can be said to be abetting the commission of offence under section 306 of the Indian Penal Code. Merely because a married woman committed suicide within seven years of her marriage in her in-laws' house does not *ipso facto* result in the presumption of abetment of suicide by her husband or his relatives.

In case of **M. Mohan -Vrs.- State represented by the Deputy Superintendent of Police reported in (2011) 48 Orissa Criminal Reports (SC) 961**, it is held as follows:-

> "45. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained."

The intention of the legislature is clear that in order to convict the persons under section 306 of the Indian Penal Code, the clear *mens rea* to instigate a person to commit suicide must exist. It also requires active or direct act which led the deceased to commit suicide seeing no other option and this act must have been intended to push the deceased into such a position that he/she committed suicide. Where the accused, by his continuous course of conduct, creates circumstances under which the deceased was left with no other option than to commit suicide, the instigation or intentional aiding may be inferred. It is not enough, if the acts of the accused caused persuasion in the mind of the deceased to commit suicide. In some cases, there may be several reasons for creating great disturbance to the psychology of the deceased which resulted in the commission of suicide. One of such reason may be due to some overt act committed by the accused at some point of time but unless there is proximity and nexus between the conduct or behavior of the accused with that of suicide committed by the deceased, it would not be proper to convict an accused under section 306 of the Indian Penal Code.

In order to ascertain the proximate link, if any, between the conduct of the appellants and suicide of the deceased, let me now examine the evidence on record. P.W.3, the informant has stated that ten to twelve days prior to the death of the deceased, he got a letter from her daughter through a female which was seized by the police on his production as per seizure list vide Ext.1. He also stated that police seized a school hand notebook of the deceased along with the letter and after receipt of the letter; he along with Sudhansu Kumar Giri (P.W.3) came to the house of the

appellants where they reached at 8.00 a.m. It further seems that the said letter along with the admitted handwriting of the deceased were sent to S.F.S.L. for examination and opinion, but no opinion of the handwriting expert was obtained and proved during trial. Even the letter was not produced in Court by the prosecution. There cannot be any dispute that the letter written by the deceased ten to twelve days prior to her death was a vital document to be proved, but surprisingly, for the reason best known to the prosecution, it has failed to prove the same for which adverse inference is to be drawn against the prosecution. Nevertheless, this Court is constrained to presume that perhaps there was nothing written in the said letter against the appellants for which the prosecution deliberately withheld the same.

Two witnesses after receipt of such letter had visited the house of the appellants and they are P.W.3 and P.W.7. P.W.3 has stated that when they reached at the house of the appellants at 8.00 a.m., the deceased started crying seeing them, but the female appellants pushed her inside the room and closed the door and when P.W.1 enquired from the deceased about the reasons for the dispute, she informed that the appellants were demanding gold ornaments and she was being ill-treated for not giving the same. The deceased further complained that she was not being given food to eat and was being assaulted by the female appellants. She further stated that the appellant no.1 was also assaulting her. Most peculiarly, the deceased is silent about any demand of dowry in her dying declaration as recorded by P.W.4. P.W.1 has stated that when he along with P.W.3 came to the house of the appellants, he entered into the room of the deceased where she complained before him that the appellants were ill-treating her for not giving the dowry articles. No further complain was made by the deceased before him as other family members entered inside the room and the deceased cried. It has been confronted to P.W.1 and proved through the I.O. (P.W.9) that he had not stated before him that eight to ten days prior to the death of the deceased, he had been to the house of the appellants and the deceased complained before him that she was being ill-treated due to demand of dowry. Therefore, the evidence of P.W.1, regarding disclosure made by the deceased before him relating to the torture on her by the appellants, being stated for the first time in Court is not acceptable. Even in the dying declaration except stating that the two female appellants i.e. appellant no.3 and appellant no.5 were scolding her since morning, nothing further has been stated by the deceased. She even did not indicate any reason for such abuse. Merely because the two ladies were abusing the deceased since morning as stated in the dying declaration and the deceased took it as an exception and committed suicide, it cannot be said that those two appellants i.e. appellant no.3 and appellant no.5 abetted the commission of suicide.

Since the offence under section 306 of the Indian Penal Code requires an active act or direct act which leads the deceased to commit suicide seeing no better option and this act must have been intended to push the deceased into such a position that she commited suicide, I am of the humble view that the prosecution has failed to establish any proximate link between the act of the appellants with the

commission of suicide of the deceased. Therefore, the conviction under section 306 of the Indian Penal code is not sustainable in the eye of law.

Section 498-A of the Indian Penal Code:

13. Coming to the conviction of the appellants under section 498-A of the Indian Penal Code, the ingredients of this section requires proving the cruelty by husband or the relatives of the husband of the woman and it is the requirement of the law that:

I. the prosecution must prove that the woman was subjected to cruelty or harassment;

II. such cruelty or harassment was meted out to her either by the husband of the woman or by any relative of her husband;

III. such cruelty was with a view to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; and

IV. such harassment was with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or was on account of failure by her or any person related to her to meet such unlawful demand.

The demand of dowry part has already been disbelieved by the learned trial Court and even no charge under section 4 of the Dowry Prohibition Act, 1961 was framed against the appellants. The deceased has also not stated in her dying declaration about the demand of any dowry. As already discussed, there are discrepancies in the evidence of P.W.1 and P.W.3 in relation to cruelty aspect which is stated to have been taken place ten to twelve days prior to the death of the deceased. So far the occurrence is concerned, it is stated by P.W.3 that on that day at about 8.00 a.m., the deceased made a telephone call to him for which they went there and found that there was no vermilion mark on her forehead and she was not wearing bangles and she started crying holding his hands. When he asked to take the deceased with him, the appellant no.2 and appellant no.4 impressed upon him not to do that as it was their family affairs and at the time of torture, when the deceased wanted to see them, she was given a push by the appellant no.5 and put inside a room. However, the appellant no.2 and appellant no.4 gave assurance to P.W.3 that they would send the deceased to her parental place with the appellant no.1 on the next day after pacifying the situation. P.W.3 has admitted not to have mentioned all the above aspects in the first information report and he has also admitted not to have stated the same before the police in his statement recorded under section 161 Cr.P.C. Therefore, the evidence of P.W.3 on this score is difficult to be accepted.

P.W.7 stated to have accompanied P.W.3 on that day to the house of the appellants. He also stated that the deceased informed them that she was being assaulted by the appellants and they were demanding ornaments and other articles, but he also admitted not to have stated the same before the police. Therefore, there is also lack of clinching evidence that the appellants subjected the deceased to cruelty or harassment and such cruelty was intended to drive her to commit suicide or to

cause grave injury or danger to her life, limb or health (whether mental or physical). Thus, in my humble view, the prosecution has failed to establish the charge under section 498-A of the Indian Penal Code.

14. Though in the dying declaration, it has been mentioned that the deceased was pregnant for two months, but neither from the post mortem report nor from the evidence of any witness, it appears that she was pregnant at the time of her death. It further appears that the appellant no.1, the husband of the deceased tried to save her for which he also sustained number of burn injuries on his person and the doctor (P.W.6) has proved the injury report of the appellant no.1 and specifically stated that the injuries were possible, if a person tried to save another person who was having burn injuries. P.W.7 stated to have noticed burn injuries on the person of the appellant no.1.

It is no doubt shocking that within a few months of her marriage, at a young age the deceased committed suicide, while staying in the house of her in-laws, by pouring kerosene on her body and setting herself ablaze. The well established rule of criminal justice is that "fouler the crime, higher the proof". In absence any legal evidence against the appellants who are the husband and relatives of the husband to be responsible for the commission of suicide of the deceased, they cannot be held guilty. Mere suspicion, howsoever strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime. There is a long mental distance between 'may be true' and 'must be true' and this basic and golden rule only helps to maintain the vital distinction between 'conjectures' and 'sure conclusions' to be arrived at on the touchstone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record.

Conclusion:

15. In view of the foregoing discussions, I am of the humble view that the prosecution has utterly failed to establish any of the charges against the appellants and accordingly, the impugned judgment and order of conviction and sentence passed by the learned trial Court is not sustainable in the eye of law. The conviction of the appellants under sections 498-A/306 of the Indian Penal Code is hereby set aside. The appellants are on bail by virtue of the order dated 30.05.2003 passed by this Court in Misc Case No.228 of 2003. They are discharged from liability of their bail bonds. The personal bonds and the sureties bonds stand cancelled.

Accordingly, the Jail Criminal Appeal stands allowed.

Trial Court records with a copy of this judgment be communicated to the concerned Court forthwith for information and necessary action.

Before parting with the case, I would like to put on record my appreciation to Mr. Gaurav Das, the learned counsel for the appellants 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 - 1092

S.K. SAHOO, J.

CRLA NO. 06 OF 2023

SHIBA PRASAD SINGH & ANR. .....Appellants

.V.

STATE OF ODISHA (OPID) .....Respondent

(A) CODE OF CRIMINAL PROCEDURE,1973 – Section 239 – Principle for discharge of an accused and duty of the court – Explained with reference to case laws. (Para 6)

(B) NEGOTIABLE INSTRUMENT ACT, 1881 – Section 138 – Essential ingredients which are to be satisfied for make out a case U/s.138 of the Act – Discussed. (Para 7

Case Laws Relied on and Referred to :-

1. (2018) 72 OCR 69 : Gajanan Property Dealer and Construction Pvt. Ltd. & Ors. Vs. State of Orissa & Anr.
2. (2012) 9 SCC 460 : Amit Kapoor Vs. Ramesh Chander & Anr.
3. (2022) 87 OCR 818 : Ramesh Chandra Sahu Vs. State of Odisha (OPID)
4. (1999) 4 SCC 690 : Arun Vyas and Ors. Vs. Anita Vyas.
5. 1982 CLJ 819 :State of West Bengal Vs. Swapan Kumar Guha.
6. (1980) 4 SCC 507 : Srinivasa Enterprises Vs. Union of India.

For Appellants : Mr. Soura Chandra Mohapatra,Sr. Adv.

For Respondent: Mr. Bibekananda Bhuyan
Mr. J.P. Patra, Special Counsel (OPID)

ORDER Date of Hearing: 11.07.2023:Date of Order: 24.07.2023

S.K. SAHOO, J.

The appellants Shiba Prasad Singh and Chaitanya Kumar Rout have filed this appeal under section 13 of the Odisha Protection of Interest of Depositors (in Financial Establishments) Act, 2011 (hereafter 'OPID Act') challenging the order dated 05.12.2022 passed by the learned Presiding Officer, Designated Court under

O.P.I.D. Act, Cuttack in C.T. Case No.12 of 2018 in rejecting the petition filed by them under section 239 of Cr.P.C. to discharge them from the case. The said case arises out of Choudwar P.S. Case No.266 of 2015.

2. On 12.11.2015 one Abakash Swain and others lodged the first information report before the Inspector in-charge of Choudwar police station stating therein that the appellants opened one shop styled as 'Maa Sarala Insurance and Investment' (hereafter 'the company') in the market complex of Kalinga chhak, Choudwar and by alluring people of higher returns, they collected huge amount and in lieu of that, issued cheques of different banks to the depositors and some persons invested money after executing agreements. It is stated that when the depositors approached the bank for encashment of the cheque amount, they found that there was no money in the account of the appellant no.1 Shiba Prasad Singh to honour the cheques issued by him. When the depositors, who had executed agreements, contacted the appellant no.1 to get back the refund of their money, they were told that he was not in a position to refund. In the first information report, the name of nineteen depositors and cheque amount of each of the depositors has been mentioned.

On the basis of such first information report, Choudwar P.S. Case No.266 dated 12.11.2015 was registered under sections 420, 468, 471 read with section 34 of the Indian Penal Code. The Inspector in-charge directed D.K.M. Bhuyan, S.I. of Police, TPM OP, Cuttack to investigate the matter.

During course of investigation, the Investigating Officer visited the spot, examined the informant and other witnesses, seized cheques of different banks issued by the appellant no.1 from depositors and left the same in the zima of the concerned persons. The office of the company was searched and it was ascertained that the office was closed since 2013 and the room was under lock and key by the owner Rabinarayan Sahu. The Investigating Officer verified the issued cheques at all the banks of Cuttack, Choudwar and Jagatpur and found that no cash was available in the respective accounts of appellant no.1. On conclusion of investigation, charge sheet was submitted under sections 420/468/34 of the Indian Penal Code, sections 4/5/6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 (hereinafter '1978 Act') and section 6 of the OPID Act, 2011 and section 138 of the Negotiable Instruments Act, 1881 against both the appellants.

3. The appellants filed the petition for discharge under section 239 of Cr.P.C., however, the learned trial Court has been pleased to observe that prima facie there is sufficient material to presume that the appellants have committed the offences under which the charge sheet has been submitted and accordingly, rejected the discharge petition.

4. On 14.03.2023, when the matter was taken up, the learned Special Counsel appearing for the State of Odisha in OPID Act placed the written instruction received from the Inspector in-charge of Choudwar police station wherein it is

indicated that the total money collected was Rs.70,14,700/- (rupees seventy lakhs fourteen thousand and seven hundred) from twelve investors and though as per the F.I.R., the total money collected was Rs.97,01,700/- (rupees ninety seven lakhs one thousand and seven hundred) from nineteen investors, but the rest investors did not cooperate with the investigation and therefore, the exact amount of investment by them could not be ascertained and it is further mentioned that the appellant no.1 was the proprietor of the company.

When on 14.03.2023 a query was made to the learned Special Counsel for the State as to what amount each of those twelve investors invested in the company and what are the documentary proof in respect of such deposits and whether the same were seized during the course of investigation and whether any letters of the banks from which instructions were stated to have been obtained that the appellant no.1 was having no money in his accounts to honour the cheques issued the investors have been seized during the course of investigation, he took time to obtain instruction in that respect.

Letter dated 27.03.2023 of the Inspector in-charge of Choudwar police station was produced by the learned Special Counsel for the State on 09.05.2023 in pursuance of the order dated 14.03.2023 wherein the names of twelve investors and the amount invested by each of them in the company has been reflected. It was further mentioned that during course of investigation, the investors did not submit any documentary proof in respect of such deposits and they stated that the appellant no.1 had not issued them any document in lieu of their deposits. However, they submitted their individual security cheques issued by the appellant no.1, which were seized from them. It is further mentioned therein that no letters of the banks from which the instructions were taken that the appellant no.1 was having no money to honour the issued cheques have been seized. Learned Special Counsel for the State on 11.07.2023 produced the letter dated 03.07.2023 of the Inspector in-charge of Choudwar police station, Cuttack wherein the photocopies of the cheques issued to the depositors were filed along with the copy of one agreement executed between the investor and the appellant no.1.

5. Mr. Soura Chandra Mohapatra, learned Senior Advocate appearing for the appellants submitted that there are no materials on record that the informant and others were induced by the appellants to invest money in the Company and they were deceived and there is no prima facie material that the so-called invested money were ever given to the appellants by the informants. Learned counsel further submitted that the statements recorded during course of investigation would indicate that the cheques which were issued in favour of the depositors were never deposited in the banks and thus, the cheques were not dishonoured and once the cheques are neither deposited in the banks nor dishonoured, the ingredients of the offence under section 138 of the N.I. Act are not attracted. It is further argued that there is also no clinching material on record to show that the ingredients of the offences under 1978

Act are made out. It is further argued that so far as the offence under section 6 of the OPID Act is concerned, one of the ingredients required is that the financial establishment must default in returning the deposit or default in payment of interest on the deposit made and when the appellant no.1 has issued the cheques to the depositors and the depositors have not deposited the same in the banks and no bank documents were seized to show that the appellant no.1 was having no money in his accounts to honour the cheques either at the time of issuance of cheque or during its validity period, it cannot be said that he has defaulted in returning the deposit or defaulted in payment of interest on the deposit and therefore, it is a fit case where the appellants should be discharged of all the offences under which charge sheet has been filed against them. Learned counsel for the appellants placed reliance in the case of **Gajanan Property Dealer and Construction Pvt. Ltd. and Others -Vrs.- State of Orissa and another reported in (2018) 72 Orissa Criminal Reports 69**, **Amit Kapoor -Vrs.- Ramesh Chander and another reported in (2012) 9 Supreme Court Cases 460** and **Ramesh Chandra Sahu -Vrs.- State of Odisha (OPID) reported in (2022) 87 Orissa Criminal Reports 818**.

Mr. Bibekananda Bhuyan and Mr. J.P. Patra, learned Special Counsel appearing for the State of Odisha in OPID Act matters, on the other hand, submitted that at this stage, the Court is not required to assess the evidence or to have a roving inquiry as to whether on the basis of available materials on record, the prosecution would succeed in establishing the guilt of the appellants. If there are grounds for presuming that the appellants have committed the offence basing on the oral as well as documentary evidence on record, the Court should not discharge the appellants. Reliance was placed in the case of **Prasan Kumar Patra -Vrs.- State of Odisha reported in (2021) 84 Orissa Criminal Reports 1**.

Principle for discharge of an accused under section 239 Cr.P.C.:

6. Section 239 of Cr.P.C., inter alia, provides that if upon considering the police report and the documents sent with it under section 173 of Cr.P.C. and making such examination, if any, of the accused and after giving prosecution and accused an opportunity being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused and record his reasons for so doing. The object of discharge under section 239 of Cr.P.C. is to save the accused from unnecessary and prolonged harassment. When the allegations are baseless or without foundation and no prima facie case are made out, it is just and proper to discharge the accused to prevent abuse of process of the Court. If there is no ground for presuming that accused has committed an offence, the charges must be considered to be groundless. The ground may be any valid ground including the insufficiency of evidence to prove the charge. When the materials at the time of consideration for framing the charge are of such a nature that if unrebutted, it would make out no case whatsoever, the accused should be discharged. Appreciation of evidence is an exercise that a Court is not to undertake at the stage of consideration

of the application for discharge. The truth, veracity and effect of the materials proposed to be adduced by the prosecution during trial are not to be meticulously adjudged. The likelihood of the accused in succeeding to establish his probable defence cannot be a ground for his discharge. (Ref: **Gajanan Property Dealer and Construction Pvt. Ltd.** (supra)

In the case of **Arun Vyas and Ors. -Vrs.- Anita Vyas reported in (1999) 4 Supreme Court Cases 690**, the Hon'ble Supreme Court held that a perusal of section 239 Cr.P.C. shows that the Magistrate has to discharge the accused, if (1) on consideration of (a) the police report, (b) the documents filed under section 173 Cr.P.C.; and (2) making such examination, if any, of the accused as the Magistrate thinks necessary; and (3) after giving the prosecution and the accused an opportunity of being heard, he considers charge against the accused to be groundless. This section, however, casts an obligation on the Magistrate to record his reasons for holding that the charge is groundless and discharging the accused. Section 239 Cr.P.C. has to be read along with section 240 Cr.P.C. If the Magistrate finds that there is prima facie evidence or the material against the accused in support of the charge (allegations), he may frame charge in accordance with section 240 Cr.P.C., but if he finds that the charge (the allegations or imputations) made against the accused do not make out a prima facie case and do not furnish basis for framing charge, it will be a case of charge being groundless, so he has no option but to discharge the accused.

In the case of **Amit Kapoor** (supra), it is held as follows:-

> "25.…We have already indicated above that framing of charge is the first major step in a criminal trial where the Court is expected to apply its mind to the entire record and documents placed therewith before the Court. Taking cognizance of an offence has been stated to necessitate an application of mind by the Court but framing of charge is a major event where the Court considers the possibility of discharging the accused of the offence with which he is charged or requiring the accused to face trial. There are different categories of cases where the Court may not proceed with the trial and may discharge the accused or pass such other orders as may be necessary keeping in view the facts of a given case. In a case where, upon considering the record of the case and documents submitted before it, the Court finds that no offence is made out or there is a legal bar to such prosecution under the provisions of the Code or any other law for the time being in force and there is a bar and there exists no ground to proceed against the accused, the Court may discharge the accused."

Thus, in view of the settled position of law, at the stage of framing of charge, the Court is required to evaluate the materials and documents on record with a view to finding out if the facts emerging there from, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offences. The Court is not expected to go deep into the probative value of the materials on record at this stage. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has

been made out. At that stage, even strong suspicion founded on material which leads the Court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.

Whether police report and the documents filed under section 173 Cr.P.C. disclose the offences:-

Offence under section 138 of the N.I. Act:

7. Adverting to the contentions raised by the learned counsel for the respective parties, let me first deal with the offence under section 138 of the N.I. Act under which charge sheet has been submitted against the appellants.

The object of bringing section 138 of the N.I. Act on statute is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. The provision was enacted to punish those unscrupulous persons who purported to discharge their liability by issuing cheques without really intending to do so, which was demonstrated by the fact that there was no sufficient balance in the account to discharge the liability. With a view to avoid unnecessary prosecution of an honest drawer of a cheque, or to give an opportunity to the drawer to make amends, the proviso to section 138 provides that after dishonour of the cheque, the payee or the holder of the cheque in due course must give a written notice to the drawer to make good the payment. Clause (c) of proviso to section 138 provides that the section shall not apply unless the drawer of the cheque fails to make the payment within fifteen days of the receipt of the said notice. The ingredients, which are to be satisfied for making out a case under section 138 of the N.I. Act against a person are that **(i)** such person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability; **(ii)** that cheque has been presented to the bank within a period of three months (the period has been reduced from six months to three months w.e.f. 01.04.2012) from the date on which it is drawn or within the period of its validity, whichever is earlier; **(iii)** that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made by the bank; **(iv)** the payee or holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; **(v)** the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within fifteen days of receipt of the said notice.

In the case in hand, even though the statements of the investors recorded during investigation by the Investigating Officer indicate that they deposited certain

amount in the company and the appellant no.1 issued cheques in their favour, but there is no material on record that the cheques were ever presented in the bank within the stipulated period for encashment and the same were dishonoured. Moreover, law is well settled that the Court can take cognizance of the offence under section 138 of the N.I. Act and proceed with the same on the basis of private complaint, if the allegations per se show that complainant had complied sections 138 and 142 of the N.I. Act. Section 2(d) of the Code of Criminal Procedure, 1973 defines 'complaint'. According to this definition, 'complaint' means any allegation made orally or in writing to a Magistrate with a view to taking his action against a person who has committed an offence, but it does not include a police report. However, in view of explanation to section section 2(d) of Cr.P.C., a report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant. In view of the offences under which chargesheet has been filed, explanation to section 2(d) of Cr.P.C. has got no application in this case.

Mr. Bibekananda Bhuyan, learned Special Counsel also fairly submitted that there is no material to attract the ingredients of the offence under section 138 of the N.I. Act.

In view of the foregoing discussions, I am of the humble view that the submission of charge sheet under section 138 of the N.I. Act is unjustified and therefore, the appellants are discharged from such offence.

Offence under section 6 of the O.P.I.D. Act:

8. In the case of **Ramesh Chandra Sahu** (supra), it is held as follows:-

> "6. Section 6 of the O.P.I.D. Act deals with punishment for default in repayment of deposits and interests honouring the commitment. In order to attract the ingredients of the offence, the following aspects are to be proved:-
>
> (i) Default in returning the deposit by any Financial Establishment; or
>
> (ii) Default in payment of interest on the deposit or failure to return in any kind by any Financial Establishment; or
>
> (iii) Failure to render service by any Financial Establishment for which the deposits have been made.
>
> In the event any of the aforesaid aspects is proved, every person responsible for the management of the affairs of the Financial Establishment shall be held guilty. 'Financial Establishment' has been defined under section 2(d) of the O.P.I.D. Act and 'deposit' has been defined under section 2(b) of the O.P.I.D. Act. The word 'default' in section 6 of the O.P.I.D. Act has been used in conjunction with honouring the commitment and therefore, it depends upon the reciprocal promises."

In the case of **Prasan Kumar Patra** (supra), it is held that so long as financial establishment fails to render service for which deposit is accepted, it would

be a continuing offence irrespective of fact that deposit was accepted prior to the O.P.I.D. Act came into force.

The statements of depositors recorded during investigation indicate that both the appellants opened the company and they allured the depositors for investment in the company with assurance of higher returns and accordingly, they deposited money in the company. Learned counsel for the appellants submitted that there are no documentary proof collected during course of investigation as to whether the deposits were made by the depositors at one time or on different dates and if so, by what mode and whether receipts of the deposits were collected by the depositors in token of their deposits. When no receipts showing deposit of the money in the company were issued in favour of the depositors, only signed cheques of the appellant no.1 were issued as appears from case records, the question of seizure of deposit receipts does not arise. One Xerox copy of agreement executed between the appellant no.1 and one of the depositors along with the cheques issued in favour of depositors by the appellant no.1 on behalf of the company has been filed with a memo by the learned Special Counsel appearing for the State of Odisha during argument. The list of depositors along with money invested by them has been submitted before this Court by the learned Special Counsel. Learned counsel for the appellants submitted that no documents of the company have been seized to show any advertisements etc. were issued by the company to allure the depositors. It cannot be lost sight of the fact that the case was instituted on 12.11.2015 and it was ascertained during investigation that the office of Company was closed since 2013 and the room was under lock and key by the owner Rabinarayan Sahu. Therefore, causing disappearance of documents of the company, if any, cannot be ruled out.

The witnesses have stated that though they were issued cheques by the appellant no.1 after depositing money in the company, but when they enquired in the bank, they came to know that there was no money available in the accounts of the appellant no.1 to honour the cheques. Learned counsel for the appellants argued that no letters from the Bank Managers of the concerned banks have been seized by the I.O. to that effect. Learned Special Counsel for the State on the other hand placed the case diary, where there is mention which banks and which accounts were verified by the I.O. and when and it was found that there was no credit/debit in the name of the Company's account. Of course, no documents were collected from the concerned Branch Managers where the appellant no.1 had accounts.

The learned counsel for the appellants argued that the bald statements of some depositors indicate that they had invested some money in the company and cheques were issued by the appellant no.1 which were never presented in the bank for encashment and thus, in absence of any clinching material on record that the appellant no.1 had no such money in his accounts to honour the cheques, the allegations are baseless and without foundation and no prima facie case is made out against the appellants and there is no ground to presume that the appellants have committed the offences under which charge sheet has been submitted.

Even though the cheques issued by the appellant no.1 were not presented by the depositors after they came to know from inquiry made in the concerned banks that there were no such amount of money available in the accounts of the appellant no.1 to honour such cheques, but materials on record indicate that the appellants have failed to render service for which deposits were accepted and it would be a continuing offence irrespective of fact that deposits were accepted prior to the O.P.I.D. Act came into force as held in the case of **Prasan Kumar Patra** (supra) and thus it cannot be said that framing of charge under section 6 of the O.P.I.D. Act would be groundless.

Offence under section 420 of the Indian Penal Code:

9. Section 415 of the Indian Penal Code defines 'cheating'. To attract the ingredients of cheating, (i) there should be fraudulent or dishonest inducement of a person by deceiving him; (ii) (a) the person so induced should be intentionally induced to deliver any property to any person or to consent that any person shall retain any property, or (b) the person so induced should be intentionally induced to do or to omit to do anything which he would not do or omit if he were not so deceived; and (iii) in cases covered by (ii) (b) above, the act or omission should be one which caused or is likely to cause damage or harm to the person induced in body, mind, reputation or property. A fraudulent or dishonest inducement is an essential ingredient of the offence. A person who dishonestly induces another person to deliver any property is liable for the offence of cheating.

Similarly, the ingredients to constitute an offence under section 420 of the Indian Penal Code, which deals with cheating and dishonestly inducing delivery of property, are as follows: (i) A person must commit the offence of cheating under section 415; and (ii) the person cheated must be dishonestly induced to (a) deliver property to any person; or (b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security. Cheating is an essential ingredient for an act to constitute an offence Under section 420 of the Indian Penal Code.

The statements on record indicate as to how false promises were made to the depositors that their investment of money would result in getting higher interest. On good faith, they being deceived by such false promises, seem to have invested money in the company for which they suffered wrongful loss and the company in turn got wrongful gain. Therefore, there are prima facie materials to attract the ingredients of offence under section 420 of the Indian Penal Code.

Offence under section 468 of the Indian Penal Code:

10. Section 468 of the Indian Penal Code deals with forgery for the purpose of cheating. The prosecution must prove that the document is a forged one and that the accused forged the document and that he did it for the purpose that the forged document would be used for the purpose of cheating. One must be found to have

done 'forgery' within the meaning of section 463 of Indian Penal Code which again implies that there has to be the making of a false document in terms of section 464 of Indian Penal Code. On a conjoint reading of section 463 and 464 of the Indian Penal Code goes to show that two essential elements of 'forgery' contemplated under section 463 of Indian Penal Code are (i) the making of a false documents or part of it and (ii) such making is with such intention as is specified in the section. These aspects are required to be established. The available materials on record do not indicate which forged documents the appellants created that they used for the purpose of cheating of the depositors. In my humble view, there are no prima facie materials to make out the ingredients of the offence under section 468 of the Indian Penal Code and thus, submission of charge sheet under section 468 of the Indian Penal Code is unjustified and therefore, the appellants stand discharged from such offence.

Offences under section Sections 4/5/6 of the 1978 Act:

11. The Preamble of 1978 Act declares that it has been enacted "to ban the promotion or conduct of prize chits and money circulation schemes and for matters connected therewith and incidental thereto".

The phrase `money circulation scheme' is defined in clause (c) of section 2 of 1978 Act which reads as under:

> "2(c). "money circulation scheme" means any scheme, by whatever name called, for the making of quick or easy money, or for the receipt of any money or valuable thing as the consideration for a promise to pay money, on any event or contingency relative or applicable to the enrolment of members into the scheme, whether or not such money or thing is derived from the entrance money of the members of such scheme or periodical subscriptions".

In the case of **State of West Bengal -Vrs.- Swapan Kumar Guha reported in 1982 Criminal Law Journal 819**, Chandrachud, C.J. after taking note of legislative drafting, reshaped and rearranged section 2(c) thus;

> 'money circulation scheme' means any scheme, by whatever name called,
>
> (i) for the making of quick or easy money, or
>
> (ii) for the receipt of any money or valuable thing as the consideration for a promise to pay money, on any event or contingency relative or applicable to the enrolment, of members into the scheme, whether or not such money or thing is derived from the entrance money of the members of such scheme or periodical subscriptions;

The phrase `prize chit' is defined in clause (e) of section 2 of 1978 Act.

> "2(e). "prize chit" includes any transaction or arrangement by whatever name called under which a person collects whether as a promoter, foreman, agent or in any other capacity, monies in one lump sum or in installments by way of contributions or subscriptions or by sale of units, certificates or other instruments or in any other manner or as membership fees or admission fees or service charges to or in respect of any savings, mutual benefit, thrift, or any other scheme or arrangement by whatever name

called, and utilises the monies so collected or any part thereof or the income accruing from investment or other use of such monies for all or any of the following purposes, namely :-

(i) giving or awarding periodically or otherwise to a specified number of subscribers as determined by lot, draw or in any other manner, prizes or gifts in cash or in kind, whether or not the recipient of the prize or gift is under a liability to make any further payment in respect of such scheme or arrangement.

(ii) refunding to the subscribers or such of them as have not won any prize or gift, the whole or part of the subscriptions, contributions or other monies collected, with or without any bonus, premium, interest or other advantage by whatever name called, on the termination of the scheme or arrangement, or on or after the expiry of the period stipulated therein,

but does not include a conventional chit."

Section 3 bans prize chit and money circulation schemes or enrolment as member to any such scheme or participation in such chit or scheme. Sections 4 and 5 are penal provisions and prescribe punishment. Section 6 deals with offences committed by Companies.

From the perusal of the above provisions, it is clear that the 1978 Act prohibits `money circulation scheme'. It is, therefore, necessary that the activity charged as falling within the mischief of the Act, must be shown to be a part of the scheme for making quick or easy money depending upon the happening or non-happening of an event or contingency relative or applicable to the enrolment of members into the scheme. Therefore, a transaction under which, one party deposits with the other or lends to that other a sum of money on promise of being paid interest at a rate higher than the agreed rate of interest cannot, without more, be a 'money circulation scheme' within the meaning of Section 2(c) of the Act, howsoever high the promised rate of interest may be in comparison with the agreed rate. What that section requires is that such reciprocal promises, express or implied, must depend for their performance on the happening of an event or contingency relative or applicable to the enrolment of members into the scheme. In other words, there has to be a community of interest in the happening of such event or contingency.

There is lack of materials on record to show that there was any 'money circulation scheme' floated by the appellants. Nothing has been seized in that respect.

In the case of **Srinivasa Enterprises -Vrs.- Union of India reported in (1980) 4 Supreme Court Cases 507**, Hon'ble Justice V.R. Krishna Iyer (as His Lordship then was) while discussing the definition of 'prize chit' as per section 2(e) of 1978 Act held as follows:-

"The quintessential aspects of a prize chit are that the organizer collects moneys in lump sum or installments, pursuant to a scheme or arrangement, and he utilises such moneys

> as he fancies primarily for his private appetite and for (1) awarding periodically or otherwise to a specified number of subscribers, prizes in cash or kind and (2) refunding to the subscribers the whole or part of the money collected on the termination of the scheme or otherwise. The apparent tenor may not fully bring out the exploitative import lurking beneath the surface of the words which describe the scheme. Small sums are collected from vast numbers of persons, ordinarily of slender means, in urban and rural areas. They are reduced to believe by the blare of glittering publicity and the dangling of astronomical amounts that they stand a chance-in practice, negligible-of getting a huge fortune by making petty periodical payments. The indigent agrestics and the proletarian urbanites, pressured by dire poverty and doped by the hazy hope of a lucky draw, subscribe to the scheme although they can ill-afford to spare any money. This is not promotion of thrift or wholesome small savings because the poor who pay, are bound to continue to pay for a whole period of a few years over peril of losing what has been paid and, at the end of it, the fragile prospects of their getting prizes are next to nil and even the hard-earned money which they have invested hardly carries any interest. They are eligible to get back the money they have paid in driblets, virtually without interest, the expression 'bonus' in Section 2(a) being an euphemism for a nominal sum. What is more, the repayable amount being small and the subscribers being scattered all over the country, they find it difficult even to recover the money by expensive, dilatory litigative process."

In the factual scenario, I am of the humble view that it is neither a case of `money circulation scheme' nor a case of 'prize chit' and therefore proceedings against the appellants sections 4/5/6 of the 1978 Act are liable to be dropped and they are entitled to be discharged from such offences.

Conclusion:

12. In view of the foregoing discussions, I am of the considered opinion that on the basis of the available materials on record, it cannot be said that no prima facie case for the commission of offences alleged against the appellants is made out under sections 420/34 of the Indian Penal Code and section 6 of the O.P.I.D. Act and that there is no ground to presume that they have committed such offences and therefore, if the proceeding is allowed to continue against the appellants for such offences, it would result in the miscarriage of justice. The learned trial Court was partially justified in rejecting the petition filed by the appellants under section 239 of Cr.P.C. and therefore, the impugned order dated 05.12.2022 passed by the learned Presiding Officer, Designated Court under O.P.I.D. Act, Cuttack in C.T. Case No.12 of 2018 in rejecting the petition for discharge except for the offences under section 468 of the Indian Penal Code, sections 4/5/6 of the 1978 Act and section 138 of the N.I. Act stands confirmed. The learned trial Court shall now proceed to frame charges under sections 420/34 of the Indian Penal Code and section 6 of the O.P.I.D. Act against the appellants and expedite the trial as the F.I.R. was instituted on 12.11.2015 and charge sheet was submitted on 17.05.2018 and more than five years have passed in the meantime and the investors are waiting since last so many years after they have invested their hard earned money in the company to get justice.

Accordingly, the CRLA allowed in part.

A copy of the order be communicated to the learned trial Court by the Registry.

2023 (II) ILR – CUT -1104

S.K. SAHOO, J.

CRIMINAL APPEAL NO.136 OF 1993

OM PRAKASH AGARWALLA .....Appellant

.V.

S.C. DAS, INSPECTOR,
VIGILANCE, C.D., CUTTACK .....Respondent

(A) ESSENTIAL COMMODITIES ACT, 1955 – Section 7 r/w clause 2(a), 2-A and sub-clause (3) of clause 3 of Orissa sugar dealers licensing order, 1963 – The appellant have been charged for contravening the provision of 1963 order punishable under Sec 7 of the E.C. Act – The restriction on bulk consumer not to keep sugar in excess of 100 quintals without prior approval of licensing authority came into force by way of a notification dt.02.03.1990 – Prior to that there was no restriction – Whether storage of hundred quintals of sugar as on 02.12.1986 can be said as contravention of any provisions of 1963 order – Held, No. – Since there was no restriction of any quantity of storage for the bulk consumer as on date of occurrence it cannot be said that there was any contravention of the provisions of 1963 order by the Appellant. (Para-9)

(B) WORD – "Confectionary"– Define with reference to Judicial Precedents. (Para-7)

Case Laws Relied on and Referred to :-

1. A.I.R. 1963 Madras 460 : M/s. Parry and Co. Ltd. Vs. Perry and Co.
2. 1977 CLJ1341 : Sadanand Khanchand & Anr. Vs. The State of Maharashtra & Anr.
3. (1998) 7 SCC 228 : Pappu Sweets and Biscuits & Anr. Vs. Commissioner of Trade Tax, U.P., Lucknow

For Appellant : Mr. Dayananda Mahapatra

For Respondent: Mr. M.S. Rizvi, Addl. Standing Counsel

JUDGMENT Date of Hearing and Judgment: 27.07.2023

S.K. SAHOO, J.

This appeal has been filed by the appellant Om Prakash Agarwalla challenging the order dated 07.05.1993 of the learned Special Judge, Cuttack in G.R. Case No.72 of 1986 in finding him guilty under section 7 of the Essential Commodities Act, 1955 (hereinafter 'E.C. Act') for contravening the provisions of Orissa Sugar Dealers Licensing Order, 1963 (hereinafter '1963 Order') and sentencing him to undergo S.I. for six months and to pay a fine of Rs.1,000/- (rupees one thousand), in default, to undergo S.I. for one month.

2. The prosecution case, as per the written report (Ext.3) submitted by Sri Sarat Chandra Das (P.W.3), Inspector, Vigilance, C.D., Cuttack before the Superintendent of Police, Vigilance, Cuttack Division, Cuttack on 02.12.1986 is that he received reliable information regarding clandestine business of sugar by accused no.1, M/s. Sankar Misri Factory. Therefore, he (P.W.3) along with Inspector D.B. Tripathy, proceeded to the spot and traced out accused no.1. The appellant Om Prakash Agrawalla was the proprietor of M/s. Sankar Misri Factory which was situated at Malgodown, Cuttack. During inspection, the informant came to know that the appellant is the owner of Misri Factory in Meria Bazar, who lifted 200 packets of imported sugar (Philippines) from Orissa Consumers Cooperative Federation, Malgodown Branch, Cuttack on 22.11.1986 under receipt no.13183 dated 21.11.1986 for Rs.52,000/- (rupees fifty two thousand), each packet weighed 50 kgs and stored those 100 quintals of sugar in M/s. Santholia Brothers, which is owned by the brother of the appellant. When the appellant was interrogated, he denied to have possessed any sugar licence for dealing with such purchase and storage.

On verification of the shop of the accused no.2 Laxmidhar Pradhani, the informant also came to know that he did not have a valid licence for carrying on business in sugar and accordingly, the first information report was lodged against both the accused for having contravened the provisions of 1963 Order punishable under section 7 of the E.C. Act.

3. The defence plea of the appellant was that he owned a Misri Factory for which there was no necessity for having any licence and without any licence, one can possess 100 quintals of sugar and he would come within the definition of 'bulk consumer'. The defence plea of accused no.2 Laxmidhar Pradhani, the Branch Manager of Orissa Consumers Cooperative Federation Ltd., Malgodown Branch, Cuttack was that he had a licence for dealing with the sugar and he has been falsely entangled in the case.

4. The prosecution in order to establish its case examined four witnesses.

P.W.1 Santosh Kumar Agarwalla is the nephew of the appellant and he stated that the appellant had stored 100 quintals of sugar in 200 packets, which were imported from Philippines, in his godown known as 'M/s. Santholia Brothers, Malgodown, Cuttack' and the same was seized by the police and it was kept in his zima as per zimanama (Ext.1) and he is a witness to the said zimanama.

P.W.2 Banabasi Tripathy was the Inspector of Vigilance and he stated to have accompanied Sarat Chandra Das (P.W.3), Inspector of Vigilance to Malgodown, Cuttack on 22.11.1986 and found the appellant was in possession of 200 packets of imported Philippines sugar, each containing 50 kgs of sugar. He further stated about the presence of the appellant in the godown and the appellant failed to produce any licence or authority to purchase and store the sugar in the godown of M/s. Santholia Brothers. He proved the seizure list (Ext.2).

P.W.3 Sarat Chandra Das was the Inspector, Vigilance, Cuttack and he along with P.W.2 on receipt of reliable information of storage of 200 packets of imported sugar in Sankar Misri Factory of Malgodown, Cuttack proceeded to the spot and seized the sugar under seizure list (Ext.2) and after preliminary enquiry, he submitted the report to the Superintendent of Police, Vigilance.

P.W.4 Nityananda Dalai was the Inspector, Vigilance, who registered the case against the accused persons under section 7 of the E.C. Act for the contravention of 1963 Order. He stated to have seized the 200 packets of sugar and bills of the sugar from Orissa Consumer Cooperative Federation, Cuttack. He seized some documents from the Consumer Society, dealership licence of Consumer Society, recorded the statements of the witnesses and on completion of investigation, submitted final form.

The prosecution exhibited nine documents. Ext.1 is the zimanama in respect of 100 quintals of sugar in 200 packets, Ext.2 is the seizure list of 200 packets of imported sugar from Philippines (each packet containing 50 kgs.), Ext.3 is the written F.I.R., Ext.4 is the seizure list of bills of 200 packets of sugar, Ext.5 is the seizure list of registration certificate of sales tax, Ext.6 is the seizure list of purchase register from Radheshyam Agarwal relating to the period from 19.12.1986 to 30.12.1986, Ext.7 is the zimanama of registers under the custody of Santholia Brothers, Ext.8 is the seizure list of stock book relating to the year 1986-87 and Ext.9 is the zimanama.

The defence has not examined any witness, however exhibited one document. Ext.A is the original licence.

5. The learned trial Court after analyzing the oral as well as documentary evidence on record came to hold that from Ext.A, it is crystal clear that Orissa Consumers Cooperative Federation, Bhubaneswar, is declared as a licencee since 1989-90 and therefore, the prosecution story that the accused no.2 did not possess any valid licence for dealing with sugar, completely falls to the ground and accordingly, held that the prosecution is not able to make out any case against the accused no.2 Laxmidhar Pradhani. However, the learned trial Court held that the appellant was found to have been in possession of 100 quintals of sugar. Even if he is assumed to be a bulk consumer, he cannot store more than 10 quintals in view of sub-clause (3) of Clause 3 of 1963 Order. Though the appellant was having no licence still he was possessing 100 quintals of sugar. Thus, the trial Court held him to have contravened the provisions of 1963 Order and accordingly, he was found to be guilty.

6. Mr. Dayananda Mahapatra, learned counsel appearing for the appellant contended that the restriction on bulk consumer not to keep sugar in excess of 100 quintals without prior approval of licencing authority came into force by way of a notification dated 02.03.1990 and prior to that there was no such restriction and

therefore, the storage of 100 quintals of sugar as on 02.12.1986 cannot be said to be a contravention of any of the provisions of 1963 Order. Learned counsel further argued that the defence plea is consistent that the appellant was having a Misri Factory and 'Misri' would come under the definition of 'confectionery' and the definition of 'bulk consumer', as provided under Clause 2(a) of the 1963 Order, indicates that 'confectionery' would also come under the same. The appellant being a 'bulk consumer' and not a 'dealer', no licence was necessary for preparation of Misri and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. M.S. Rizvi, learned Additional Standing Counsel appearing for the Vigilance Department, on the other hand, supported the findings of the learned trial Court and submitted that since the quantity of the sugar seized in this case was more than 10 quintals and the appellant was having no licence for such storage, he can be said to have flouted sub-clause (3) of Clause 3 of 1963 Order and therefore, the appeal should be dismissed.

7. The term 'Bulk consumer' has been defined under Clause 2(a) of 1963 Order, which reads as follows:-

> "2(a). "bulk consumer" means jails, hospital, sanatoria, convalescent homes, nursing homes, orphanages, work houses, asylums, infirmaries, hostels, school, colleges, universities, bakeries, confectionaries, hostels and restaurants."

'Confectioneries' comes within the definition of 'bulk consumer' mentioned in Clause 2(a) of 1963 Order.

Clause 2-A deals with restriction on 'bulk consumers' and it reads as follows:-

> "**2-A. Restriction on 'Bulk consumers'**:-
>
> (1) A bulk consumer shall not store sugar in excess of 100 quintals in any calendar month without prior approval of the Licensing Authority.
>
> (2) If any bulk consumer stores sugar in excess of 100 quintals without the prior approval of the Licensing Authority, he shall be liable to pay a penalty not exceeding Rs.1,000/-, as may be determined by the Licensing Authority.
>
> (3) The provisions contained in Clause 16 shall mutatis mutandis apply in case of storage of sugar in excess of the limit prescribed under Sub-clause (1)."

The restriction under Clause 2-A came into operation vide notification dated 02.03.1990 i.e. much after the date of occurrence of this case.

Mr. Mahapatra drew the attention of the Court to some judicial precedents where the word 'confectionery' has been dealt with.

In the case of **M/s. Parry and Co. Ltd. -Vrs.- Perry and Co. reported in A.I.R. 1963 Madras 460**, a Division Bench of the Madras High Court held in paragraph-17 as follows:-

> "17. Confectionery therefore, is sweetmeat, while biscuit is in the nature of dry bread which has the characteristic of being baked. It cannot therefore be said that biscuit and confectionary are identical. But there can be fancy biscuits in which confectionery can be put on the top of them. But the essential characteristic of biscuit is different from that of confectionery. When therefore registration is granted under Trade Marks Act with respect to biscuit it cannot obviously give a right to its proprietor of the mark to use that trade mark for confectionery. If he does so and there is already a registered owner of the same or similar mark with respect to confectionery the latter can sustain an action for infringement."

In the case of **Sadanand Khanchand and another -Vrs.- The State of Maharashtra and another reported in 1977 Criminal Law Journal 1341**, a Division Bench of the Bombay High Court held as follows:-

> "xxx xxx It is obvious that an article of confectionery comes into being only as a result of a process of preparation in which several ingredients are used. It is obvious, therefore, that confectionery of the kind of a "China ball" will be included in prepared food and will not fall into the residuary item No.23."

The Hon'ble Supreme Court had the occasion to discuss the meaning of the term 'confectionary' in the case of **Pappu Sweets and Biscuits and another -Vrs.- Commissioner of Trade Tax, U.P., Lucknow reported in (1998) 7 Supreme Court Cases 228**, wherein it was observed as follows:-

> "6. xxx xxx The word 'confect' means 'to put together from varied material'. The term 'confection' means 'the act or processing of confecting as a fancy dish or sweetmeat or fruit or nut preserved for even a medical preparation made with sugar syrup or honey'. 'Confectionery' then means 'sweet edibles or the confectioner's act or business'.
>
> In Consolidated Glossary of Technical Terms Central Hindi Directorate, Ministry of Education, Government of India, (1962 Edition), 'confectionery' is defined as MISTHAN, MITHAI. In the English-Hindi Dictionary of Dr. Kamil Bulkey, the meaning of the word 'confectionery' is given as misthan, mithai, and sweetmeat has been described to mean as murabba, misthan, mithai. Thus, according to the dictionaries mithai is synonymous with 'sweetmeat' in English and that is why the English translation of the aforesaid notification correctly uses 'sweetmeat' as the English version of 'mithai'. There is no doubt that a toffee is a sweetmeat as understood by the people where toffee originated."

Learned counsel for the appellant submitted that there cannot be any dispute that the 'Misri' or 'sugar candy' would come within 'confectionery' and resultantly, it would also come within the definition of 'bulk consumer' as defined in Clause 2(a) of 1963 Order.

8. P.W.1 has stated that the appellant had purchased the sugar to manufacture sugar candy in his factory and his factory is located at Meria Bazar in Cuttack town and he had kept these sugar in his godown as there was want of space in his house. P.W.3, the Inspector, Vigilance has also stated that the appellant owns a Misri factory inside the premises and he could not say whether any licence is required or not for manufacture of Misri. Therefore, in view of the evidence of P.W.1 and

P.W.3, it becomes clear that the appellant was the owner of a Misri factory, which was located at Meria Bazar, Cuttack and the appellant had purchased the sugar for manufacturing sugar candy in his factory and due to non-availability of space in the house, he had stored the sugar in the godown situated at Malgodown, Cuttack. While answering to the question no.3 put by the learned trial Court under section 313 of the Cr.P.C., the appellant has taken a specific stand that he had purchased the sugar for preparation of Misri (sugar candy).

An accused is not required to prove its case beyond all reasonable doubts rather he can establish his defence plea by preponderance of probabilities. Against this factual backdrop, when the plea of the accused is supported by two of the prosecution witnesses and the prosecution has failed to prove any contrary evidence to that effect, the defence plea becomes acceptable.

9. Now, the question crops up for consideration as to if the appellant had kept the sugar for preparation of Misri (sugar candy) on 22.11.1986 in the store at Malgodown and whether he was required to obtain any licence as mentioned in sub-clause (3) of Clause 3 of 1963 Order or he being a 'bulk consumer' is not required to have a licence as per the said clause.

Clause 3 of 1963 Order deals with licencing of dealers and it states, inter alia, that no person shall carry on business as a dealer except under and in accordance with terms and conditions of a licence issued in this behalf by the licencing authority. 'Licencing authority' has been defined under Clause 2(c). Sub-clause (3) of Clause 3 of 1963 Order states that any person, who stores sugar in any quantity exceeding 10 quintals, at any one time shall, unless the contrary is proved, be deemed to store the sugar for the purpose of carrying on the business of purchase, or sale, or storage for sale, of sugar. In other words, if sugar in excess of 10 quintals is seized from a person, who has stored the same, it is to be deemed that he has kept it for business purpose or for sale and the contrary is to be proved by the alleging party that it was not meant for business purpose or sale. Since it has already been held that the sugar candy or Misri being the confectioneries are covered under the definition of 'bulk consumer', it is to be seen whether there is any kind of restriction on the bulk consumer. The learned trial Court has relied on the provision under Clause 2-A of the impugned order and held that even if it is assumed that the appellant is a bulk consumer, he cannot store more than ten quintals as per sub-clause (3) of Clause 3 of the 1963 Order. As already stated, the restriction under Clause 2-A of the 1963 Order came into force on 02.03.1990 which was much after the date of occurrence.

On a plain reading of the Clause 2-A, it would be apparent that if a bulk consumer stores sugar of 100 quintals or less in any calendar month then there would be no necessity of obtaining prior approval of the licencing authority. Only when the quantity of storage of sugar exceeds 100 quintals in any calendar month then it has to be done after obtaining prior approval of the licencing authority

otherwise, he would be liable to pay penalty as mentioned under Clause 2-A. The restriction of 10 quintals as mentioned under sub-clause (3) of Clause 3 in 1963 Order is meant for the 'dealers'. In other words, if somebody is a 'dealer' and does not come within the meaning of 'bulk consumer', he has to obtain licence to carry on his business as a dealer and in case of 'bulk consumer', only if he wants to keep in excess of 100 quintals then only he has to obtain approval of the licencing authority.

In the case in hand, since the defence plea that the sugar of 100 quintals was kept by the appellant for the purpose of 'confectioneries' and as his establishment comes within the definition of 'bulk consumer' and since there was no restriction of any quantity of storage for the 'bulk consumer' as on the date of occurrence, I am of the view that it cannot be said that there was any contravention of the provisions of sub-clause (3) of Clause 3 of 1963 Order by the appellant in possessing 100 quintals of sugar without any licence. Therefore, the conviction of the appellant under section 7 of the E.C. Act is not sustainable in the eye of law and the same is hereby set aside.

The appellant is acquitted of the charge.

Accordingly, the Criminal Appeal is allowed. The appellant is on bail by virtue of the order of this Court. He is discharged from liability of his bail bond. The personal bond and the surety bond hereby stand cancelled.

The lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.

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2023 (II) ILR – CUT - 1110

K.R. MOHAPATRA, J.

W.P.(C) NO.16627 OF 2016

RADHASHYAM MAHAKUR & ORS. .....Petitioners

.V.

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

ODISHA GRAMA PANCHAYAT ACT, 1964 – Section 149 – Fixation of head quarter of Grama Panchayat – Scope of Judicial interference – Held, the power to fix the GP headquarter is administrative in nature hence this court should not sat over the same as an appellate authority. (Para 6)

Case Laws Relied on and Referred to :-

1. 96 (2003) CLT 454 : Harihar Swain & Ors Vs. State of Orissa & Ors.
2. (2016) 121 CLT 152 : Keshab Sahukar Vs. State of Orissa Commissioner-cum-Secretary, Panchayatraj Department & Ors.

For Petitioners : Mr. Himansu Sekhar Mishra

For Opp. Parties : Mr. Baibaswata Panigrahi, ASC (For Opposite party Nos.1 to 3)
Mr. Amit Prasad Bose (For Interveners)

JUDGMENT Date of Judgment:17.04.2023

K.R. MOHAPATRA, J.

1. This matter is taken up by virtual/physical mode.

2. This Writ Petition has been filed assailing order dated 30th July, 2016 (Annexure-2) passed by Commissioner-cum-Secretary, Panchayatiraj Department, Government of Odisha-Opposite Party No.1, whereby a new Gram panchayat (GP), namely, 'Khursel' has been constituted by bifurcating 'Larambha' GP under Patnagarh block in the district of Balangir.

3. Mr. Mishra, learned counsel submitted that the villagers of Indupur under Patnagarh block are the Petitioners in this Writ Petition. Previously village Indupur was part and parcel of Larambha GP along with nine other villages. The State Government in the Department of Panchayatiraj in exercise of power under Section 149 of the Odisha Grama Panchayats Act, 1964 (for brevity 'the Act') issued Notification No.10729 of 1st July, 2015 (Annexure-1) prescribing norms, procedure and time table for reorganization and delimitation of Gramas of State of Odisha. Accordingly, process was initiated for reorganization and delimitation of Gramas throughout Odisha. However, without following the prescribed procedure prescribed under Annexure-1, Khursel GP has been constituted comprising of three villages, namely, Indupur, Khursel and Debabhuin bifurcating the same from Larambha GP. The Petitioners in particular and villagers of Indupur in general, who are natives of Indupur village, are facing immense difficulties after creation of Khursel GP.

3.1 It is his submission that taking into consideration the geographical barriers as well as location of the village,village Indupur should have been part and parcel of Larambha GP. Further, fixation of headquarter of GP at Khursel is contrary to the prescription under Clause-10 of Annexure-1, which provides as under:-

> *"10. ……..*
>
> *The following priority shall be given to cover the village as G.P. Headquarter;*
>
> *i) Population of 2,000 and above as 1st priority;*
>
> *ii) Population of 1,500 and above as 2nd priority;*
>
> *iii) Population of 1,000 and above as 3rd priority*
>
> *In case two or more villages come under the same category, then higher population, locational advantage and administrative convenience should be given preference for constitution of new Grama Panchayat headquarter.*

xx xx xx"

Since village Indupur has the highest number of population priority should have been given for fixation of headquarter of bifurcated GP at Indupur.

3.2 He further submitted that Annexure-II to the notification under Annexure-1 provides the procedure for reorganization and delimitation of Gramas. It provides that a Block Level Committee (BLC) will be constituted consisting of the concerned Block Development Officer,Tahasildar, Child Development Project Officer and Grampanchayat Extension Officer as its members, who are assigned to take up preparation of data sheet of proposed reorganization of Grama Panchayats by bifurcation or amalgamation of villages adjoining to the Grama as per law. The BLC will finalize the report within a month from the date of issue of notification by the Department and submit it to the District Level Committee (DLC) for verification and recommendation to the Government.Recommendation of the BLC along with trace map in distinguished colour for proposed new Grama Panchayat is to be furnished to the DLC who in turn scrutinize the same and make recommendation to the Government for creating of new Grama Panchayat. In the instant case, neither any BLC has been constituted for bifurcation of Larambha GP nor has any recommendation been made by the DLC to the State Government. The Government in Panchayatiraj Department took up the matter at its level and issued order under Annexure-2. Neither any objection was called for from the villagers nor was any opportunity of hearing given more particularly to the villagers of Indupur before issuing Annexure-2.

3.3 In the counter affidavit, it has been stated that pursuant to the direction of this Court in W.P.(C) No.8863 of 2016, the Commissioner-cum-Secretary, Panchayatiraj Department, took up the matter and issued Annexure-2, which is in flagrant violation of norms and procedure prescribed under Annexure-1 for creation of Grama Panchayats and fixation of headquarter. He, therefore, prays for setting aside the impugned order under Annexure-2.

3.4 It is his submission that in case it is held that creation of 'Khursel' as new GP is justified, the villagers of Indupur should be allowed to be with Larambha GP in view of geographical barriers as well as convenience of villagers of Indupur at large.

3.5 Mr. Panigrahi, learned ASC vehemently objected the submission made by learned counsel for the Petitioners. It is his contention that admittedly no recommendation was made by the DLC to the Government for creation of 'Khursel' GP in the instant case. But, one Subala Mahalinga and some villagers of Debhuin, Khursel and Indupur (interveners herein), had filed W.P.(C) No.8863 of 2016 before this Court with a prayer to constitute a new GP, namely, 'Khursel' by including the villagers of above named villages under Patnagarh block. This Court, vide order dated 24thJune, 2016, disposed of the said writ petition with a direction to the Petitioners therein to file appropriate application before Commissioner-cum-

Secretary, Panchayatiraj Department-Opposite Party No.1 along with a copy of the said order and in that event, the Opposite party No.1 was directed to consider and dispose of the same after affording reasonable opportunity of personal hearing to the parties within sixty days of receipt of such application. Accordingly, personal hearing in the matter was conducted by Opposite Party No.1 on 27th July,2016 at 11.30 AM in the Panchayatiraj Department Conference Hall in presence of District Panchayat Officer,Balangir along with interveners.Thereafter,order under Annexure-2 was issued constituting 'Khursel' GP consisting of three villages, namely, Indupur, Khursel and Debhuin. Considering that village Khursel is centrally located and keeping in mind the convenience of other two villagers, headquarter of the newly bifurcated GP was directed to be fixed at Khursel village.

3.6 It is his submission that population of a village is not the sole criteria to fix headquarter of a GP. It is keeping in mind the geographical contiguity, natural barriers and administrative convenience, distance factor from farthest villages of proposed GP headquarter; the same has been fixed at village 'Khursel'. Since the reconstitution of GP was undertaken pursuant to the direction of this Court, the procedure for reconstitution of GP by constituting BLC and consideration of their report was not necessary in the instant case. However, objections of the villagers and interveners were taken into consideration and they were given personal hearing as directed by this Court in W.P.(C) No. 8863 of 2016. Hence, no illegality has been committed by creating a new GP, namely, Khursel or fixing it's headquarter in that village.

3.7 Mr. Panigrahi, learned ASC further submitted that since creation of Khursel GP is the decision of the State Government in Panchayatiraj Department keeping in view the criteria provided under Annexure-1, this Court should not interfere with said decision like an appellate authority. In support of his decision, he relied upon the case of ***Harihar Swain and others Vs. State of Orissa and others***,reported in 96 (2003) CLT 454, wherein it is held as under:-

> *"6. Fixation of headquarters of a Grama Panchayat in any particular village is essentially an administrative matter and so long as relevant considerations have weighed with the Government, in fixing the headquarters in a particular village, the High Court cannot interfere with the decision of the Government like an Appellate Authority and quash the decision of the Government. While exercising power underjudicial review, the High Court under Article 226 of the Constitution has only to see whether the administrative power has been exercised within the limits of law and taking into account the relevant considerations and so long as the High Court is satisfied that the power has been exercised within the limits of law after taking into account the relevant considerations, the High Court will not interfere with the same on the ground that it should have been located at a different place."*

He also relied upon a decision in the case of ***Keshab Sahukar Vs. State of Orissa represented through Commissioner-cum-Secretary, Panchayatraj Department and others***, reported in (2016) 121 CLT 152, wherein at para-7, it is held as under:

"7. Sub-Section (3) of Section 4 of the Orissa Gram Panchayat Act, 1964 reads as follows :-

"(3) The office and headquarters of the Grama Sasan shall be situated within the limits of the Grama and unless otherwise ordered by the State Government in the village bearing the name of the Grama."

Interpreting the aforesaid provision, this Court in the case of Sarpanch, Allaori G.P. and others vs.State of Orissa and others, 2011 (Supp.-II) OLR -943, has held that, ordinarily the Headquarter of the Gram Panchayat should be fixed in the village bearing the name of the Grama. In appropriate case, it can be fixed in some other village. Almost same is the view of this Court in the case of Pedenti Malana and others vs. State of Orissa and others, 97 (2004) C.L.T. 607. So far as the power of the Government to locate the Headquarter of a Gram Panchayat is concerned, this Court in a catena of decisions has held that such power is an administrative power of the Government. This Court, in the case of Bijay Kumar Behera & others vs. State of Orissa & others, 91 (2001) C.L.T. 249, has held that discretion is vested upon the Government to locate the Headquarter of the Gram Panchayat.That discretionary power has to be exercised on relevant consideration germane to the issue and cannot be permitted to be exercised on extraneous consideration. Though the Court is restrained to interfere with the discretion exercised by the State Government so long as the said discretion is exercised bona fide, but it would be fully entitled to interfere when it comes to the conclusion that the discretion has been exercised arbitrarily basing on extraneous consideration or has been exercised ignoring the relevant materials.Absence of any mode or guidelines does not vest unfettered power upon the Government. ……..Same is the view of this Court in the case of Harihar Swain and others vs. State of Orissa and others, 96 (2003) C.L.T. 454. It is specifically held in that case that, fixation of the Headquarter of a Gram Panchayat in any particular village is essentially an administrative matter and, so long as relevant considerations have weighed with the Government in fixing the Headquarters in a particular village, the High Court cannot interfere with the decision of the Government like an appellate authority and quash the decision of the Government. While exercising powers under judicial review, the High Court under Article 226 of the Constitution has only to see whether administrative power has been exercised within the limits of law after taking into account the relevant considerations, and so long as the High Court is satisfied that the power has been exercised within the limits of law after taking into account the relevant considerations, the High Court will not interfere with the same on the ground that it should have been located at a different place. It has further been held that,power has been vested in the State Government to decide the location of the office and the Headquarters of the Grama Sasan and such power can be exercised by the State Government from time to time depending upon the requirements of the public interest and there is no statutory bar for the Government to re-consider and take a fresh decision in the public interest. Same is the view of this Court in the case of Smt.Babita Negi and others vs. State of Orissa and others, 100 (2005) C.L.T. 397."

In view of the above, although village Indupur has the highest population in comparison to other two villages of Khursel GP, but taking into consideration that Khursel is the centrally located and is convenient for the villagers of tagged villages together with the fact that there is no natural barrier etc., decision under Annexure-2 has been taken. As such, the same warrants no interference.

4. Mr. Bose, learned counsel for the interveners submitted that pursuant to order dated 17th March, 2021 passed in Misc. Case No.17157 of 2016, the interveners have been impleaded as parties to the writ petition. However, the Petitioners have not filed consolidated cause title as yet. It was his submission that

while reconstituting or bifurcating a GP Clauses-5, 6, 7 and 10 of the notification under Annexure-1 should be harmoniously construed. The said Clauses read as follows:-

> *"5. Grama Panchayats having population around 10,000 or more shall be bifurcated and reorganized basing on geographical location, natural barrier and administrative convenience for constitution of a new Grama Panchayat.*
>
> *6. Boundary of existing Grama Panchayat will be changed by inclusion and exclusion of villages on the ground of geographical contiguity, natural barrier and administrative convenience.*
>
> *7. The distance factor from the farthest village to the proposed Grama Panchayat headquarter should be around 2-5 Kms. While selecting the G.P. Headquarters, proper care should be taken that the proposed G.P. headquarter is easily approachable from the tagged villages, centrally located and administratively convenient to the people. Overall, the average population of the Grama Panchayat should be around 5000.*
>
> *xx xx xx*
>
> *10. The number of Zilla Parishad Constituencies within the Panchayat Samiti area shall remain unchanged and accordingly, the Zilla Parishad Constituencies shall be reorganized comprising number of Grama Panchayats coming under the concerned Z.P. constituency.*
>
> *The following priority shall be given to cover the village as G.P. Headquarter;*
>
> *i) Population of 2,000 and above as 1st priority;*
> *ii) Population of 1,500 and above as 2nd priority;*
> *iii) Population of 1,000 and above as 3rd priority*
>
> *In case two or more villages come under the same category, then higher population, locational advantage and administrative convenience should be given preference for constitution of new Grama Panchayat headquarter.*
>
> *xx xx xx"*

In view of the above, population of a village is not the sole criterion to fix headquarter of the GP. Along with population, geographical contiguity, natural barriers,administrative convenience, location of the village for fixation of headquarter as well as easy approachability of the villagers of the tagged villages were taken into consideration while issuing order under Annexure- 2 by creating Khursel GP and fixing headquarter at Khursel.Referring to the village map at Annexure-A/2 to the counter affidavit filed by the State Government Mr. Bose submitted that Khursel is the centrally located village, which situates in between Indupur and Debhuin. There is also no natural barrier in between three villages. Further,the farthest point of village Indupur is within three kilometers from the proposed headquarter. No case has been made out by the Petitioners to fix headquarter at Indupur. Only vague statements have been made in the writ petition raising objection for fixation of headquarter at village Khursel. Initially there was no proposal for creation of a GP bifurcating from Larambha GP. It is at the instance of the villagers of Indupur, Khursel and Debhuin writ petition bearing W.P.(C) No.8863 of 2016 was filed. As per the direction of this Court, the Commissioner-cum- Secretary, Panchayatiraj Department-Opposite Party No.1 considered the grievance of the interveners herein and giving ample opportunity to the persons to

have their say,passed the order under Annexure-2. Perusal of averments made in the writ petition makes it abundantly clear that the Petitioners are aggrieved by the decision of fixation of headquarters at Khursel. Since village Khursel is centrally located and convenient for villagers of other two villages there is no illegality for fixation of headquarter. As such,order under Annexure-2 warrants no interference. Hence,he prays for dismissal of the writ petition.

5. Heard learned counsel for the Parties; perused the materials on record. Admittedly, no recommendation was made for creation of Khursel GP. Thus, submission of report by the BLC and recommendation for creation of new GP by the DLC does not arise in this case. At the instance of the interveners W.P.(C) No.8863 of 2016 was filed and pursuant to the direction of this Court, the Commissionercum-Secretary took up the matter and upon consideration of the objections raised and giving opportunity of personal hearing of the parties concerned. Khursel GP has been created consisting of three villages, i.e., Indupur, Khursel and Debhuin. As per Clause-10 of Annexure-1 notification priority for fixation of headquarter should be given to the village which has the largest population. But population is not the sole criteria for fixation of headquarter of a GP in view of Clause-6 of the notification under Annexure-1. The distance factor from the farthest village to the proposed Grama Panchayat headquarter should be around 2-5 Kms. It is also prescribed therein while selecting the G.P.Headquarters, proper care should be taken so that the proposed G.P. headquarter is easily approachable from the tagged villages, centrally located and administratively convenient to the people. Admittedly, Khursel is the centrally located village, which situates in between Debhuin and Indupur. There is no natural barrier in between these three villages. It is stated in the counter affidavit that the distance between two villages, i.e., Indupur and Debhuin to village Khursel, where headquarter of the GP is proposed, is less than three kilometers from the center point, i.e., new GP Khursel. Although it is stated in the writ petition that the villagers of Indupur will face immense difficulties if the headquarter of GP is fixed at Khursel, but no specific material has been placed in support of the same.

6. Mr. Mishra, learned counsel for the Petitioners submitted that since headquarter of Larambha GP is less than one kilometer from village Indupur, it should be allowed to be tagged with Larambha GP instead of newly bifurcated Khursel GP. This contention has no legal basis. Firstly, there is no material on record to show that headquarter of Larambha GP is less than one kilometer from village Indupur. Secondly, only because approaching headquarter at Larambha GP will be convenient for some of the villagers of Indupur the larger interest of said village cannot be brushed aside and given a goby. As held in the case of ***Harihar Swain (supra) and Keshab Sahukar(supra)*** the power to fix the GP headquarter is administrative in nature. Hence, this Court should not sit over the same as an appellate authority.

6.1. A contention has been raised by learned counsel for the Petitioners that procedure prescribed in the notification under Annexure-1 has not been followed while constituting Khursel GP or fixation of its headquarter. As discussed earlier, since the process of creation of new GP was initiated pursuant to the direction of this Court in the earlier writ petition filed by the interveners herein, initial report by BLC and recommendation by DLC are immaterial in the case at hand. On perusal of Annexure-2, it appears that upon hearing parties concerned and consideration of representation filed by the interveners, the same has been passed. Submissions made by learned counsel for the parties does not make out any manifest error or glaring defect in reconstituting Khursel GP and fixation of its headquarter. Although pursuant to the interim order, the office of the headquarter has not been opened at Khursel, but there is no objection of the public at large of the above named three villages in receiving benefits under different Schemes and benefits of the Governance.

7. As such, this Court finds no reason to interfere with the order under Annexure-2. Accordingly, the writ petition being devoid of any merit stands dismissed.

7.1 Interim order dated 28th September, 2016 passed in Misc.Case No.15555 of 2016 stands vacated.

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2023 (II) ILR – CUT - 1117

K.R. MOHAPATRA, J.

CMP NO. 4 OF 2023

SULOCHANA PARIDA & ORS. …….Petitioners

.V.

KAMINI PARIDA & ORS. …….Opp. Parties

CODE OF CIVIL PROCEDURE, 1908 – Order VI Rule 17 – Suit is of the year 2003 – Plaintiff/Petitioner filed an amendment in the year 2022 – Trial Court rejected the amendment on the ground of the pecuniary Jurisdiction as well as on the ground of limitation – Whether the rejection is sustainable? – Held, No. – Only because of the pecuniary Jurisdiction amendment of the plaint can not be denied – The petition for amendment filed by the plaintiff/Petitioner is allowed with cost of Rs.10,000/- which shall be paid to the defendants. (Para 8-10)

For Petitioner : Mr. Bhaskar Chandra Panda

For Opp. Parties : Mr. Monmoy Basu

ORDER Date of Order: 24.07.2023

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Mr. Basu, learned counsel appearing for Opposite Party Nos.1 and 7 also files Vakalatnama on behalf of Opposite Party Nos. 2 to 4 in Court, which is taken on record. He also files an affidavit of Opposite Party No.7 stating that Opposite Party No.11-Mamata Parida has died issueless since 2021 and hence no substitution vide Opposite Party No.11 is necessary in this case.

3. Mr. Panda, learned counsel for the Petitioners submits that the name of Opposite Party No.11 may be deleted at the risk of Opposite Party Nos.1 to 7.

4. Taking into consideration the submissions made by learned counsel for the parties, name of Opposite Party No.11-Mamata Parida be deleted from the cause title at the risk of Opposite Party Nos.1 to 4 and 7.

5. Order dated 3rd December, 2022 (Annexure-1) passed by learned Civil Judge (Junior Division), 2nd Court, Cuttack in CS No.134/58 of 2008/2003 is under challenge in this CMP, whereby an application for amendment of the plaint filed by the Plaintiffs/Petitioners has been partly allowed. Petitioners in this CMP assail part of the order refusing amendment of the plaint.

6. Mr. Panda, learned counsel for the Petitioners submits that CS No.58 of 2003 has been filed for declaration that the partition deed executed between Shyam Sundar and Radhu Parida is outcome of fraud and also for consequential relief. During pendency of the suit, Plaintiffs/Petitioners filed an application for amendment of the plaint to incorporate some of the Defendants as parties to the suit and in consequence to change the serial number of the proforma Defendants. A prayer for incorporation of the pleading with regard to validity of RSD No.1896 dated 30th April,1999 was also sought for. Further, a prayer to declare such sale deed as null and void was also sought for in the plaint by way of amendment. Learned trial Court, while allowing the prayer for impletion of parties and change of serial number of proforma Defendants rejected the prayer for amendment to incorporate foundational pleadings as well as prayer to declare the sale deed dated 30th April, 1999 as null and void. Hence, this CMP has beenfiled.

6.1 Mr. Panda, learned counsel for the Plaintiffs/Petitioners submits that learned trial Court rejected the amendment, as aforesaid on two grounds, more particularly that the amendment sought for is barred by limitation and it will take away the pecuniary jurisdiction of the Court. It is his submission that the question of

limitation can be decided at the time of hearing by framing an additional issue. Validity of the sale deed dated 30th April, 1999 depends upon the adjudication with regard to validity of the partition deed, which is under challenge. Instead of filing a separate suit, Plaintiffs/Petitioners sought for amendment of the plaint to save judicial time of the Court for adjudication of the lis between the parties. He further submits that only because the pecuniary jurisdiction of the Court will be taken away by virtue of amendment of the plaint, that itself cannot be a ground to refuse the prayer. He, therefore, prays for setting aside the impugned order to the extent of rejecting amendment of the plaint and to permit the Petitioners to incorporate the proposed amendment as sought for.

7. Mr. Basu, learned counsel for Opposite Party Nos.1 to 4 and 7 vehemently objects the above submission. It is his submission that the sale deed in question was well within the knowledge of the Plaintiffs on the date of filing of the suit. The Plaintiffs also did not take any step to amend the plaint at the time of impleading the purchasers of the aforesaid sale deed under Order I Rule 10 (2) CPC. When the suit was posted for hearing, such a plea has been taken to linger the proceeding. It is his submission that earlier, Plaintiffs/Petitioners had moved this Court in W.P.(C) No.659 of 2011 in which they had assailed the order refusing to stay further proceeding of the suit. Ultimately, Plaintiffs/Petitioners withdrew the said writ petition. Thus, the Plaintiffs are adopting different methods to linger the proceeding of the suit. As such, learned trial Court has committed no error in rejecting the prayer for amendment, as aforesaid.

8. Considering the submissions of learned counsel for the parties, this Court finds that hearing of the suit has not yet commenced. Of course, the suit is of the year 2003 and is pending before learned Civil Judge (Junior Division), 2nd Court, Cuttack.Only because the pecuniary jurisdiction of the Court will be taken away by the amendment of the plaint; the same cannot be the sole ground to refuse the prayer. Since the Plaintiffs/Petitioners have prayed for declaration that the deed of partition as aforesaid to be null and void, learned trial Court should have considered the amendment to incorporate the pleadings as well as prayer with regard to validity of the RSD dated 30th April, 1999, as it is an consequence of such partition, which is under challenge. If the Petitioners/Plaintiffs are not permitted to incorporate such amendment at this stage, it may lead to multiplicity of litigations.In order to shorten the time for complete adjudication of the lis between the parties with regard to validity of partition as well as consequential execution of sale deed, this Court feels that learned trial Court should have allowed the amendment; which is of course subject to the question of limitation. If objection to the prayer for amendment is raised on the ground of limitation, the amendment sought for should not be thrown out at the threshold, more particularly when objection on limitation depends upon interpretation of materials on record. In such cases, question of limitation can also be decided by framing an issue to that effect.

8.1 In that view of the matter, this Court feels that the amendment sought for should have been allowed.

9. Accordingly, the impugned order under Annexure-1 rejecting the amendment, as aforesaid, is set aside. The petition for amendment filed by the Plaintiffs/Petitioners is allowed.Keeping in mind the suit is of the year 2003 and prayer for amendment was made in the year 2022, this Court feels that the contesting Defendants should be compensated by adequate cost.

10. Accordingly, this Court directs that consolidated plaint shall be accepted subject to payment of cost of Rs.10,000/- (rupees ten thousand only), which shall be paid to the Defendants along with copy of the amended plaint within a period of fifteen days hence. Needless to say that the Defendants are at liberty to file additional written statement to the amended plaint within a period of two weeks thereafter. It is made clear that if the consolidated plaint is not filed along with the cost as aforesaid within the time stipulated as above, the order under Annexure-1 impugned herein shall be revived. Learned trial Court shall also make an endeavour to see that the suit is disposed of at an early date.

11. Interim order dated 11th January, 2023 passed in IA No.5 of 2023 stands vacated.

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2023 (II) ILR – CUT - 1120

KRUSHNA RAM MOHAPATRA, J.

CMP NO. 662 OF 2015

GOPAL BANKA & ORS. .....Petitioners

.V.

DINESH AGARWAL .....Opp. Party

SPECIFIC RELIEF ACT, 1963 – Section 6(3) r/w order XLIII Rule 1(r) of Code of Civil Procedure, 1908 – Whether in view of clear bar in the provision U/s 6(3) of the Act any appeal is maintainable U/o XLIII Rule 1(r) from an order U/o 39 Rule 1 and 2 of CPC – Held, No – The provision itself makes it clear that no appeal shall lie from any 'Order' including the order U/o 39 Rule 1 and 2 of CPC made in a suit under section 6 of the 1963 Act. (Para 7.1)

Case Laws Relied on and Referred to :-

1. 1995 (II) OLR 394 : Prasanna Kumar Singh Vs. Golaka Chandra Madhual & Anr.
2. AIR 2013 SC 1099 : Mohd. Mehtab Khan & Ors Vs. Khushnuma Ibrahim Khan & Ors.

3. 2014 (2) Mh.L.J. : Rajashree Pravin Sonawane Sonawane & Ors. Vs. Arvind Kumar Fatechand.
4. (1998) 1 SCC 500 : Vinita M. Khanolkar Vs. Pragna M. Pai & Ors.
5. 2000 (4) ALD 159 : A.N.Paramkusha Bai Vs. K.Krishna & Anr.

For Petitioners : Mr. Abhisek Kejriwal

For Opp Party : Mr. N.C. Rout

JUDGMENT Heard & disposed of : 31.07.2023

KRUSHNA RAM MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Judgment dated 21st February, 2015 (Annexure-7) passed by learned First Additional District Judge, Rourkela in F.A.O. No.02 of 2014 is under challenge in this CMP, whereby learned appellate Court while holding that the appeal is maintainable, directed the Petitioners from raising any construction, making alteration or alienation of the suit property till disposal of the suit and to maintain *status quo* over the suit property by not changing its nature and character till disposal of the suit.

3. Mr.Kejriwal, learned counsel being authorized by Mr. Sandipani Mishra, learned counsel for the Petitioners submits that C.S. No. 53 of 2013 has been filed by the Plaintiff-Opposite Party under Section 6 of the Specific Relief Act, 1963 (for brevity 'the Act'). In the said suit, an application under Order XXXIX Rules 1 and 2 CPC in I.A. No.35 of 2013 was filed, which was dismissed vide order dated 29th March, 2014 (Annexure-5). Assailing the same, the Plaintiff-Opposite Party preferred FAO No.02 of 2014 and the impugned order under Annexure-7 has been passed.

4. Submission of Mr. Kejriwal, learned counsel for the Petitioners in brief is that in view of Section 6(3) of the Act, no appeal against a decree or order passed in a suit under Section 6 of the Act is maintainable. Thus, an appeal against an order passed in a petition filed under Order XXXIX Rules 1 and 2 CPC in a suit under Section 6 of the Act is not maintainable. In support of his case, Mr. Kejriwal relied upon a decision in the case of ***Prasanna Kumar Singh Vrs. Golaka Chandra Madhual and Anr.,*** reported in 1995 (II) OLR 394, wherein, this Court discussing the scope of Section 6(3) of the Act *vis-à-vis* the provision under Order XLIII Rule 1(r) CPC held that in view of clear provision under Section 6(3) of the Act, no appeal lies from an order under Order XXXIX Rules 1 and 2 CPC.

5. This Court in the case of ***Prasanna Kumar Singh*** **(supra)** explained the word ***'Order'*** observing as under:-

> "*It is generally understood to be a command, direction or decision of the Court or Judge on some intermediate point or issue in the case, but without finally disposing of the main issue or issues in the cause. Then, it is merely interlocutory.*"

5.1 Discussing the law on this point, this Court held as under:-

> *"8. As indicated above, the prohibition of an appeal against any order or decree in the suit it absolute. There can be no quarrel over the proposition that the order to which the prohibition applies must have nexus with the subject matter of dispute. In the case at hand, undisputedly the decision which was assailed in appeal was passed in adjudicating an application in terms of Order 39, Rules 1 and 2 of the Code. Whether the order is wrong or not, not is the question. What is relevant and what has to be considered is whether it is an order passed in the suit instituted under Sec.6 of the Act. The plain, simple and emphatic answer to the question is yes. However, the situation may be different where an order or decree is passed in a suit under Section 6;, which has additional directions or prohibitions for example, a decree for possession and damages. Obviously, the decree does not have only nexus with the suit itself, which has restricted operation in term of Section 6. In such case the whole decree may be applied against, But that is not the case here. The dispute relates to correctness of the order passed in respect of the application under Order 39 rules 1 and 2 of the Code. The inevitable conclusion, therefore, is that the appeal was not maintainable and it has been rightly held to be so by the learned District Judge."*

5.2 He, therefore, submits that no appeal lies from an Order XXXIX Rules 1 and 2 CPC in a suit under Section 6 of the Act. He further submits that the prohibition under Section 6(3) of the Act, is of course, not applicable to letters patient appeals as held in ***Mohd. Mehtab Khan & Ors Vs. Khushnuma Ibrahim Khan and Ors.,*** reported in AIR 2013 SC 1099 as under:-

> *"13. While the bar under Section 6(3) of the SR Act may not apply to the instant case in view of the initial forum in which the suit was filed and the appeal arising from the interim order being under the letters patent issued to the Bombay High Court, as held by a Constitution Bench of this Court in P.S. Sathappan v. Andhra Bank Ltd. [(2004) 11 SCC 672], what is ironical is that the correctness of the order passed in respect of the interim entitlement of the parties has reached this Court under Article 136 of the Constitution. Ordinarily and in the normal course, by this time, the suit itself should have been disposed of. Tragically, the logical conclusion to the suit is nowhere in sight and it is on account of the proverbial delays that have plagued the system that interim matters are being contested to the last court with the greatest of vehemence and fervour. Given the ground realities of the situation it is neither feasible nor practical to take the view that interim matters, even though they may be inextricably connected with the merits of the main suit, should always be answered by maintaining a strict neutrality, namely, by a refusal to adjudicate. Such a stance by the courts is neither feasible nor practicable. Courts, therefore, will have to venture to decide interim matters on consideration of issues that are best left for adjudication in the full trial of the suit. In view of the inherent risk in performing such an exercise which is bound to become delicate in most cases the principles that the courts must follow in this regard are required to be stated in some detail though it must be made clear that such principles cannot be entrapped within any straitjacket formula or any precise laid down norms. The courts must endeavour to find out if interim relief can be granted on consideration of issues other than those involved in the main suit and also whether partial interim relief would satisfy the ends of justice till final disposal of the matter. The consequences of grant of injunction on the defendant if the plaintiff is to lose the suit along with the*

> *consequences on the plaintiff where injunction is refused but eventually the suit is decreed has to be carefully weighed and balanced by the court in every given case. Interim reliefs which amount to pre-trial decrees must be avoided wherever possible. Though experience has shown that observations and clarifications to the effect that the findings recorded are prima facie and tentative, meant or intended only for deciding the interim entitlement of the parties have not worked well and interim findings on issues concerning the main suit has had a telling effect in the process of final adjudication it is here that strict exercise of judicial discipline will be of considerable help and assistance. The power of self-correction and comprehension of the orders of superior forums in the proper perspective will go a long way in resolving the dangers inherent in deciding an interim matter on issues that may have a close connection with those arising in the main suit."*

He, therefore, submits that impugned order under Annexure-7 is not sustainable and liable to be set aside.

6. Mr. Rout, learned counsel for the Plaintiff-Opposite Party vehemently objects to the above. It is his submission that since the Plaintiff-Opposite Party has a right under the CPC to prefer an appeal against an order under Order XXXIX Rules 1 and 2 CPC, the same cannot be taken away so lightly in view of Section 6(3) of the Act. No restriction has been imposed in the provision under Order XLIII Rule 1(r) CPC taking away the right of appeal against an order passed in a suit for possession under Section 6 of the Act. Thus, the unfettered right under Order XLIII Rule 1(r) CPC enables the Court to entertain an appeal against an order under Order XXXIX Rules 1 and 2 CPC, even if in a suit under Section 6 of the Act. In support of his case, he relied upon a decision in the case of ***Rajashree Pravin Sonawane Sonawane and Ors. Vs. Arvind Kumar Fatechand,*** reported in 2014 (2) Mh.L.J. in which Bombay High Court relying upon a catena of decisions including of Hon'ble Supreme Court, held as under:-

> *"6. Admittedly, the application under Order 39, Rules 1 and 2 of Civil Procedure Code once filed and decided, the remedy under the law to challenge the same is by invoking Order 43, Rule 1 of Civil Procedure Code. The submission that, in view of section 6 of the Specific Relief Act the Appeal is not maintainable, is unacceptable for simple reason that the suit is not yet finally decided nor there is decree and/or final order is passed."*

He also placed reliance on a decision in the case of ***Vinita M. Khanolkar Vs. Pragna M. Pai and others***, reported in (1998) 1 SCC 500 in which, it is held as under:-

> *"3. Now it is well settled that any statutory provision barring an appeal or revision cannot cut across the constitutional power of a High Court. Even the power flowing from the paramount charter under which the High Court functions would not get excluded unless the statutory enactment concerned expressly excludes appeals under letters patent. No such bar is discernible from Section 6(3) of the Act. It could not be seriously contended by learned counsel for the respondents that if clause 15 of the Letters Patent is invoked then the order would be appealable. Consequently, in our view, on the clear language of clause 15 of the Letters Patent which is applicable to Bombay*

High Court, the said appeal was maintainable as the order under appeal was passed by learned Single Judge of the High Court exercising original jurisdiction of the court. Only on that short ground the appeal is required to be allowed."

6.1 It is his submission that similar view has been taken by Andhra Pradesh High Court in the case of ***A.N.Paramkusha Bai Vs. K.Krishna and another***, reported in 2000 (4) ALD 159 that an appeal is maintainable against an order under Order XXXIX Rules 1 and 2 CPC in a suit under Section 6 of the Act. It is further submitted that question of maintainability was not raised by the Petitioners before learned appellate Court. Thus, this Court should not delve into the question of maintainability of the appeal while exercising the power under Article 227 of the Constitution. Hence, he prays for dismissal of the CMP.

7. In order to appreciate the submissions made by learned counsel for the parties, this Court perused Section 6 of the Act which reads as under:

"***6. Suit by person dispossessed of immovable property****-(1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person through whom he has been in possession or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.*

(2) No suit under this Section shall be brought-

(a) after the expiry of six months from the date of dispossession; or

(b) against the Government.

(3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

(4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof."

7.1 Sub-section (3) clearly provides that no appeal shall lie from any order or decree passed in any suit instituted under the Section. Thus, the provision itself makes it clear that no appeal shall lie from any '*Order*' including the order under Order XXXIX Rules 1 and 2 CPC made in a suit under Section 6 of the Act. It has been so held by this Court in the case of ***Prasanna Kumar Singh (supra).*** The decisions, which are relied upon by Mr. Rout, learned counsel for the Opposite Party, are not applicable to the instant case, as the Bombay High Court has relied upon a decision of the Hon'ble Supreme Court to hold so, which deals with an issue as to whether a letters patent appeal would lie against an order passed in a suit under Section 6 of the Act. It has been categorically held therein that statutory power barring an appeal or revision cannot cut across the Constitutional power of the High Court. Thus, I am not persuaded to apply the ratio in the case of ***Rajashree Pravin (supra)*** to the case at hand. It is equally held so by Andhra Pradesh High Court, which does not persuade this Court in view of the clear provision under Section 6(3) of the Act, which has been elaborately discussed in the case of ***Prasanna Kumar Singh (supra),*** wherein this Court considered the scope and ambit of the provision under Section 6(3) of the Act *vis-à-vis* Order XLIII Rule 1(r) CPC.

8. The question of maintainability is a pure question of law which touches the root of the matter. Thus, it can be raised for the first time even in a proceeding under Article 227 of the Constitution. Thus, I am not persuaded by the submission made by Mr. Rout, learned counsel for the Opposite Party.

8.1 Accepting the submission of Mr. Kejriwal, learned counsel for the petitioners, this Court sets aside the order under Annexure-7 passed by learned First Additional District Judge, Rourkela in FAO No.02 of 2014.

9. Since the suit is of the year 2013, learned trial Court should make all endeavours to see that the suit is disposed of at an early date in accordance with law. The parties are directed to co-operate with learned trial Court for early disposal of the suit.

10. Interim order dated 13th May, 2015 passed in Misc. Case No.665 of 2015 stands vacated.

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2023 (II) ILR – CUT - 1125

B.P.ROUTRAY, J.

MACA NO. 726 OF 2008

DANSAN SINGH .....Appellant

. V.

BIJAYA BIHARI SINGH & ORS. .....Respondents

MOTOR ACCIDENT – Claim of Compensation – Liability saddled upon the owner by the tribunal as the driver had fake driving license – The owner challenged the order of the tribunal on the ground that, neither the competency of driver ever questioned nor any scope was there with owner to verify the genuineness of driving license – Effect of – Held, the order of tribunal set aside and direction issued to the insurer/ company to deposit entire compensation amount in favour of deceased family member.

Case Laws Relied on and Referred to :-

1. (2004) 3 SCC 297 : National Insurance Co.Ltd. Vs. Swaran Singh & Ors.
2. (2020) 4 SCC 49 : Nirmala Kothari Vs. United India Insurance Co.Ltd.
3. Civil Appeal No.4919/2022 decided on 26.07.22 : Rishi Pal Singh Vs. New India Assurance Co. Ltd.

For Appellant : Mr. P.K.Rath

For Respondents : Mr. S.K.Swain

JUDGMENT Date of Judgment : 16.05.2023

B.P.ROUTRAY, J.

1. Heard Mr. Rath, learned counsel for the Appellant and Mr.Swain, learned counsel for Respondent No.3.

2. Present appeal by the Owner is directed against judgment dated 26th July, 2008 of District Judge-cum-1st M.A.C.T., Sundargarh in MAC Case No.28 of 2006, wherein compensation to the tune of Rs.3,32,000/- has been granted along with interest @7.5% per annum with effect from the date of filing of the claim application on account of death of the deceased by motor vehicular accident on 18th May, 2006.

3. The Tribunal while granting compensation has saddled the liability on the owner by exonerating the Insurer on the ground that the driver of the offending vehicle i.e. Truck bearing registration No.OR-16B-2998, possessed a fake driving license.

4. Mr. Rath submits that the offending vehicle is a Truck i.e. a goods carriage vehicle and it was not within the knowledge of the owner regarding possession of fake driving license by his driver. He further submits that competency of the driver was never questioned nor any scope was there with the owner to verify the genuiness of driving license produced by his driver.

5. Upon hearing Mr.Swain, learned counsel for the Insurer and keeping in view the principles decided in ***National Insurance Co.Ltd.-vrs-Swaran Singh & Ors., (2004) 3 SCC 297*** and ***Nirmala Kothari vs United India Insurance Co.Ltd, (2020) 4 SCC 49,*** the liability is to be borne by the Insurer since the competency of the driver has not been disputed and nothing has been stated in course of adducing evidence. In such situation, while it was without the knowledge of the owner regarding possession of fake license by his driver, the Insurer cannot be absolved of its liability in terms of the insurance policy. In another recent decision, ***Rishi Pal Singh vs. New India Assurance Co. Ltd.*** (Civil Appeal No.4919 of 2022, decided on 26th July 2022), the Hon'ble Supreme Court have held as follows:

> "10. The owner of the vehicle is expected to verify the driving skills and not run to the licensing authority to verify the genuineness of the driving license before appointing a driver. Therefore, once the owner is satisfied that the driver is competent to drive the vehicle, it is not expected from the owner thereafter to verify the genuineness of the driving license issued to the driver.
>
> 11. In view of the said finding, the order passed by the High Court affirming the order of the Tribunal is set aside. Hence, liberty is given to the insurance company to recover the amount from the appellant is also set aside. Conseqeuntly, the appeal is allowed."

6. So in the result, the appeal is allowed and the Insurer-Respondent No.3 is directed to deposit the entire compensation amount as directed by the Tribunal along

with interest within a period of two months from today; where-after the same shall be disbursed in favour of the claimants-Respondent Nos. 1 & 2 on such terms and proportion contained in the impugned judgement.

7. The statutory deposit made by the Appellant with accrued interest thereon be refunded to him on proper application.

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2023 (II) ILR – CUT - 1127

B.P.ROUTRAY, J.

MACA NO. 385 OF 2019

THE DIVISIONAL MANAGER, M/s. NATIONAL INSURANCE COMPANY LTD., CUTTACK .....Appellant

.V.

SUBALA @ BUDHIBAMAN PATRA & ORS. .....Respondents

MOTOR VEHICLES ACT, 1988 – Section 2(34) –"Public Place"– Meaning and interpretation – Discussed and interpreted with reference to case law. (Para 5-9)

Case Laws Relied on and Referred to :-

1. AIR 1991 Ori 173 : Oriental Fire and General Insurance Co. Ltd. Vs. Raghunath Muduli & Ors.
2. AIR 1988 Bom 248 : Pandurang Chimaji Agale & Anr. Vs. New India Life Insurance Co. Ltd., Pune & Ors.
3. 2005 (1) TAC 367 (M.P.) : Rajendra Singh Vs. Tulsabai & Ors.
4. 1999 (2) TAC 485 (Mad) : United India Insurance Co. Ltd. Vs. Parvathi Devi & Ors.
5. 2011 (3) TAC 321 (Ori.) : M/s. M.K. Bhaumik Vs. Sukura Singh & Ors.
6. (2017) 16 SCC 680 : National Insurance Company Ltd. Vs.Pranay Sethi & Ors.

For Appellant : Mr. B. Dasmohapatra

For Respondents : Mr. B.N. Rath

JUDGMENT Date of Judgment :26.06.2023

B.P. ROUTRAY, J.

1. Present appeal has been filed by National Insurance Co. Ltd., the Insurer, questioning it's liability to pay the compensation saddled on it on account of the motor vehicular accident happened in the premises of a factory. Learned District Judge-cum-1st MACT, Nayagarh in the impugned award dated 6th March 2019, passed in MAC No.40 of 2016, has directed for payment of compensation of Rs.8,84,000/- along with interest @ 6% per annum in favour of the claimants, payable by the appellant - insurer.

2. The facts of the case are that, the deceased, a man aged about 33 years, was the driver of Truck bearing registration number OD-02-U-8676. On 17th April 2016 he brought his truck to Ganesh Metalics Pvt. Ltd. loading iron ore and was taking rest at the backside of his truck awaiting his turn to unload. Around 2.30 – 3.30 am on 18th April 2016, the offending vehicle, i.e. Truck bearing registration number OR-19-L-5315 being driven in a rash and negligent manner ran over the deceased while he was taking rest at the backside of his truck.

3. The Appellant contends that despite the spot of accident is within the premises of Ganesh Metalics Pvt. Ltd., which is a private place, learned tribunal did not answer their objection on the question of liability and without answering the same learned tribunal straight away saddled the liability on the insurer. The claimants – Respondents on the other hand have prayed for enhancement of compensation amount by filing cross objection.

4. The validity of the insurance policy and negligence on the part of the driver of the offending vehicle is not questioned by the parties.

5. In order to deal with the submission of the Appellant, it is important to refer Section 2(34) of the Motor Vehicles Act, 1988. As per the definition, "public place" means a road, street, way or other place, whether a thoroughfare or not, to which the public have a right of access. The interpretation of word "public place" no more remains *res integra*. This court in the earlier decision in ***Oriental Fire and General Insurance Co. Ltd. v. Raghunath Muduli and Others, AIR 1991 Ori 173*** have interpreted the term "public place", as defined in Section 2(24) of the erstwhile 1939 Act, to hold as under:-

> "Bearing in mind the fact that the provisions of Section 95 of the Act are beneficial provisions for making the insurer liable to pay compensation in a case where death or bodily injury to any person or damage to any property of a third party is caused by or arising out of the use of the vehicle in a public place, there cannot be any manner of doubt that the expression 'public place' should be given a wide interpretation. In this view of the matter, the road inside the Orissa Secretariat compound must be held to be public place and if any death or injury occurs inside that compound on account of any use of vehicle, then the insurer must be held to be liable to pay the compensation. …. .. xxx .. .."

6. This court while expressing aforesaid view relied on a Full Bench decision of Bombay High Court in ***Pandurang Chimaji Agale and Another v. New India Life Insurance Co. Ltd., Pune and Others, AIR 1988 Bom 248,*** wherein Bombay High Court proceeded to hold that:-

> "The term 'public place' is a term of the Act, the same having been defined specifically by Sub-clause (24) of Section 2 of the Act.
>
> The first thing to remember with regard to the definition is that it is an inclusive one. Secondly, it in terms makes it clear that any road, street, way or other place, whether a thoroughfare or not, is a public place for the purposes of the Act, the only condition

> being that the public should have a right of access to it. Thirdly, the expression used in the definition is 'a right of access' and not 'access as of right'. Lastly, when it states that any place or stand at which passengers are picked up or set down by a stage carriage, is a public place, it shows that it is not so much concerned with the ownership of the place as with its user.... The definition of 'public place' under the Act is, therefore, wide enough to include any place which members of public use and to which they have a right of access. The right of access may be permissive, limited, regulated or restricted by oral or written permission, by tickets, passes or badges or on payment of fee. The use may be restricted generally or to particular purpose or purposes. What is necessary is that the place must be accessible to the members of public and be available for their use, enjoyment, avocation or other purpose.... Hence, all places where the members of public have an access, for whatever reasons, whether as of right or controlled in any manner whatsoever, would be covered by the definition of 'public place' in Section 2(24) of the Act."

7. The Division Bench of Madhya Pradesh High Court in ***Rajendra Singh v. Tulsabai and Others, 2005 (1) TAC 367 (M.P.),*** upon an exhaustive survey of case laws of different High Courts have come to hold that a private place to which public have a permissive access is also a public place and gave the finding that the compound of a factory where the accident took place and which had public access and vehicles were going for business purposes is a public place.

8. The Full Bench of Madras High Court in ***United India Insurance Co. Ltd. v. Parvathi Devi and Others, 1999 (2) TAC 485 (Mad)***, have held as follows:-

> "16. The definition of 'public place' is very wide. A perusal of the same reveals that the public at large has a right to access though that right is regulated or restricted. It is also seen that this Act is beneficial legislation, so also the law of interpretation has to be construed in the benefit of public. In the overall legal position and the fact that if the language is simple and unambiguous, it has to be construed in the benefit of the public, we are of the view that the word 'public place' wherever used as a right or controlled in any manner whatsoever, would attract section 2(24) of the Act. In view of this, as stated, the private place used with permission or without permission would amount to be a 'public place'.
>
> 17. In view of what we have discussed above, we hold that the expression 'public place' for the purpose of Chapter VIII of the Motor Vehicles Act, 1939 will cover all places including those of private ownership where members of the public have an access whether free or controlled in any manner whatsoever.'"

9. In the case at hand Ganesh Metalics Pvt. Ltd. is a private factory and the accident took place within its premises. The premises had the access of vehicles for business purpose and the deceased was undisputedly the driver of one such vehicle. Going as per the definition of "public place" given in the MV Act and the case laws decided by different high courts including this court it can be well said that the definition of "public place" is to be interpreted in a wider connotation to include any place to which the members of public use and where they have a right of access. The right of access may be permissive, limited, restricted or regulated. This court in ***M/s.***

M.K. Bhaumik v. Sukura Singh and Others, 2011 (3) TAC 321 (Ori.), while dealing with a similar question have held as under:-

> "10. If we further bear in mind the overall object of the provisions of Chapter XI of the M.V. Act which deals with compulsory insurance of the vehicle to cover risks to third parties and their property, with claims to be filed for recovering compensation, no fault liabilities and liabilities arising out of hit and run accidents, etc., the intention of the legislature is clear. It is to secure compensation to the persons and property which are exposed to the accidents caused by the vehicles. The very nature of the motor vehicle and its use mandate these provisions. The motor vehicle in this respect can be likened to a wild animal. Whoever keeps it does so at his risk. As pointed out earlier, some of the restrictions on the use of the vehicle contained in the Act are irrespective of the nature of the place where it is used and irrespective of whether it is plied or kept stationary. The legislature was concerned not so much with the nature of the place where the vehicle causes the accident as where it was likely to do so. Hence all places where the members of public and/or their property are likely to come in contact with the vehicles can legitimately be said to be in its view when the legislature made the relevant provisions for compulsory insurance. It will have, therefore, to be held that all places where the members of public have an access, for whatever reasons, whether as of right or controlled in any manner whatsoever, would be covered by the definition of 'public place' in Section 2(34) of the M.V. Act. To hold otherwise would frustrate the very object of the said chapter and the Act."

10. In the instant case when the entry of a transport vehicle or goods carriage vehicle is permitted in the factory premises it can safely be concluded that such premises constitute a public place for the purpose of compensation under the MV Act and liability on the part of the insurer in terms of Section 147 of the MV Act. It is because the term "public place" cannot be confined by a restricted meaning keeping in view the object of the MV Act and it is not to be taken as a place where public have uncontrolled access at all times. It is to be understood with reference to the places and for the purpose of the Act that the places to which a vehicle has access. Wherever a goods vehicle or a passenger carrying vehicle has the permission to entry, the driver of the vehicles, other employees of the vehicle and the workers engaged thereof for various purposes have deemed to have access and therefore the place has to be treated as a public place. Accordingly, this court comes to the conclusion that the premises of Ganesh Metalics Pvt. Ltd. where the accident took place is a public place within the meaning of Section 2(34) of the MV Act, 1988.

11. No serious challenge has been put forth by the Appellant – insurer with regard to quantification of compensation amount. But conversely, the claimants – Respondents have prayed for enhancement of the same by addition of future prospect and adequate amount towards general damages.

12. Learned tribunal assessed income of the deceased at Rs.9000/- per month. No dispute is raised regarding the same which is also found reasonable in the opinion of this court taking note of the date of accident and place of residence of the deceased as a truck driver. But the tribunal granted Rs.20,000/- for obsequies and

mental agony. In terms of the principles rendered in the case of ***National Insurance Company Ltd. v. Pranay Sethi and Others, (2017) 16 SCC 680***, and without disturbing the finding on income of the deceased, 40% future prospect is added on the same to increase the loss of dependency to Rs.12,09,600/-. Adding Rs.30,000/- towards funeral expenses and loss of estate and further adding Rs.40,000/- to each parent (Respondent No.1 and 2) towards filial consortium, the total compensation amount is determined at Rs.13,19,600/-, payable along with interest @ 6% per annum.

13. In the result the appeal is disposed of with a direction to the Appellant – insurer to deposit total compensation of Rs. Rs.13,19,600/- (thirteen lakhs nineteen thousand six hundred) before the tribunal along with interest @ 6% per annum from the date of filing of the claim application, i.e. 20th May, 2016, within a period of two months from today, where-after the same shall be disbursed in favour of the claimants on such terms and proportion to be decided by learned tribunal.

14. On deposit of the award amount before learned Tribunal and filing of a receipt evidencing the deposit with refund application before this Court, the statutory deposit made by the Appellant before this Court with accrued interest thereon shall be refunded to the Insurance Company.

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2023 (II) ILR – CUT - 1131

Dr. S.K. PANIGRAHI, J.

ARBA NO. 21 OF 2007

BABAJI NAYAK .....Appellant

.V.

RITES LTD. THROUGH DEPUTY GENERAL MANAGER .....Respondent

(A) ARBITRATION & CONCILIATION ACT, 1996 – Section 37 – Power of the Court under the section to interfere against the arbitral award – Held, the court may intervene only in cases involving fraud, bias, violation of the principles of natural justice etc. but not to correct errors of the Arbitrator.

(B) ARBITRATION & CONCILIATION ACT, 1996 – Section 34 – Whether the Court sitting as Court of Appeal can modify the arbitral award? – Held, under section 34, the award can only be confirmed or set aside, but cannot be modified.

(C) PAYMENT – Once it is accepted as "Full & Final" – Whether subsequently the same amount can be challenge or assailed before the

court or Arbitrator? – Held, Yes. – Even in the case of issuance of full and final discharge/ settlement voucher/ no dues certificate the arbitrator or court can go into the question whether the liability has been satisfied or not.

(D) ARBITRAL AWARD – Whether the Arbitrator can award the interest on the awarded amount in the absence of a provision in the contract between the parties? – Held, if there is no provision in the arbitration agreement for a rate of interest, the tribunal in its discretion determines the rate of interest keeping the facts and circumstance into consideration – Where the agreement is silent on this aspect then the Arbitrator is required to use the test of reasonableness and exercise its discretion in awarding the interest.

(E) ARBITRATION & CONCILIATION ACT, 1996 – Section 37 – Appeal – Whether a cross objection is maintainable in an Appeal under this section? – Held, No.

Case Laws Relied on and Referred to :-

1. (2006) 11 SCC 181: Mcdermott International Inc. Vs. Burn Standard Co. Ltd.
2. (2022) 4 SCC 116 : UHL Power Co. Ltd. Vs. State of H.P.
3. (2020) 12 SCC 539 : K. Sugumar Vs. Hindustan Petroleum Corpn. Ltd..
4. (2014) 9 SCC 263 : Oil & Natural Gas Corporation Ltd. Vs. Western Geco International Limited.
5. (2015) 3 SCC 49 : Associate Builders Vs. Delhi Development Authorit.
6. (2019) 15 SCC 131 : Ssangyong Engg. & Construction Co. Ltd. Vs. NHA.
7. (2000) 8 SCC 151 : Datar Switchgears Ltd. Vs. Tata Finance Ltd.
8. 2016 SCC OnLine Ori 1039 : State of Orissa Vs. Bhagyadhar Dash.
9. (2012) 1 SCC 594 : P.R. Shah Shares & Stock Broker (P) Ltd. Vs. B.H.H. Securities (P) Ltd.
10. (2015) 5 SCC 739 : Swan Gold Mining Ltd. Vs. Hindustan Copper Ltd.
11. AIR 2009 (SCW) 6217 : K.V. Mohd. Zakir Vs. Regional Sports Center.
12. (1996) 1 SCC 18 : State of U.P. Vs. Ram Nath Constructions.
13. 2021 SCC OnLine Del 3428 : M/S Pragya Electronics Pvt. Ltd. Vs. M/s Cosmo Ferrites Ltd.
14. (2006) 11 SCC 181 : Mc Dermott International Inc. Vs. Burn Standard Co. Ltd.
15. (2018) 11 SCC 328 : Kinnari Mullick Vs. Ghanshyam Das Damani.
16. (2021) 7 SCC 657 : Dakshin Haryana Bijli Vitran Nigam Ltd. Vs. Navigant Technologies (P) Ltd.
17. (2021) 9 SCC 1 : NHAI v. M. Hakeem.
18. (2009) 1 SCC 267 : National Insurance Company Ltd. Vs. Boghara. Polyfab Pvt. Ltd.
19. (2004) 2 SCC 663 :Chairman and Managing Director, NTPC Ltd. Vs. Reshmi Constructions,Builders and Contrac.
20. (2011) 2 SCC 400 : R.L. Kalathia & Co. Vs. State of Gujarat.
21. (2006) 13 SCC 475 : Ambica Construction Vs. Union of India.
22. AIR 2005 SC 2071 : Bhagwati Oxygen Ltd. Vs. Hindustan Copper Ltd.

23. (2004) 3 SCC 250 : Municipal Corporation of Delhi & Ors. Vs. International Security and Intelligence Agency Limited.
24. (2017) 2 SCC 37 : Mahanagar Telephone Nigam Limited Vs. Applied Electronics Limited.
25. (2002) 5 SCC 510 : ITI Limited Vs. Siemens Public Communications Network Limited.

For Appellant : Mr. B.N. Mohanty

For Respondent : Mr. B.S. Tripathy

JUDGMENT Date of Hearing:18.01.2023 : Date of Judgment:05.05.2023

Dr. S.K. PANIGRAHI, J.

1. This Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act" for brevity) has been filed seeking setting aside of the Judgment dated 26.07.2007 passed by the learned District Judge, Dhenkanal in Arbitration Petition No.249 of 2005 arising out of arbitration award dated 27.07.2005 passed in Arbitration Case No.1 of 2003 by the learned Sole Arbitrator Shri Govinda Das, Sr. Advocate.

I. FACTUAL MATRIX OF THE CASE:

2. In response to the Tender Call Notice dated 15.11.2000 issued by the present Respondent, the Appellant submitted his tender on 12.12.2000 for execution of the balance work pertaining to Section KB-I and II for Kalinga Railway Siding at Talcher, Angul District.

3. Having been declared successful, work order dated 25/30.1.2001 was issued in favour of the Appellant. The work order indicated the time limit for completion of the contract to be three months. After receiving the work order, the Appellant approached the present Respondent at the site office for handing over of the site. Subsequently, a portion of the site was handed over to the Appellant on 02.02.2001 and the completion period of the work was to be countenanced from that date.

4. Upon commencement of execution of the work, the tenants of Plot Nos.1414, 1415 and 1416 of Khata No.184 of Mouza-Danara raised a hue and cry on account of non-receipt of compensation as well as employment pursuant to the land acquisition by Mahanadi Coal Fields Ltd. These tenants allegedly created grave obstruction and did not allow the present Appellant to proceed with execution of the work. The same appears to have been intimated by the Appellant to the Respondent through multiple letters, with the first being written on 01.03.2001 and last on 20.11.2001.

5. It appears that despite the fact that the adverse situation was brought to the knowledge of the present Respondent, it insisted on completion of the work without rendering any assistance to solve the issue of obstructions created by the tenants.

Meanwhile, the present Appellant also allegedly attempted to resolve the issues of the tenants but the same was to no avail. In these circumstances, the present Appellant requested the Respondent to close the contract with refund of the security deposit and settle his claims towards deployment of machines and man power at the site for the extended period. It is pertinent to note here that there was unilateral extension of time for completion of the work by the Respondent despite no such request having been made by the present Appellant.

6. However, in response to the request for closure of the contract, the Respondent served an ultimatum on the Appellant to complete the work in line with the extension granted i.e. by 13.11.2001 or suitable action would be taken under Clause-62 of the General Conditions of Contract. Vide letter dated 13.11.2001, the Respondent gave the Appellant 48 hours additionally to complete the work, failing which the contract would stand rescinded and the earnest money deposited by the Appellant would be forfeited. It was also brought to the notice of the Appellant that upon his failure to complete the work, a subsequent agency would be brought in to complete the work.

7. The contract ultimately stood rescinded by the Respondent on 20.11.2001. The present Appellant vide letter dated 27.12.2001 claimed a compensation of Rs.90,57,084/- towards the financial loss sustained by the Appellant and requested that the matter may be referred to Arbitration as per Clause 63 of the General Conditions of Contract.

8. Upon failure of the Respondent to appoint an Arbitrator within the 30 days, the Appellant approached this Court under Section 11(6) of the Act, wherein after hearing the parties, Sri Govinda Das, Sr. Advocate was appointed as the sole Arbitrator to adjudicate the dispute and difference between the parties.

9. After hearing the parties, the learned Sole Arbitrator vide his award dated 27.07.2005 was pleased to partly allow the claims made by the Appellant and rejected all the counter claims of the Respondent. The learned Arbitrator partly allowed Claim No.2 (hiring charges of machineries) at Rs.7,500/- for 288 days for a total of Rs.21,00,000/-; Claim No.4 (the wages of the employees employed by the Appellant) for Rs.85,000/-; Claim No.10 (loss of profit) at Rs.2,18,000/-, Claim No.1 (refund of security deposit/EMD) at Rs.50,000/- and Claim No.12 (cost of litigation) at Rs.15,000/- for a total amount of Rs.24,68,000/- with interest @ 9% per annum from the date of commencement of the arbitration proceeding to the date of payment of the amount.

10. Being aggrieved, the present Respondent approached the learned District Judge, Dhenkanal under Section 34 of the Act vide ARBP No.249 of 2005 seeking setting aside of the arbitral award dated 27.07.2005. After hearing both parties, the learned District Judge vide order dated 26.07.2007, while upholding the award, partially modified the same and reduced the amount awarded under Claim No.2

(hiring charges of machineries) from Rs.21,00,000/- to Rs.6,75,000/- and also set aside the Claim No. 2 (cost of litigation) completely. The awarded amount was, therefore, revised by the learned District Judge from Rs.24,68,000/- to Rs.10,28,000/-.

11. Being aggrieved, the present Appellant filed the present appeal under Section 37 of the Act seeking setting aside of the judgment dated 26.07.2007 passed by the learned District Judge, Dhenkanal in Arbitration Petition No.249 of 2005 arising out of arbitration award dated 27.07.2005 passed in Arbitration Case No.1 of 2003 by the learned Sole Arbitrator.

12. As the matter stood thus, while the present Appeal was pending, the present Respondent paid an amount of Rs.13,43,016/- to the Appellant. The present Respondent then contended that the said amount was paid in "*full and final settlement*" of the award as modified by the learned District Judge vide order dated 26.07.2007 in Arbitration Petition No.249 of 2005 and, therefore, the present Appeal ought to be dismissed. Despite protest by the counsel for the Appellant, the said contention was accepted by this Court and the present Appeal stood dismissed by order dated 13.09.2019 in ARBA No.21 of 2007. However, the present Appellant approached the Supreme Court vide SLP(C) No.27625 of 2019 and sought the setting aside of order of this Court dated 13.09.2019 passed in the present Appeal. The Supreme Court was pleased to allow the Special Leave Petition and vide order dated 23.08.2022 in SLP(C) No.27625 of 2019 directing that the present Appeal be restored and adjudicated upon independently on its own merits.

13. Now that the facts leading up to the instant Appeal has been laid down, this Court makes endeavour to summarise the contentions of the Parties and the broad grounds on which they have approached this Court seeking the exercise of this Court's limited jurisdiction available under Section 37 of the Act.

II. APPELLANT'S SUBMISSIONS:

14. The counsel for the Appellant assails the impugned order dated 26.07.2007 of the learned District Judge mainly on the ground that the learned District Judge, ignored the exclusive list of limited grounds as contemplated under Section 34 of the Act and made an endeavor to enlarge the scope of the same in order to interfere with the award passed by the Arbitrator.

15. Furthermore, it was vehemently contended that while modifying and reducing the amount awarded by the Arbitrator under Claim No.2 (hiring charges of machines), the learned District Judge has re-appreciated the evidence in order to examine the correctness of the conclusion of the Arbitrator. By substituting his own views and evaluation with that of the Arbitrator, the learned District Judge has contravened the settled position of law which does not permit any such substitution. Upon arriving at the conclusion that the arbitral award is not in conflict with public policy or any substantive law, the learned District Judge went beyond the scope of

Section 34 of the Act in substituting the reasoning of the Arbitrator as well as partially modifying the award, both of which, as submitted, is impermissible in law.

16. As regards to the cross objections filed by the present Respondent, it was submitted by the counsel for the Appellant that the same is impermissible and not maintainable in law. Furthermore, the conduct of the Respondents in disbursing the amount as modified by the learned District Judge indicates their acceptance and admission of their liability.

III. RESPONDENT'S SUBMISSIONS:

17. *Per contra*, the learned Counsel for the Respondent submitted that the present appeal ought to be dismissed as the Appellant has received the entire modified awarded amount including the interest on 03.11.2007 without any objection and demur.

18. Furthermore, in the entire discussion on Claim No.2, it was submitted that there was no finding or reason assigned by the Arbitrator that the contractor is entitled to compensation at the rate of Rs.7500/- per day for 280 days (though the contract period was for 90 days). The Arbitrator failed to appreciate that a contractor who was entrusted with the work for a total contract value of Rs.21,72,400/- would never pay hiring charges of Rs.22,500/- per day as in that eventuality the contractor would have a paltry sum to meet the expenses of labour payment, cost of material and cost of establishment. The award of hiring charges of Rs.7500/- per day was, therefore, violative of the Act.

19. It was also submitted that the Award was illegal as the Arbitrator had deliberately ignored the material documents filed by the Respondent. The award is not based on the evidence on record and the Arbitrator distorted the tenor of the contract by giving inconsistent and contradictory conclusions. As such, it was vehemently submitted that the Award of the Arbitrator is not in conformity with the public policy of India.

20. With reference to the cross objections, the counsel for the Respondent submitted that the learned District Judge having held that the Arbitrator has committed serious illegalities, should have set aside the entire awarded amount instead of partially modifying the same. Furthermore, the Respondent alleged that no part of the award could be sustained as the appointment of the Arbitrator was without jurisdiction and this aspect was not properly considered by the Arbitrator while disposing of the petition under Section 16 of the Act. It was also submitted that the learned District Judge did not take note of the entire matter in its proper perspective and as such the judgement of the court to the extent it upheld the award is liable to be set aside.

IV. ISSUES FOR CONSIDERATION:

21. Having heard the learned Counsel for the parties and perused the materials available on record, this Court here has identified the following issues to be determined:

A. What is the scope of this Court's power under Section 37 of the Act and whether the arbitral award is in contravention of the public policy of State under Section 34(2)(b)(ii) of the Act?

B. Whether the Court while considering the objections under Section 34 of the Act may sit as a Court of appeal and re-appreciate or reassess the case of the parties and whether the Court is permitted to partially modify the award?

C. Whether the Appellant is barred from raising any dispute after accepting any payment of the nature of alleged "full and final payment"?

D. Whether the Arbitrator erred in law by granting interest on the awarded amount in the absence of a provision in the contract between the parties?

E. Whether a cross objection is maintainable in an appeal under Section 37 of the Act?

V. ISSUE A: WHAT IS THE SCOPE OF THIS COURT'S POWER UNDER SECTION 37 OF THE ACT AND WHETHER THE ARBITRAL AWARD IS IN CONTRAVENTION OF THE PUBLIC POLICY OF STATE UNDER SECTION 34(2)(B)(II) OF THE ACT?

22. In the present matter, this Court concerned with Section 37(1)(c) which states that an appeal lies under Section 37 from an order setting aside or refusing to set aside an arbitral award under Section 34. 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.***

23. The Supreme Court has confined the supervisory role of the Courts when it comes to testing the validity of an Arbitration Award. The Supreme Court in ***Mcdermott International Inc.*** **v.** ***Burn Standard Co. Ltd.***[1] held that the Court may intervene only in cases involving fraud, bias, violation of the principles of natural justice, etc. but not to correct errors of the Arbitrator. The interference of the Court must be kept at a minimum level.

24. Under Section 37, the extent of judicial scrutiny and scope of interference is further narrower. The Supreme Court in ***UHL Power Co. Ltd. v. State of H.P***[2]., 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. In MMTC*

1. (2006) 11SCC 181, **2.** (2022) 4 SCC 116

Ltd. v. Vedanta Ltd. [MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293] , the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words : (SCC pp. 166-67, para 11)

"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] reasonableness.Furthermore,"patent illegality"itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract."

A similar view, as stated above, has also been taken by the Supreme Court in ***K. Sugumar v. Hindustan Petroleum Corpn. Ltd.***.[3]

25. It is in the parameters as laid down by the Apex Court vis-a-vis the scope of judicial intervention that the present appeal impugning the order dated 26.07.2007 passed by the learned District Judge, Dhenkanal in Arbitration Petition No.249 of 2005 arising out of arbitration award dated 27.07.2005 passed in Arbitration Case No.1 of 2003 by the learned Sole Arbitrator shall be dealt with.

26. In ***Oil & Natural Gas Corporation Ltd. v. Western Geco International Limited***,[4] the Apex Court has observed that the award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

27. After being subsequently discussed in ***Associate Builders v.Delhi Development Authorit***[5] the position of law was clarified and laid down recently by the Supreme Court in ***Ssangyong Engg. & Construction Co. Ltd. v. NHA***[6] wherein it was held that:

"36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 :

3. (2020) 12 SCC 539 , **4**. (2014) 9SCC 263 **5**. (2015) 3SCC 49, **6.** (2019) 15 SCC 131

(2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] ."

28. It is the Respondent's earnest contention that the arbitral award goes against the fundamental public policy of India as the appointment of the Arbitrator is contrary to the mandate of the contract. The same issue was agitated by the Respondent in the appeal preferred by them under Section 34 of the Act. The learned District Judge has correctly given this issue primacy as the same affects the root of the matter.

29. In this regard, this Court notes that it was the Appellant who vide letter dated 27.12.2001 raised a demand to refer the dispute to an Arbitrator. Upon receiving no reply, the Appellant approached this Court under Section 11(6) of the Act seeking appointment of an Arbitrator. This Court vide order dated 05.09.2002, was pleased to appoint Sri Govinda Das, Sr. Advocate to adjudicate the dispute and difference between the parties. Section 11 of the Act clearly stipulates that if the parties fail to agree on an Arbitrator within 30 days of the date of receipt of the request made, then the Chief Justice or any person or institution designated by him may be approached to secure the appointment of an Arbitrator. When the present Respondent failed to act, as is required by the statute, the Appellant approached this Court. The present Respondent's grievance arises from the fact that Clause 64.6 of the General Conditions of Contract which states that the Arbitrator is to be an Engineer from the Respondent's company. However, this Court is of the view that the said contention will not survive because the intent of Section 11 of the Act clearly implies that the Chief Justice or his designate will make the "choice" of the person to be appointed as an Arbitrator. Being thus so, the Chief Justice or his designate cannot be said to be bound by the agreement entered into between the parties, as if the same was the intention of the legislature, then it would have been expressly provided in the Act. The Supreme Court has held in this regard in ***Datar Switchgears Ltd. v. Tata Finance Ltd.***[7] that if the opposite party, upon receipt of a request for appointment of an arbitrator, does not do so within 30 days, then the opposite party's right shall cease in this regard. This reasoning, which was also adopted by the learned District Judge, suffers no infirmity.

30. Therefore, bearing in mind the limited scope for this Court's interference, the arbitral award cannot be said to be perverse, absurd or against the fundamental public policy of India on this ground.

VI. ISSUE B: WHETHER THE COURT WHILE CONSIDERING THE OBJECTIONS UNDER SECTION 34 OF THE ACT MAY SIT AS A COURT OF APPEAL AND RE-APPRECIATE OR REASSESS THE CASE OF THE PARTIES AND WHETHER THE COURT IS PERMITTED TO PARTIALLY MODIFY THE AWARD?

7. (2000) 8 SCC 151

31. The law is no longer *res integra* that where the Arbitrator has assessed the material and evidence placed before them in detail, the Court while considering the objections under Section 34 of the said Act does not sit as a Court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. It is not open to the Court to interfere with the award merely because in the opinion of the Court, another view is possible. The duty of the Court, in these circumstances, is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, this Court while considering the objections under Section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The Court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is supported by his own reasoning. The same has been previously reiterated by this Court in ***State of Orissa v. Bhagyadhar Dash***[8].

32. It is seen that the Arbitrator has elaborately considered the various documents, submissions and evidence led by the parties. The contract being extended – whether unilaterally or not, would create a duty to perform on the Appellant. The Appellant has shown that he was willing and desirous to complete the contract but because of the lack of assistance from the Respondent, he could not do so. In this regard, this Court does not deem it unreasonable that the Appellant would have had deployed machinery for the entire duration of the contract. As such, the Arbitrator has applied his mind and granted reasonable hiring charges per day instead of directly allowing the hiring charges claimed by the Appellant. The Supreme Court in ***P.R. Shah Shares & Stock Broker (P) Ltd. v. B.H.H. Securities (P) Ltd***.[9] has held that a Court does not sit in appeal over the award of an Arbitrator by re-assessing or re-appreciating the evidence. An award can be challenged only on the grounds mentioned in Section 34(2) of the Act and in absence of any such ground, it is not possible to re-examine the facts to find out whether a different decision can be arrived at. This view was reiterated by the Apex Court in ***Swan Gold Mining Ltd. v. Hindustan Copper Ltd.***[10]***, K.V. Mohd. Zakir v. Regional Sports Center***[11] and ***State of U.P. v. Ram Nath Constructions***[12] and the High Court of Delhi in ***M/S Pragya Electronics Pvt. Ltd. v. M/s Cosmo Ferrites Ltd.***[13].

33. The learned District Judge has entered into the merits of the claim and has decided the appeal under Section 34 of the Act as if the District Court was deciding the dispute between the parties afresh. The learned District Judge has embarked on a journey to substitute his own reasoning with that of the learned Arbitrator by modifying the amount payable under Claim No.2. The learned District Judge has exercised jurisdiction not vested in it under Section 34 of the Act.

8. 2016 SCC On line Ori 1039, **9.** (2012) 1 SCC 594 **10.** (2015) 5 SCC 739 **11**. AIR 2009 (SCW) 6217
12. (1996) 1 SCC 18 **13**. 2021 SCC OnLine Del 3428

34. Furthermore, it has been held time and again by the Supreme Court in ***McDermott International Inc. v. Burn Standard Co. Ltd.***[14], ***Kinnari Mullick v. Ghanshyam Das Damani***[15] ***and Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd.***[16]**.** that under Section 34, the award can only be confirmed or set aside, but not modified. The Supreme Court recently in ***NHAI v. M. Hakeem***[17], held that Section 34 being an appellate provision, only provides for setting aside awards on very limited grounds. Section 34 of the Act, does not include within its scope, the power to modify an award.

35. In light of the settled position of law, this Court is unable to sustain the reappreciation of the evidence or the modification of the arbitral award by the learned District Judge.

VII. ISSUE C: WHETHER THE APPELLANT IS BARRED FROM RAISING ANY DISPUTE AFTER ACCEPTING ANY PAYMENT OF THE NATURE OF ALLEGED "FULL AND FINAL PAYMENT"?

36. For this Issue, this Court considers it apposite to first reproduce a portion of the Supreme Court's order dated 23.08.2022 passed in SLP(C) No.27625 of 2019, by virtue of which the present Appeal was restored. The Apex Court observed therein:

> *"It reveals from the order impugned dated 13.09.2019 that the High Court has not looked into the appeal preferred at the instance of the petitioner on merits and dismissed on the premise that the petitioner had accepted a sum of Rs.13,43,016/- in terms of the award passed by the District Judge dated 26.07.2007 and since it was accepted by the petitioner without any protest, they have no right to continue with the proceedings initiated under Section 37 of the Act.*
>
> *It is also brought to our notice that the respondent has also filed cross objections and that too have been disposed of under the order impugned dated 13.09.2019.*
>
> *With the assistance of the learned Counsel for the parties, we have looked into the money receipt dated 03.11.2007 which is on record (page 162), it nowhere indicates that it was accepted by the petitioner towards full and final settlement in terms of the award rather it is a money receipt signed by the petitioner and there is no other document filed by either party which may disclose that money has been accepted by the petitioner either under protest or for full and final settlement in terms of the award passed by the District Judge dated 26.07.2007.*
>
> *After we have heard the learned Counsel for the parties, in our considered view, the judgment passed by the High Court impugned dated 13.09.2019 is not sustainable in law and deserves to be set aside."*

37. As has been previously discussed by this Court in ***United India Insurance Company Ltd., Bhubaneswar v. Suryo Udyog Ltd.*** (supra), accepting a payment in the nature of a so-called "full and final payment" in itself is not a bar for the Court in adjudicating upon a dispute arising out of the quantum of such payment. It has been

14. (2006) 11 SCC 181, 15. (2018) 11 SCC 328, 16. (2021) 7 SCC 657 , 17. (2021) 9 SCC 1

held by the Supreme Court in ***National Insurance Company Ltd. v. Boghara Polyfab Pvt. Ltd.***[18] that even in the case of issuance of full and final discharge/settlement voucher/no-dues certificate the arbitrator or Court can go into the question whether the liability has been satisfied or not. This decision has followed the view taken by the Supreme Court in ***Chairman and Managing Director, NTPC Ltd. v. Reshmi Constructions, Builders and Contrac***[19], which has also been reiterated by the Apex Court in ***R.L. Kalathia & Co. v. State of Gujarat***[20] and ***Ambica Construction v. Union of In***dia[21].

38. In the present case, however, as has been noted by the Supreme Court itself, the money receipt dated 03.11.2007 nowhere indicates that it was accepted by the Appellant towards full and final settlement in terms of the award. Rather, it is merely a money receipt signed by the Appellant without any such endorsement to this effect. Therefore, the present Appeal can by no stretch of imagination be liable to be dismissed on account of the present Appellant receiving a sum of money in furtherance of the impugned judgment and order.

VIII. ISSUE D: WHETHER THE ARBITRATOR ERRED IN LAW BY GRANTING INTEREST ON THE AWARDED AMOUNT IN THE ABSENCE OF A PROVISION IN THE CONTRACT BETWEEN THE PARTIES?

39. It is the contention of the Respondent that the learned Arbitrator has also committed a patent illegality by granting interest at the rate of 9% per annum when allegedly there is an express bar in the General Conditions of Contract which governs the parties. A bare perusal of Clause 64.11. of the General Conditions of Contract which refers to money claims, shows that it does not encompass within its scope of applicability to arbitral awards which arise out of a claim pertaining to determination, termination or non-fulfillment of the contract. The Appellant's claim cannot be equated to a money claim as the same arose because the Appellant was unable to complete the contract despite his willingness and readiness to do so. Therefore, the award of a moderate rate of interest by the Arbitrator cannot be termed to be patently illegal.

40. Furthermore, as the conditions of the contract between the parties is silent as to award of interest made for a claim of such an nature, this Court may refer to the Supreme Court in ***Bhagwati Oxygen Ltd. v. Hindustan Copper Ltd.***[22] wherein it was held that if there is no provision in the arbitration agreement for a rate of interest, then it is in the discretion of the Arbitral Tribunal to determine the rate of interest to be granted based on the facts and circumstances of the matter in hand. The learned Arbitrators further have the power and jurisdiction to grant interest in all three stages of an arbitration i.e. pre-reference period, *pendente lite* and post award period. The learned Arbitrators are only bound by the terms of the agreement

18. (2009) 1 SCC 267, **19**. (2004) 2 SCC 663, **20**. (2011) 2 SCC 400, **21**. (2006) 13 SCC 475, **22.** AIR 2005 SC 2071

entered into between the parties, but in cases where the agreement is silent about the question of interest, the learned Arbitrators are required to use the test of reasonableness and exercise their discretion in awarding interest.

IX. ISSUE E: WHETHER A CROSS OBJECTION IS MAINTAINABLE IN AN APPEAL UNDER SECTION 37 OF THE A&C ACT?

41. At the outset, it may be noted that this Court is of the opinion that keeping the settled position of law in mind and the discussion above, the arbitral award is not liable to be set aside on merits and the learned District Judge's partial modification of the same is not tenable in law.

42. However, this Court also considers it appropriate to briefly touch upon the question of maintainability of cross objections in an appeal under Section 37 of the Act.

43. While dealing with the previous Arbitration Act of 1940, the Supreme Court in ***Municipal Corporation of Delhi and others v. International Security and Intelligence Agency Limited***[23] had *inter-alia* dealt with the issue of competence and maintainability of cross objections in an appeal preferred under the Arbitration Act, 1940.

44. In this regard, the Supreme Court noted that Section 41(a) of the Arbitration Act, 1940 provides that "*the provisions of the Code of Civil Procedure, 1908 (V of 1908), shall apply to all proceedings before the Court, to all appeals, under Arbitration and Conciliation Act*". A bare reading of Section 41(a) of the Arbitration Act, 1940 would suggest that in all the appeals filed under Section 39 of the Arbitration Act, 1940, the provisions of Order 41, Rule 22 of the C.P.C. would be applicable. The Supreme Court also observed that the right to take a cross objection is the exercise of substantive right of appeal conferred by a statute, and the grounds of challenge against the judgment, decree or order impugned remain the same whether it is an appeal or a cross objection. The difference lies in the form and manner of exercising the right. Hence, the Supreme Court held that a cross objection can be preferred under Section 39 of the Arbitration Act, 1940.

45. However, unlike the Arbitration Act of 1940, there is no such provision in the present Act to prescribe that the provisions of the C.P.C. should apply to all the proceedings before the court and to all appeals under the Act.

46. The issue of applicability of C.P.C. in the context of maintainability of cross objection under Section 37 of the Arbitration and Conciliation Act, which was specifically dealt with by the Supreme Court in the case of ***Mahanagar Telephone Nigam Limited v. Applied Electronics Limite***[24].

47. The Apex Court while dealing with the applicability of the provisions of C.P.C. with respect to proceedings taken under the provisions of the Act, observed

23. (2004) 3 SCC 250, **24**. (2017) 2 SCC 37

that while enacting the Act, the legislature has intentionally not carried forward any provision pertaining to the applicability of C.P.C. While differing from the ratio laid down in the case of ***Municipal Corporation of Delhi and others v. International Security and Intelligence Agency Limited*** (supra), the Supreme Court observed that the said decision was rendered in the backdrop of the Arbitration Act, 1940, and hence, it is distinguishable. The Apex Court held that the Arbitration and Conciliation Act, 1996 being a complete code in itself, the applicability of C.P.C. is not to be conceived. Accordingly, the Supreme Court held that the application of the provisions of Order 41, Rule 22 of C.P.C., cannot be construed to maintain a cross objection in an appeal filed under Section 37 of the Arbitration and Conciliation Act.

48. The Supreme Court while rendering the above view, considered its earlier decision in ***ITI Limited v. Siemens Public Communications Network Limited***[25] wherein it has *inter alia* been held that there is no express prohibition against the applicability of C.P.C. in a proceeding arising out of the Arbitration and Conciliation Act, hence, there cannot be any inference that C.P.C. is not applicable in the matters related to the Arbitration and Conciliation Act when the express exclusion of C.P.C. is not provided for. The Supreme Court observed that the decision in ***ITI Limited vs. Siemens Public Communications Network Limited*** (supra), though a binding precedent, appears to be incorrect, as the scheme of the Arbitration and Conciliation Act clearly provides otherwise and the legislative intent of the Arbitration and Conciliation Act also postulates the same.

49. In view of such conflict with its pervious decision, the Supreme Court observed that the views expressed in ***ITI Limited vs. Siemens Public Communications Network Limited*** (supra) deserves to be reconsidered by a larger Bench and the Supreme Court continues to be *in seisin* of the said issue.

50. Until the date and judgment of this order, the outcome of the reference to the larger Bench remains pending. Till then, it is pertinent to mention, that the decision of the Supreme Court in ***Mahanagar Telephone Nigam Limited s. Applied Electronics Limited*** (supra) holds the field, which held that the filing of cross objection under Section 37 of the Arbitration and Conciliation Act is not maintainable; and that analogy cannot be drawn from the provision of Order 41, Rule 22 of the C.P.C., as the same is not applicable on the proceedings arising under the Arbitration and Conciliation Act, 1996. Therefore, while even on merits the cross objections are deemed to not hold much water, the said cross objections as per the present position of law is also not maintainable.

51. This Court also briefly notes that the conduct of the Respondent of accepting and admitting their liability as per the award to the extent of Rs.28,79,350/- as alleged to be evident from the deduction of TDS is not extensively dealt with here. The counsel for the Respondent has clarified that the said TDS

25. (2002) 5 SCC 510

certificates were erroneous, immediately rectified with amendment of return and the same was duly communicated to the Appellant. This Court proposes to leave it at that.

X. CONCLUSION:

52. 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 Arbitrator acted well within his jurisdiction in awarding the appropriate relief.

53. The award of Rs.24,68,000/- including interest @ 9% per annum in favour of the Appellant vide arbitral award dated 27.07.2005 is upheld and reinstated in its entirety. The Respondent is directed to make good the payment without any further delay after making the adjustment in accordance with the amount already paid.

54. Consequently, it is observed that the present ARBA No.21 of 2007 is allowed and the arbitral award is upheld. The cross objections are dismissed. No order as to costs.

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2023 (II) ILR – CUT - 1145

Dr. S.K. PANIGRAHI, J.

ARBA NO. 4 OF 2021

JINDAL INDIA THERMAL POWER LTD. ……Appellant

.V.

QUARTZ INFRA AND ENGINEERING PVT. LTD., BHANJARA HILLS, HYDERABAD …….Respondent

(A) ARBITRATION AND CONCILIATION ACT, 1996 – Section 37 – When an arbitral award can be set aside – Held, if it is contrary to (a) fundamental policy of Indian law (b) the interest of India, or (c) Justice or morality or (d) if it is patently illegal. (Para 26)

(B) ARBITRATION AND CONCILIATION ACT,1996 – Sections 18,27 – Learned Arbitral Tribunal rejected the application under section 27 of the Act – Whether it amounts to contravene the principle of Natural Justice and violation of Sec 18 of the Act – Held, No – The Arbitral Tribunal is the master of both quality and quantity of evidence to reach a finding of fact – To set aside an arbitral award on the ground of violation of principles of natural justice relevant factors need to be satisfied. (Para 41-46)

Case Laws Relied on and Referred to :-

1. (2019) 9 SCC 798 : State of Jharkhand Vs. HSS Integrated SDN.
2. (2019) 4 SCC 163 : MMTC Limited Vs. Vedanta Limited
3. (2020) 12 SCC 539 : K. Sugumar Vs. Hindustan Petroleum Corpn. Ltd.
4. (2006) 11 SCC 181 : Mcdermott International Inc. Vs. Burn Standard Co. Ltd.
5. (2021) 9 SCC 1 : NHAI M.Hakeem.
6. (2020) 12 SCC 539 : K. Sugumar Vs. Hindustan Petroleum Corpn. Ltd.
7. (2022) 4 SCC 116 : UHL Power Company Ltd. Vs. State of Himachal Pradesh.
8. (2014) 9 SCC 263 : Oil & Natural Gas Corporation Ltd. Vs. Western Geco. International Limited.
9. (2015) 3 SCC 49 : Associate Builders Vs. Delhi Development Authority.
10. (2019) 15 SCC 131 : Ssangyong Engg. & Construction Co. Ltd. Vs. NHAI.
11. (2022) 2 SCC 275 : State of Chattisgarh Vs. Sal Udyog.
12. (2022) 1 SCC 131 : Delhi Airport Metro Express (P) Ltd. Vs. DMRC.
13. (2006) 4 SCC 445 : Hindustan Zinc Ltd. Vs. Friends Coal Carbonization.
14. 2016 SCC OnLine Ori 1039 : State of Orissa Vs. Bhagyadhar Dash.
15. (2003) 7 SCC 396 : State of U.P. Vs. Allied Constructions.
16. (2012) 1 SCC 594 : P.R. Shah Shares & Stock Broker (P) Ltd. Vs. B.H.H. Securities (P) Ltd.
17. (2015) 5 SCC 739 : Swan Gold Mining Ltd. Vs. Hindustan Copper Ltd.
18. (1985) 3 SCC 398 : Union of India Vs. Tulsiram Patel.
19. (2003) 4 SCC 557 : Canara Bank Vs. Debasis Das.
20. [1995] O.J. No. 3021 : Mungo Vs. Saverino.
21. (1996) 3 SCC 364 : State Bank of Patiala Vs. S.K. Sharma.
22. (2015) 3 SCC 49 : Associate Builders Vs. Delhi Development Authority.
23. [1957] 13 F.J.R. 237 : Union of India Vs. T.R. Varma.
24. (2001) 5 SCC 691 : Indu Engineering & Textiles Ltd. Vs. Delhi Development Authority.
25. (2014) 9 SCC 263 : ONGC Ltd. Vs. Western Geco International Ltd.

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For Respondent : Mr. V. Subba Raju, In person

JUDGMENT Date of Hearing:21.04.2023 : Date of Judgment: 03.07.2023

Dr. S.K. PANIGRAHI, J.

1. This Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "A & C Act") has been filed seeking setting aside of the judgment and final order dated 09.04.2021 passed by the learned District Judge, Angul in Arbitration Petition No. 8 of 2017 arising out of arbitration award dated 21.2.2017 passed by the Learned Arbitral Tribunal comprising Justice S.B. Sinha (Retd.), Former Judge, Supreme Court of India, Justice R.C. Chopra (Retd.), Former Judge, Delhi High Court and Shri P.S. Rao.

I. FACTUAL MATRIX OF THE CASE:

2. The present Appellant is a Public Limited Company engaged *inter alia* in the business of production of electricity for which it undertook construction of a 2 x 600 MW Thermal Power Plant at Derang, Angul in Odisha. Having come in touch with the present Respondent Company during their stint as a sub-contractor for one M/s G.S.R. Ventures Pvt. Ltd., the Appellant Company herein, entered into multiple direct contracts with the Respondent Company. The present *lis* revolves around five such contracts.

3. The basic details of the five contracts involved in the present appeal are as follows:

i. Raw Water Reservoir Extension – Work Order No. JITPL/2011-12/Odisha/300 – Valued at Rs.10,49,72,288/- Dated: 14.12.2011 and Date of completion stipulated to be: 28.2.2012

ii. Ash Dyke–Work Order No. JITPL/2011-12/Odisha/311 – Valued at Rs.21,49,92,525/- Dated: 2.2.2012 and Date of completion stipulated to be: 2.10.2012

iii. Peripheral Roads–Work Order No.JITPL/2011-12/Odisha/246 – Valued at Rs.7,95,00,000/- Dated:11.4.2011 and Date of completion stipulated to be:11.7.2011

iv. Internal Roads and Drains – Work Order No. JITPL/2011-12/Odisha/315 – Valued at Rs.16,49,00,000/- Dated: 29.2.2012 and Date of completion stipulated to be: 28.2.2013

v. Boundary Wall – Work Order No. JITPL/2011-12/Odisha/310 – Valued at Rs.1,59,69,075/- Dated: 14.12.2011 and Date of completion stipulated to be: None mentioned.

4. Disputes arose between the parties when the present Appellant terminated the aforementioned contracts on 2.2.2013 /6.2.2013 and further encashed the Bank Guarantees furnished by the Respondent Company between December, 2012 and January, 2013. The Respondent Company contended that the delay in performance was triggered due to hindrances and obstructions for which the Appellant was responsible, and therefore invoked arbitration. The Ld. Arbitral Tribunal comprising Justice S.B. Sinha (Retd.), Former Judge, Supreme Court of India, Justice R.C. Chopra (Retd.), Former Judge, Delhi High Court and Shri P.S. Rao accordingly entered into the reference. After hearing both sides and perusing the records during the course of 55 sittings, the Arbitral Award dated 21.1.2017 was passed by Justice S.B. Sinha (Retd.) and Shri P.S. Rao whereas Justice R.C. Chopra (Retd.) passed a dissenting opinion on the same day. The Ld. Tribunal in its majority award has awarded Rs. 9,71,06,938/- in favour of the present Respondent including *pendente lite* interest on the awarded amount at the rate of 12% per annum. It has been further directed that if the payment is not made within one month from the date of the award, the present Appellant would be liable to pay interest at the rate of 18% per annum till the date of actual payment.

5. Aggrieved by the arbitral award, the present Appellant challenged the Award dated 21.2.2017 before the Ld. District Judge, Angul on various grounds in a

petition under Section 34 of the A&C Act. Having heard the parties, the Ld. District Judge has been pleased to dismiss the petition *vide* its order dated 9.4.2021 in ARBP No.8 of 2017.

6. Being thus aggrieved, the present Appellants have approached this Court in ARBA No.4 of 2021, challenging the judgment and order dated 09.04.2021 of the learned District Judge passed in ARBP No.8 of 2017.

7. It is also pertinent to mention here that this Court had referred the parties to mediation, during the course of the proceedings, having conceived the opinion that the parties should explore the possibility of an amicable settlement *vide* its order dated 25.1.2023. However, the parties failed to arrive at a settlement.

8. Now that the background leading up to the instant Appeal have been laid down, this Court shall endeavour to summarise the contentions of the Parties and the broad grounds that have been raised to invoke this Court's limited jurisdiction available under Section 37 of the A&C Act.

II. APPELLANT'S SUBMISSIONS

9. Shri Ciccu Mukhopadhyaya, learned Senior Counsel for the Appellants assails the arbitral award and the judgment of the Ld. District Judge mainly on the ground that there has been a breach of the principles of natural justice. It has vehemently been contended that the refusal of the Ld. Tribunal to entertain the application filed under Section 27 of the A&C Act (to call upon additional witnesses) was a breach of the principles of natural justice. The same is contended to have seriously aggrieved the present Appellant, who submits that such denial resultantly disallowed them from bringing some relevant material evidence on record. Furthermore, it is also claimed that the Arbitral Award relies on a large number of judgments which neither party had cited, thereby denying the parties an opportunity to address their arguments on the same.

10. It is also contended that the Ld. Tribunal has traversed beyond the contours of the contract and the terms contained therein to arrive at its findings. This is contended especially with regard to the Appellant's alleged unfettered right to terminate the contract and the grant of loss of profit to the Respondent Company.

11. Moreover, it is submitted that the learned District Court has hastily ignored the contentions of the Appellant and did not assign any independent reason as to how or why the findings of the Ld. Tribunal were correct.

12. Lastly, it is vehemently submitted that the Ld. Tribunal has violated Section 18 of the Act as it has allegedly failed to treat the parties equally and therefore, on this ground as well the present Arbitral Award is liable to be set aside.

III. RESPONDENT'S SUBMISSIONS

13. *Per contra*, learned counsel for the Respondent states that the Appellants have not been able to demonstrate any reasonable ground for interfering with the

impugned judgment apart from making bald statements towards the same. It was vehemently argued that the scope of interference of this Court in an application under Section 37 of the A&C Act is extremely limited and this Court cannot reappreciate evidence at this stage, therefore his Court may not revisit the factual findings of the Ld. Tribunal apart from testing the same on the mantle of reasonableness. It was also submitted that the Learned District Judge had considered all the material aspects of the contentions raised by the parties and also duly regarded their submissions thereby warranting no interference with the concurrent views of the Learned Arbitral Tribunal as well as the Learned District Judge.

14. It was also strenuously argued that the Learned Arbitral Tribunal has, in fact, zealously scrutinized all the claims and counter claims to ultimately awarded the present Respondent only Rs.9.71 crores as compared to the total claim of Rs.30.6 crores. It is further alleged that the present Appellants have not been diligently conducting the matter and have employed delay tactics to further inconvenience and perpetuate hardships to the Respondent Company.

IV. ISSUES FOR CONSIDERATION:

15. Having heard the parties and perused the materials available on record, this court has identified the following issues to be determined:

A. What is the scope of this Court's power under Section 37 of the A&C Act and whether the arbitral award is patently illegal as alleged by the Appellant?

B. Whether the Learned Arbitral Tribunal has contravened the principles of natural justice and violated Section 18 of the A&C Act by rejecting the application under Section 27 of the A&C Act, preferred by the Appellant?

C. Whether the District Court has merely parroted the Learned Tribunal's findings without applying its own judicial mind to the contentions and submissions of the parties?

ISSUE A: WHAT IS THE SCOPE OF THIS COURT'S POWER UNDER SECTION 37 OF THE A&C ACT AND WHETHER THE ARBITRAL AWARD IS PATENTLY ILLEGAL AS ALLEGED BY THE APPELLANTS?

16. The Appellant has approached this Court challenging the Ld. District Court's order dated 9.4.2021 wherein the Appellant's challenge to the award dated 21.2.2017 has been dismissed. The law regarding a challenge to an arbitral award under the A&C Act is no more a *res integra*.

17. The intention of the legislature while enacting the A&C Act was mainly the prompt and efficacious disposal of matters. The A&C Act has been set forth with the objective to curtail the interference of the courts into the arbitral proceedings. In order to further advance this objective while granting an opportunity to maintain a check on it, a provision to set aside the award has been included. But even then, it

was provided that an award may only be set aside as it fulfills certain criteria which would qualify to be bad in law.

18. It is incontrovertible that the Learned Arbitrator or Arbitral Tribunal is to pass an award, upon conducting the arbitration proceedings with the participation of parties to the dispute, and considering the Statement of Claim and Statement of Defence presented by and on behalf of the parties, keeping in mind the relevant documents placed on record by the parties. The Learned Arbitrator or Arbitral Tribunal is for all intents and purposes considered a Court faced with the task of adjudicating the dispute before him. An unfettered scope of intervention in their functioning would defeat the spirit and purpose of the A&C Act. Therefore, the Supreme Court has time and again reiterated that the scope of intervention of the Courts is limited in the cases of a challenge under Section 34 or Section 37 of the A&C Act.

19. Having regard to the contentions urged and the issues raised, it is apposite to take note of the principles enunciated by the Apex Court in some of the relevant decisions cited by the parties on the scope of challenge to an arbitral award under Section 34 and the scope of appeal under Section 37 of the Act of 1996.

20. There is no gainsaying that the jurisdiction of this Court under Section 37 of the A&C Act is limited in scope. In this regard, it is deemed apt to advert to the decision in ***State of Jharkhand v. HSS Integrated SDN***[1], wherein the Supreme Court observed as follows:—

> *"7. As held by this Court in a catena of decisions, the award passed by the Arbitral Tribunal can be interfered with in the proceedings under Sections 34 and 37 of the Arbitration Act only in a case where the finding is perverse and/or contrary to the evidence and/or the same is against the public policy. (See Associate Builders v. DDA).*
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> *7.1. In the present case, the categorical findings arrived at by the Arbitral Tribunal are to the effect that the termination of the contract was illegal and without following due procedure of the provisions of the contract. The findings are on appreciation of evidence considering the relevant provisions and material on record as well as on interpretation of the relevant provisions of the contract, which are neither perverse nor contrary to the evidence in record. Therefore, as such, the first appellate court and the High Court have rightly not interfered with such findings of fact recorded by the learned Arbitral Tribunal."*

21. The scope of Section 37 of the Arbitration Act was further analyzed by the Supreme Court in ***MMTC Limited v. Vedanta Limited***[2]**.** where it was held:

> *"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*

1. (2019) 9 SCC 798, **2**. (2019) 4 SCC 163

> *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."*

A similar view, as stated above, has been taken by the Supreme Court in ***K. Sugumar v. Hindustan Petroleum Corpn. Ltd***[3].

22. Recently, in ***Haryana Tourism Limited v. Kandhari Beverages Limited***, the Supreme Court was in *seisin* of a situation wherein the appellant therein had accepted the tender filed by the respondent, however, disputes arose between the parties during pendency of the contract which led to appointment of an Arbitrator. Aggrieved by the Arbitrator's Award, the respondent filed objections under Section 34 of the Arbitration Act before the concerned ADJ, which was dismissed. The respondent preferred an appeal against the order of learned ADJ as well as the Award of the learned Arbitrator before the Punjab and Haryana High Court under Section 37 of the Arbitration Act, which was allowed. Assailing the order of the High Court, the appellant approached the Supreme Court. While setting aside the order of the High Court and restoring the Award of the Arbitrator and order of the learned ADJ, the Supreme Court delineated the scope of Section 37 of the A&C Act and observed thus:

> *"8. So far as the impugned judgment and order passed by the High Court quashing and setting aside the award and the order passed by the Additional District Judge under Section 34 of the Arbitration Act are concerned, it is required to be noted that in an appeal under Section 37 of the Arbitration Act, the High Court has entered into the merits of the claim, which is not permissible in exercise of powers under Section 37 of the Arbitration Act.*
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> *9. As per settled position of law laid down by this Court in a catena of decisions, an award can be set aside only if the award is against the public policy of India. The award can be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to, (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal. None of the aforesaid exceptions shall be applicable to the facts of the case on hand. The High Court has entered into the merits of the claim and has decided the appeal under Section 37 of the Arbitration Act as if the High Court was deciding the appeal against the judgment and decree passed by the learned trial court. Thus, the High Court has exercised the jurisdiction not vested in it under Section 37 of the Arbitration Act. The impugned judgment and order passed by the High Court is hence not sustainable."*

23. The Supreme Court, has repeatedly reiterated in ***Mcdermott International Inc.* v. *Burn Standard Co. Ltd***[4]***, NHAI M.Hakeem***[5] and ***K. Sugumar v. Hindustan Petroleum Corpn. Ltd.***[6] among others, that the A&C Act includes a provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness.

24. From a perusal of the judicial *dicta* cited hereinabove, it is discernible that the scope of interference under Section 37 of the A&C Act is narrow. Before

3. (2020) 12 SCC 539 , **4**. (2006) 11 SCC 181, **5**. (2021) 9 SCC 1, **6**. (2020) 12 SCC 539

interfering with an Award passed by the Arbitral Tribunal, which, in fact, has been concurred with by the First Appellate Court, this Court shall circumspect and refrain from reassessment or re-examination of the merits of the case, as if it were a Court of Appeal against the Award. 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.

25. It is similarly fairly well settled law that the jurisdiction of the Court under Section 34 of the A&C Act is narrow and limited. Reliance in this regard may be placed upon the Supreme Court's judgment in ***UHL Power Company Ltd. v. State of Himachal Pradesh***[7], wherein it was observed that:

> *"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."*

26. An arbitral award may be set aside only if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

27. After the Apex Court's judgment and findings in ***Oil & Natural Gas Corporation Ltd. v. Western Geco International Limited***[8] were subsequently discussed in ***Associate Builders v. Delhi Development Authority***[9] the position of law was clarified and laid down recently by the Supreme Court in ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI***[10], wherein the Apex Court was pleased to broadly stipulate the aforementioned four constituents of what makes an award against the "public policy of India".

28. This Court has to see whether the conclusion so arrived suffers from any patent illegality while making sure not to transgress the 'lakshman rekha' of the scope of this Court's powers under Section 37 of the A&C Act.

29. The Supreme Court in ***State of Chattisgarh v. Sal Udyog***[11] reiterated its earlier observations in ***Delhi Airport Metro Express (P) Ltd. v. DMRC***[12] while referring to the facets of patent illegality, held as under:

7. (2022) 4 SCC 116, **8.** (2014) 9 SCC 263, **9**. (2015) 3 SCC 49, **10.** (2019) 15 SCC 131, **11**. (2022) 2 SCC 275
12. (2022) 1 SCC 131

> *"29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality."*

An award might be set aside stating it to be patently illegal, provided the illegality goes to the root of the award. If the illegality is of a trivial nature, it cannot be said that the award is against public policy. This proposition was reaffirmed by the Supreme Court in ***Hindustan Zinc Ltd. v. Friends Coal Carbonization***[13].

30. This Court had the opportunity to peruse the Arbitral Award and the Learned District Judge's judgment and order. There is an area of serious concern pertaining to the disconcerting propensity of the Courts tasked with hearing challenges to the arbitral award, embarking on a journey of dissecting and re-assessing factual aspects. Keeping in mind the limited scope of this Court's interference as well as this Court's inability to enter into the merits of the matter, the principal contentions put forth by the parties are examined on the touchstone of the grounds envisioned in the A&C Act and have been dealt with in the following manner:

***i. With respect to the impugned award being contrary to the terms of the contract*:**

a. The Appellant very ardently contended that it had an absolute right of termination without cause and therefore there could be no question of wrongful termination by the Appellant. It is their further submission that the Ld. Tribunal had not considered this particular contention and if the same had been considered, it would have led to a different result than what the Arbitral Tribunal arrived at. In the present case, it was submitted by the Appellant that the express terms of the contract entitled the Appellant to terminate the contracts without cause and at will. As such if the provision was not ignored, the Tribunal was bound to uphold the right of termination and hence bound to reject any claims for wrongful termination or damages for wrongful termination i.e. loss of profit.

b. An arbitral tribunal must decide in accordance with the terms of the contract but if an arbitrator construes a term of the contract in a reasonable manner, it would not mean that

13. (2006) 4 SCC 445

the award can be set aside on this ground. Construction of the terms of the contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person would do. Of course, the arbitrator cannot wander outside the contract and deals with the matters not forming the subject matter or allotted to him as in that case he would commit jurisdictional error. Where a cause or matters in differences are referred to an arbitrator, whether lawyer or layman, he is constituted as the sole and final judge of all questions of law and of fact obviously with limited grounds of interference.

c. In Paragraph 243 of the Arbitral Award, the Ld. Tribunal has opined:

"In the opinion of the Tribunal, only because in terms of the work order the Employer has a right to reduce the quantity of the work, if any contingency arises therefore, the same would not mean that the contract can be terminated by it at its sweet will."

d. The Ld. Tribunal has further dealt with the question of how the contract should be construed, whether the contract envisions mutual obligation and if it does then whether the present Appellant fulfills their obligations satisfactorily in order to enable the Respondent to perform their part of the contract, and finally as to whether the termination of the contract was valid. After perusing the same wherein the Learned Tribunal has considered the conduct of the Parties as well as the material evidence on record when this Court embarks on a reading of the terms of the multiple contracts entered into between the parties, this Court is in favour of the opinion of the Learned Tribunal.

e. Every Clause containing the so called unfettered right to terminate is immediately succeeded with the Clause which essentially states that if the said work performed by the present Respondent is not up to the "entire satisfaction" of the Appellant, the Appellant Company has a right to terminate the assignment. The burden to explain why or how the Appellant was not entirely satisfied in order to justify the termination is *sine qua non*.

f. A clause granting unfettered right to terminate in favour of one party, especially if the said party is the one possessing higher bargaining strength, is unconscionable. A contract is meant to be respected and adhered to by both parties. The parties will perform their respective duties and obligations in line with the terms of the contract for the consideration set out therein. Upholding the applicability of such a right would inadvertently lead to anomalous situations. When the contracts themselves include two rights of termination, one being absolute, and one wherein the Appellant must justify its non-satisfaction and prescribe reasons, it would be against the conscience of this Court to hold that the Appellant's right to terminate was absolute. Especially as the Appellant itself has provided otherwise. An unfettered right to terminate a contract must be unqualified with the basic requirement of the party responsible for effecting such termination having acted in good faith. This conclusion of the Ld. Tribunal that the Appellant did not have an unfettered or absolute right of termination therefore cannot be said to be patently illegal or unreasonable.

ii. With respect to time being of essence in the contracts:

a. On the issue of time being the essence or not the Learned Tribunal referred to a large number of judgments nearly all of which had never been cited by the Respondent herein to hold that time was not of the essence in the present case as alleged by the Respondent. It is has been contended that the Learned Tribunal has completely failed to consider the argument of the Appellant herein that - even if the time was not of the essence, it could

have been made of the essence by notifying the required completion date failing which the contract could be terminated.

b. The judgments referred to by the Learned Arbitral Tribunal do not, as a matter of practice, have to be disclosed to the parties. No court in its judgment or order provides the parties a complete list of authorities it seeks to rely on in order to invite the parties agreement/disagreement with the same. This Court as well at the time of drawing up this judgment has undertaken research to understand the current position of law in order to substantiate its conclusion. The Learned Tribunal has similarly done the same. This Court is in no position to rebuke the Ld. Tribunal for its reference to a particular judgment or authority as that reference is the foundation of its reasoning to arrive at its findings. We are concerned only with the reasonableness, legality and adequacy of the said finding itself. Therefore, the contention of the Appellant that the Learned Tribunal has committed patent illegality by referring to judgments and authorities that were not cited is unsustainable and is inherently flawed.

c. Furthermore, it is pertinent to note herein that the five contracts that form the basis of the present *lis* do not contain any express provision stating that time is of the essence. There, however, is a provision that extensions may be granted subject to liquidated damages being imposed. In light of the same, the Ld. Tribunal's conclusion that time was not of essence of the contracts cannot be said to be patently illegal.

iii. Other factual disputes raised by parties

With respect to issues pertaining to quantum of claims, payment delays, electricity charges, price escalations, work hindered on account of rainy season, hindrances at site, amounts retained, etc. are factual disputes.

a. This Court is cognizant of the scope of its powers (and limitations) under Section 37 of the A&C Act. This Court has to make a conscious effort to not under any circumstances, enter into the realm of facts or factual findings. The evidence that was produced by the parties has been thoroughly examined by the Learned Tribunal which is to the satisfaction of this Court. By making submissions pertaining to such facts, the Appellant is attempting to draw this Court into an exercise of re-appreciation of evidence while also seeking to re-agitate its contentions. The same is impermissible in law and therefore, these contentions need not be gone into. However, it is indicated that the Learned Arbitral Tribunal being the best judge of the facts and therefore having recorded its factual findings is irrefragable in the present matter.

iv. Violation of principles of Natural Justice

With respect to allegations pertaining to violation of principles of natural justice in so far as the Appellant was not allowed to lead relevant evidence thereby causing grave prejudice to the Appellant; the non-consideration of the Appellant's arguments thereby allegedly violating Section 18 of the A&C Act and the reliance of the Ld. Tribunal on judgments. This contention will be discussed as a separate issue subsequently given its importance.

31. It is generally recognized that when the Arbitral Tribunal has thoroughly evaluated the materials and evidence presented to them, the court, when considering objections under Section 34 of the A&C Act, does not act as a court of appeal and is not required to reexamine all of the evidence or the parties' case on merits. An award made by an Arbitral Tribunal cannot be revoked on the ground that another

viewpoint is conceivable in the court's eyes. In these cases, the court's responsibility is to determine whether the Arbitral Tribunal's point of view on the relevant facts, pleadings, and evidence is a reasonable one. The court should be reluctant to intervene even if, after considering the objections under Section 34, it were determined that there were two possible assessments of the material and that the Arbitral Tribunal had taken one route instead of the other. If the Arbitral Tribunal's viewpoint is reasonable, the court is not permitted to substitute its own opinion for that of the Learned Arbitrator. The same has been previously reiterated by this Court in ***State of Orissa v. Bhagyadhar Dash***[14] and more recently in judgment dated 9.1.2023 in ARBA No. 39 of 2018 titled as ***United India Insurance Company Ltd., Bhubaneswar v. Suryo Udyog Ltd.***

32. This Court notes that the arbitration between the parties pertained to five different contracts. The Learned Tribunal accordingly dealt with the claims raised in each contract separately. The meticulousness showcased by the Learned Tribunal in assessing each claim is, in fact, laudable.

33. This Court doesn't find the findings of the Learned Tribunal to be unreasonable. The Learned Tribunal in their award, has appreciated all relevant evidence, examined witness statements, and simultaneously evaluated the tenacity of the claims of the parties in light of the terms of contract, to arrive at a reasoned conclusion.

34. The Arbitrator is a Judge chosen by the parties and his decision is final. It is well-settled that the Court is precluded from re-appreciating the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law or the arbitrator exceeds the terms of the agreement or passes an award in absence of any evidence. An error apparent on the face of records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is plausible one, the Court will refrain itself from interfering. The said proposition is laid down by the Supreme Court in ***State of U.P.*** **v.** ***Allied Constructions***[15] and followed in subsequent decisions.

35. The scope of interference of this Court being very limited, this Court would not be justified in reappraising the material on record and substituting its own views in place of the arbitrator's view. Where there is an error apparent on the face of the record or if the arbitrator has not followed the statutory position, then and then only would it be justified for this Court to interfere with the award published by the arbitrator. Once the arbitrator has applied his mind to the matter before him, this Court is not permitted to reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the arbitrator would prevail.

14. 2016 SCC On Line Ori 1039, **15**. (2003) 7 SCC 396

36. The Supreme Court in ***P.R. Shah Shares & Stock Broker (P) Ltd. v. B.H.H. Securities (P) Ltd***.[16] has held that a Court does not sit in appeal over the award of an Arbitrator by re-assessing or re-appreciating the evidence. An award can be challenged only on the grounds mentioned in Section 34(2) of the Act and in absence of any such ground, it is not possible to re-examine the facts to find out whether a different decision can be arrived at. This view was reiterated by the Apex Court in ***Swan Gold Mining Ltd. v. Hindustan Copper Ltd.***[17]. In light of the aforesaid facts, this Court does not doubt that there is no patent illegality in the present case much less, any apparent violation of any terms of public policy.

ISSUE B: WHETHER THE WHETHER THE LD. ARBITRAL TRIBUNAL HAS CONTRAVENED THE PRINCIPLES OF NATURAL JUSTICE AND VIOLATED SECTION 18 OF THE A&C ACT BY REJECTING THE APPLICATION UNDER SECTION 27 OF THE A&C ACT, PREFERRED BY THE APPELLANT?

37. ***"****They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men"*- (The Apex Court held in ***Union of India v. Tulsiram Patel***[18]whilst discussing the principles of natural justice***)***.

38. The Supreme Court in ***Canara Bank v. Debasis Das***[19] held that:

> *"Natural Justice is another name of common-sense justice. Rules of Natural Justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law in Volving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form."*

39. As a part of the rule of Natural Justice, the right of *audi alteram partem* is a valuable right which mandates that no one should be condemned unheard. A corollary has been deduced from the above rule, namely "*quialiquid statuerit parte inaudita altera, aequum licet dixerit, baud aequum fecerit*" that is, "he who shall decide anything without the other side having seen heard, although he may have said what is right, will not have been what is right" or another manner in which it is now expressed, "justice should not only be done but should manifestly be seen to be done".

40. The Appellant has submitted that the Arbitral Award is vitiated on account of violation of basic and fundamental principles of natural justice as the Appellant herein was not allowed to lead evidence on material facts in issue in the arbitration by rejection of the Section 27 Application filed by the Appellant before the Tribunal by a Majority Decision, with the Minority Dissenting. The Appellant therefore

16. (2012) 1 SCC 594, **17**. (2015) 5 SCC 739 **, 18**. (1985) 3 SCC 398, **19**. (2003) 4 SCC 557

contends that the parties were not treated equally and hence Section 18 of the A&C Act also stood violated. Campbell J. of the Ontario Superior Court of Justice in ***Mungo v. Saverino***[20] very beautifully summarised:

> *"The great merit of arbitration is that they should be, compared to courts, comparatively quick, cheap and final. There is a trade-off between perfection on the one hand and speed, economy and finality on the other hand. If you go to arbitration, you can get quick and final justice and you can get on with the rest of your life. If you go to court, you can get exquisitely slow and expensive justice and you can spend the rest of your life enduring it and paying for it.*
>
> *For a disappointed arbitral litigant, jurisdiction and natural justice are good pickings. Jurisdiction and natural justice invoke the primordial instinct of courts to second-guess other tribunals and thus defeat the greatest benefit of arbitration, its finality.*
>
> *It is, therefore, important for the court to resist its natural tendency, faced with a clear and attractive argument on jurisdiction and natural justice, to plunge into the details of the arbitration and second-guess the arbitrator not only on the result but also on the punctilio of the arbitration. If an arbitration is basically fair, courts should resist the temptation to plunge into detailed complaints about flaws in the arbitration process".*

41. To set aside an arbitral award on the ground of violation of principles of natural justice, the court has to be satisfied, first, that the arbitral tribunal breached a rule of natural justice in making the arbitral award. Second, and more importantly, the court must then be satisfied that the breach of natural justice caused actual or real prejudice to the party challenging the award. In other words, the breach of the rules of natural justice must have actually altered the outcome of the arbitral proceedings in some meaningful way before curial intervention is warranted. Where the same result could or would ultimately have ensued even if the arbitrator had acted properly, there would be no basis for setting aside the arbitral award in question.

42. A party contending to use the principles of natural justice has to satisfy the Court that not only has it been denied the right of hearing or a notice, but also that the denial in fact has resulted in "real prejudice" to it by frustrating its lawful rights. The principles of natural justice are required to be complied with having regard to the 'fact-situation' of 'case to case' without there being any straitjacket formula with the thrust to find out prejudice caused to the complainant as opined by the Supreme Court in ***State Bank of Patiala v. S.K. Sharma***[21]. The principles of natural justice having been followed in a particular case are not 'immutable' but 'flexible'.

43. The Learned Arbitral Tribunal in its order dealing with the Section 27 Application preferred by the Appellant for summoning of eight additional witnesses has opined as follows:

> *"... there cannot be any doubt or dispute that approval to be granted by the Arbitral Tribunal for the purpose of obtaining assistance of the Court in taking evidence is discretionary in nature.*

20. [1995] O.J. No. 3021 **21**. (1996) 3 SCC 364

With a view to exercise such discretion, the Tribunal is not only required to take into consideration the question as to whether the purpose for which the witnesses have been summoned is genuine and the same shall be useful to the Tribunal in determining the real dispute between the parties.

... The arbitral proceedings had commenced on 2 July 2013.

... The Respondent at all material times was and still is aware of the nature and extent of dispute between the parties.

The Respondent intended to examine five witnesses as would appear from the list of witnesses submitted by it on 28 February 2015.

... It is also not the case of the Respondent that the concerned witnesses have declined to depose in its favour unless summoned by the Tribunal or a competent court of law.

... The witness sought to be summoned admittedly did not sign the level books and thus he would not be able to prove or disprove the contents thereof.

So far as the second reason for summoning the said witness is concerned, the fact that he shall be able to prove the details of the progress achieved after handing over of the site by the Claimant is not a relevant issue, being not a matter of dispute between the parties hereto, more so, having not been pleaded.

(Pertaining to the First Witness sought to be summoned)

... The parties have brought on record materials which were supposed to be within their power and possession, but if they did not, they would suffer the legal consequences therefore.

... The Respondent, therefore at all material times, could have produced him as a witness. ... (Pertaining to the Second Witness sought to be summoned)

... Moreover, if the Claimant has not been able to prove the quality of supplies of the materials brought on site, it may suffer consequences therefore. (Pertaining to the Third Category of Witnesses who were suppliers/sub-contractors and sought to be summoned)"

44. The Arbitral Tribunal, therefore, was amply satisfied about the sufficiency of the evidence presented before it and in fact was of the opinion that prejudice would be caused to the present Respondent(Claimant therein) if the application under section 27 were to be allowed. Moreover, a glance at the aforementioned extracts would show that the Ld. Tribunal was of the opinion that both the parties would have to bear the consequences for not having filed or gotten on record evidence to support their contentions. No discrimination was made and therefore it is rather evident that the parties were treated equally. Dealing with such matters in ***Associate Builders v. Delhi Development Authority***[22], the Apex Court has held that Arbitral Tribunal is the master of both quality and quantity of evidence to reach a finding of fact.

45. Furthermore, as the Supreme Court has observed in the case of ***Union of India v. T.R. Varma***[23], that the principles of natural justice require that the parties should have the opportunity of placing all relevant evidence on which they rely.

22. (2015) 3 SCC 49 **23**. [1957] 13 F.J.R. 237

However, in the present matter, it does not appear that the evidence of these witnesses were at all relevant to the enquiry and therefore in not examining these witnesses there has been no violation of the principles of natural justice, and no denial of reasonable opportunity.

46. This Court also notes that the A&C Act does not provide for a dissenting award. It only prescribes the form of an award. The "Operative Part of The Award", signed by all three members of the Arbitral Tribunal, which states that "*The decision of the Arbitral Tribunal by the Majority of the Members shall be treated to be the Award of the Tribunal in terms of Section 29(1) of the Arbitration and Conciliation Act, 1996*" shows that the majority award fulfills the requirements of a valid Arbitral Award as envisioned in the A&C Act. The dissenting award referred to by the Appellant or the dissenting procedural orders are at the end of the day merely dissenting opinions and can only be used to buttress the submissions, but not to conclusively justify any findings. The parties are bound by the findings that the majority award arrives at and this Court in an appeal against the arbitral award only has to consider those findings and their reasonableness. As this court is aware, there may be multiple ways of looking at a fact situation, but this Court need only examine whether the majority award's appreciation of facts/ law was reasonable, fair and justifiable based on cogent reasoning.

ISSUE C: WHETHER THE LD. DISTRICT COURT HAS PARROTED THE LD. TRIBUNAL'S FINDINGS WITHOUT APPLYING ITS OWN JUDICIAL MIND TO THE CONTENTIONS AND SUBMISSIONS OF THE PARTIES?

47. The judicial approach is one of the tests required to be applied to find out if the award is arbitrary, extraneous or whimsical. The judicial approach is a specie of the larger genus of "Fundamental Policy of Indian Law". The decision making authority is required to act *bona fide* and deal with the subject in a fair, reasonable and objective manner and its decision should not be actuated by any extraneous consideration.

48. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

49. An award can be said to be against justice or morality only when it shocks the conscience of the Court. The award cannot be passed on the mere *ipse dixit* of the arbitrator. Mere reference to documents, deposition, pleadings without discussing the relevancy and cogency of such materials and evidence would make the award an unreasoned award. Since an award is subject to judicial review, it is important that such award must disclose the mind of the arbitrator. Therefore, as discussed above, if the interpretation of the contract rendered by the learned arbitrator is a possible interpretation the same cannot be interfered with by this Court

under Section 34 of the Arbitration Act. The Court also cannot re-appreciate the evidence considered by the learned arbitrator under Section 34 of the A&C Act, let alone under Section 37 of the A&C Act .

50. It is trite law that the scope of examination under Section 34 of the A&C Act does not entail re-adjudication of the disputes. Unless an arbitral award falls foul of the public policy of India or is vitiated by patent illegality, no interference in the award is warranted. In the present case, the Ld. District Judge did not accept that any of the grounds as set out in Section 34 of the A&C Act are established.

51. In ***Indu Engineering & Textiles Ltd. v. Delhi Development Authority***[24], the Supreme Court held that the Arbitrator being a Judge appointed by the parties, the award passed by him is not to be interfered with lightly. When the view taken by the arbitrator was a possible or a plausible one, on his analysis of evidence and interpretation of contractual and/or statutory provisions and did not suffer from any manifest error, it was not open to the Court to interfere with the award. Even though the judgment in ***Indu Engineering & Textiles Ltd.*** (supra) was rendered in the context of an application under Section 30 of the Arbitration Act 1940, for setting aside of an award, the same principle would squarely apply to an application for setting aside an award, under Section 34 of the 1996 A&C Act as well.

52. In ***ONGC Ltd. v. Western Geco International Ltd.***[25]**,** the Apex Court added distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Supreme Court held:

> *"35. What then would constitute the 'fundamental policy of Indian law' is the question. The decision in ONGC [(2003) 5 SCC 705 : AIR 2003 SC 2629] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression 'fundamental policy of Indian law', we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge."*

24. (2001) 5 SCC 691 **25**. (2014) 9 SCC 263

53. Having discussed the principle, this Court now adverts to the Learned District Judge's order. After succinctly noting the background of the case in hand, the Learned District Judge has also managed to capture the gist of the dispute between the parties. Thereafter, the issues were summarised and put forth in nine short points by the Ld. District Judge, who proceeded to hear both parties on all those issues.

54. It appears from a perusal of the order impugned that the Learned District Judge was conscious of his powers under Section 34 of the A&C Act. Keeping the same in mind, the Learned District Judge perused the impugned award and only after such perusal he has come to the opinion that the Learned Tribunal has thoroughly scrutinised the evidence to arrive at its conclusion pertaining to time not being the essence of the contract. One can see the reference to specific paragraphs of the arbitral award at various points throughout the impugned order which shows the meticulousness of the Learned District Judge. The Learned District Judge was of the opinion that there was no illegality or impropriety in the rejection of the Section 27 Application preferred by the present Appellant as well.

55. This Court therefore does not see merit in the contention that the Learned District Judge did not apply its mind to the facts of the matter presented before it. The Learned District Judge perused the award, heard the parties and assessed their contentions. The judicial approach having been adopted, in the absence of any arbitrariness, capriciousness or whims, this Court is compelled to negative this ardent submission of the Appellant.

V. CONCLUSION:

56. Therefore, in light of the discussion above, keeping the settled principles of law in mind and for the reasons given above, this Court is of the considered view that the impugned order as well as the Arbitral Award warrant no interference under Section 37 of the A & C Act.

57. The award of the Learned Arbitral Tribunal of Rs.9,71,06,938/- in favour of the present Respondent including *pendente lite* interest on the awarded amount at the rate of 12% per annum with the further direction that if the payment is not made within one month from the date of the award, the present Appellant would be liable to pay interest at the rate of 18% per annum till the date of actual payment is upheld in its entirety. The Appellant is directed to make good the payment without any further delay.

58. ARBA No.4 of 2021 is disposed on the abovementioned terms. No order as to costs.

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2023 (II) ILR – CUT - 1163

MISS. SAVITRI RATHO, J.

CRLMC NO. 1173 OF 2022

ARUN KUMAR PANIGRAHI & ORS. .....Petitioners

.V.

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

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – The Petitioner challenges the cognizance of offences punishable under section 498-A, 506, 323 and 34 of IPC – Marriage between the petitioner No.5 and Op. No.2 has been dissolved by decree of divorce – There has been an amicable settlement between the parties with exchange of articles – Rs.10,00,000/-has also been paid towards permanent alimony – Whether the criminal proceeding should be quashed in exercise of power U/s 482 of Cr.PC – Held, Yes. (Para 6-11)

Case Laws Relied on and Referred to :-

1. AIR 2021 SC 3087 : Lt. Col. S.K. Hari & Anr. Vs. The State of Uttar Pradesh & Anr.
2. (In SLP (Criminal) Diary No.33313 of 2019 : Sri Rangappa Javoor Vs. State of Karnataka & Anr.

For Petitioners : Mr. Ashok Das

For Opp. Parties : Ms. S. Patnaik, A.G.A.

JUDGMENT Date of Judgment:21.07.2023

MISS. SAVITRI RATHO, J.

This application under Section 482 of the Code of Criminal Procedure (in short "Cr.P.C") has been filed by the petitioners challenging the order dated 27.01.2015 passed by the learned S.D.J.M., Bhubaneswar in 1.C.C. No. 3984 of 2014, taking cognizance of offences punishable under Section -498-A, 506, 323 and 34 of the Indian Penal Code (in short IPC") read with Section 4 of the D.P. Act against the petitioners. This case on being transferred to the learned S.D.J.M., Puri has been re-numbered as I.C.C. No. 305 of 2019.

FACTUAL MATRIX

2. The allegations of the opposite party no.2, Swagatika Dash in brief is that the marriage between the parties had taken placed on 24.02.2012 and at the time of marriage, cash along with other household articles and gold ornaments had been given to the accused as per the demand but not being satisfied with the said amount, they demanded cash @ Rs. 10,00,000/- and a house at Puri. When she could not fulfill their demands, they started torturing her mentally and physically and they did not provide food during her pregnancy and did not allow to meet her family

members. After two months of her marriage, she came to her father's house being aggrieved with the torture meted to her in her husband's house and she gave birth to a daughter in SCB Medical College while she was staying in her father's house. The accused did not even go to see her at the hospital.

3. Petitioner no.1, Arun Kumar Panigrahi and petitioner no.2, Kiran Kumar Panigrahi are the brother-in-laws of the complainant. Petitioner no.3, Rajani Panigrahi is the mother-in-law of the complainant. Petitioner No.4, Priyanka Rani Mohapatra is the sister-in-law of the complainant. Petitioner No.5, Barun Kumar Panigrahi is the husband of the complainant.

SUBMISSIONS

4. Drawing my attention to the judgment dated 09.02.2022 passed by the learned Family Judge, Puri in C.P. No. 58 of 2016 vide Annexure-2, Mr. Ashok Das, learned counsel for the petitioners submits that the marriage between the Petitioner No. 5 Barun Kumar Panigrahi and the opposite Party No.2 has been dissolved by a decree of divorce and it has been observed in paragraph 11 of the judgment that there has been an amicable settlement between the parties and they have exchanged their individual articles with each other and the husband has handed over a cheque of Rs.10,00,000/- in shape of demand draft towards permanent alimony and maintenance of the wife and she has stated that she will not claim any further alimony and maintenance from the husband. He draws my attention to cross-examination of Smt. Swagatika Dash, the wife who has been examined as witness no.1 for the respondent in C.P. No.58 of 2016 and submits that she had undertaken not to claim any further alimony and maintenance from the husband and to withdraw all the pending proceeding against him and not to object the proceeding lodged by him in the High Court for quashing of criminal proceeding initiated against him and his family members. Relying on the decisions of the Hon'ble Apex Court in the case of ***Lt. Col. S.K. Hari & Another vrs. The State of Uttar Pradesh and Another*** reported in ***AIR 2021 SC 3087*** and ***Sri Rangappa Javoor vrs. State of Karnataka and Another (In SLP (Criminal) Diary No.33313 of 2019,*** he submits that the criminal proceeding initiated against the petitioners may be quashed.

5. Ms. S. Patnaik, learned Additional Government Advocate has fairly submitted that in cases where the marriage between the parties have been dissolved by a decree of mutual divorce, criminal cases between them are usually withdrawn. When the settlement between husband and wife is not disputed, if criminal proceedings involving the parties are still pending and application for quashing is filed in the High Court, the proceedings are usually quashed by the High Court in exercise of power under Section 482 of the Cr.P.C.

ANALYSIS AND DISCUSSION

6. The decision in the of ***Lt. Col. S.K. Hari (supra***), is not relevant for deciding this case. In the said case, the proceedings were quashed by the Supreme Court

subject to payment of a lump sum amount towards all outstanding demands and claims.

7. In the case of ***Sri Rangappa Javoor (Supra),*** the Hon'ble Supreme Court has held as follows:

> *"…. This court has held that in cases of offences relating to matrimonial disputes, if the Court is satisfied that the parties have genuinely settled the disputes amicably, then for the purpose of securing ends of justice, criminal proceedings inter-se parties can be quashed by exercising the powers under Articles 142 of the Constitution of India or even under Section 482 of Code of Criminal Procedure, 1973.*
>
> *In view of the aforesaid position, we allow the present appeal and set aside the impugned order.Consequently, the criminal proceedings in charge sheet dated 17.02.2011 arising out of F.I.R. No. 9/2011 dated 17.02.2011 under Sections 498A, 427, 504 and 506 of the Indian Penal Code, 1860, registered at Police Station Gadag Town, Gadag, Karnataka are quashed.*
>
> *Pending application(s), if any shall stand disposed of."*

8. Paragraph 2 of the evidence of opposite party No 2 Swagatika Dash examined as R.W.1 in Civil Proceeding No. 58 of 2016 is reproduced below :

> *"As I have already received my permanent alimony and maintenance towards myself and my minor child being her mother guardian, I shall not claim any further alimony and maintenance from the petitioner. I do not want to reside with the petitioner. I undertook that, I shall withdraw all the pending proceeding against the petitioner.*
>
> *I shall not object the proceeding lodged by the petitioner before Hon'ble High Court for quashing of criminal proceeding initiated against the petitioner and his family members."*

9. In the judgment dated 09.02.2022 passed in Civil Proceeding No. 58 of 2016, the learned Judge, Family Court, Puri has observed at paragraph 11 :

> *"….From the evidence of P.W. 1 and R.W. 1 , it is clear that in view of amicable settlement , they have exchanged their individual articles with each other , and that the petitioner handed over Rs 10,00,000/- in shape of demand draft vide No. 036235 of Axis Bank towards permanent alimony and maintenance of the respondents and their child respectively and that respondent would not claim further alimony and maintenance from the petitioner."*

10. Notice had been issued against the opposite party No. 2 but could not be served as she was not found in the address. After going through the judgment in C.P. No. 58 of 2016 and the deposition of the opposite party No. 2 in C.P. No. 58 of 2016, I do not consider it necessary to keep the case pending awaiting her appearance as I am satisfied that the dispute between the parties has been amicably settled.

11. As I am satisfied that there has been a " genuine" settlement between the petitioner No. 5 and opposite party No.2 and permanent alimony has been paid to

the opposite party No.2 by the petitioner and they have exchanged their articles with each other. It would therefore be in the interest of justice to quash the G.R. Case as no useful purpose would be served by keeping it pending.

12. The order dated 27.01.2015 passed by the learned SDJM Bhubaneswar taking cognizance of offences punishable under Section -498- , 506, 323 and 34 of the Indian Penal Code (in short IPC") read with Section 4 of the D.P. Act against the petitioners in 1.C.C. No. 3984 of 2014 and the proceedings in I.C.C. No. 305 of 2019 now pending in the Court of learned S.D.J.M., Puri are quashed.

The CRLMC is allowed.

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2023 (II) ILR – CUT - 1166

R.K. PATTANAIK, J.

CRLMC NO.2125 OF 2022

ASHOK KUMAR JAIN & ANR. …….Petitioners

.V.

STATE OF ODISHA & ANR. …….Opp Parties

(A) INDIAN PENAL CODE, 1860 – Section 499 – Defamation – Whether publication of notice in the newspaper with regard to termination of the membership from a society is amounts to defamation? – Held, No.

(B) INDIAN PENAL CODE, 1860 – Section 499 – Essential ingredients to attract the offence indicated with reference to case law.

(Para 9-10)

Case Laws Relied on and Referred to :-

1. (2017) 13 SCC369: Binit Kumar & Ors. Vs. State of U.P.
2. 1989 (1) SCC 494 : Kiran Bedi Vs. Committee of Inquiry & Anr.
3. (1983) 1 SCC 124 : Board of Trustees of the Port of Bombay Vs. Dillip kumar Raghavendranath Karmi and Ors.
4. 2012 (6) SCALE 190 : Vishwanath Vs. Sau. Sarla Vishwanath Agrawal.

For Petitioners : Mr. Anshuman Ray

For Opp Parties : Mr. Satyabrata Panda

JUDGMENT Date of Judgment:06.04.2023

R.K. PATTANAIK, J.

1. Instant petition under Section 482 Cr.P.C. is at the behest of the petitioners assailing the impugned order dated 5th April, 2022 passed in 1CC Case No.26 of

2022 by the learned S.D.J.M., Angul on the grounds inter alia that no prima facie case of criminal defamation is made out against them which has been alleged by the complainant, namely, opposite party No.2.

2. In the instant case, opposite party No.2 filed a complaint before the learned court below registered as 1CC Case No.22 of 2019 and thereafter, by an order under Section 156(3) Cr.P.C., Angul P.S. Case No.227 of 2019 was registered under Sections 499, 500, 501, 502, 294 and 506 read with 34 IPC later to which investigation was commenced, however, a final report was submitted at the end, in response to which, a protest petition was received and the same was treated as a complaint in 1CC Case No.26 of 2022, wherein, the order of cognizance was passed under Annexure-4 against the petitioners.

3. In fact, the petitioners were by then the Present and Secretary of Angul District Chamber of Commerce and Industries respectively and according to them, they do not play any role and committed no offence of defamation but opposite party No.2 with a revengeful attitude filed the complaint with false allegations. It is pleaded that even by considering the materials available on record, no case is made out against the petitioners as basic ingredients of the alleged offences are conspicuously absent. It is stated that opposite party No.2 has also instituted a civil suit in C.S. No.219 of 2018 against the petitioners and others pending in the file of the learned Civil Judge (Senior Division), Angul demanding compensation of Rs.1 crore from them on account of damage to his reputation. According to the petitioners despite a case registered by the order of the learned court below and investigation by the local police, no case was established which resulted in the submission of final report, however, on the strength of a protest petition, the impugned order under Annexure-4 was passed.

4. Heard Mr. Ray, learned counsel for the petitioners and Mr. Panda, learned counsel for opposite party No.2.

5. Opposite party No.2 filed the complaint against the petitioners and others including the editors of the newspapers, namely, Samaj and Prameya besides the other office bearer of the Angul Chamber of Commerce and Industries (in short 'ADCCI'). Later to the filing of the complaint, the learned court below directed registration of a case by an order under Section 156(3) Cr.P.C. Consequently, Angul P.S. Case No.227 was registered on 27th March, 2019. However, as earlier mentioned, a final report was submitted. On receiving a protest petition from opposite party No.2 treated as a complaint, the learned court below took cognizance of the alleged offences vide Annexure-4.

6. Mr. Ray, learned counsel for the petitioners submits that investigation was conducted on the allegations of opposite party No.2, however, a final report was submitted, as no case could be established against the petitioners. It is further submitted that no iota of evidence is on record to show a prima facie case of

defamation and furthermore, evidence is clearly deficient in order to prove the involvement of the petitioners. It is also submitted that the offences under Sections 294 and 506 IPC are not established as there is no material to show threat or intimidation attributed to the complainant opposite party No.2 by referring to the decision of the Apex Court in **Binit Kumar and Others Vrs. State of U.P. (2017) 13 SCC369**. Mr. Ray, learned counsel for the petitioners also submits that this Court should exercise the inherent jurisdiction and quash the impugned order under Annexure-4 in order to advance the cause of justice since the complaint filed by opposite party No.2 is manifestly attended with malafide and also ulterior motive in order to wreak vengeance against the petitioners.

7. Mr. Panda, learned counsel for opposite party No.2 on the other hand submits that since the learned court below considering the complaint and receiving evidence during enquiry later to the examination of the complainant under Section 200 Cr.P.C. reached at a conclusion that the petitioners have committed the alleged offences, the impugned order under Annexure-4 is therefore not liable to be interfered with and set aside. It is submitted that the alleged conduct of the petitioners is tainted with malafide and it was not in good faith when notices were published in the newspapers on 8th April, 2018. Since it was in bad faith and primarily directed against opposite party No.2 to harm and damage his reputation, the learned court below having taken cognizance of the alleged offences, according to Mr. Panda, learned counsel for opposite party No.2, it calls for no interference.

8. On a reading of the complaint, the Court finds that notices were published in the newspaper, such as, Samaj and Prameya on 8th April, 2018 indicating therein about the resolution dated 28th March, 2018 of the Executive Committee headed by the President and General Secretary, namely, the petitioners and their decision to terminate the primary membership of opposite party No.2 from ADCCI for a period of eighteen years with effect from 28th March, 2018 as per the provisions the bylaws of ADCCI, Angul. The said notice which was published in newspapers which is claimed by opposite party No.2 to be defamatory was intended to damage reputation. The allegation is that the petitioners being the President and Secretary of ADCCI, in connivance with the other accused persons including the Executive Bodies Members are responsible for the alleged notice. Such an action according to opposite party No.2 was by not providing any opportunity of hearing or considering showcause before taking a decision to terminate him from the primary membership of the ADCCI, Angul. In fact, opposite party No.2 claimed that he requested the petitioners to provide the relevant documents and even issued a notice to them as to the circumstances under which such an action was taken by the ADCCI but there was no response which, therefore, suggest that the public notice which was released in the newspapers was primarily to defame him and damage his reputation which he had built over the years being the Ex-President of ADCCI and an entrepreneur. Mr. Panda, learned counsel for opposite party No.2 submits that since the petitioners were responsible for such a decision and publication of notice in local newspapers

and it was meant to affect and damage the reputation of the complainant, considering the same, the learned court below took cognizance of the alleged offences against them.

9. The question is, whether, publication of notice in newspapers regarding termination of primary membership of opposite party No.2 amounts to an act of criminal defamation? It is alleged by opposite party No.2 and as revealed from the facts of the complaint that such notice was published without any justification and was intended to damage his reputation. Section 499 IPC defines defamation which means any words either spoken or intended to be read or by science or by visible representations makes or publishes any imputation concerning any person intending to harm or knowing or having reason to believe that such imputation is to harm reputation of such person is said to have defamed that person except where it falls within one of the exceptions. The explanation to Section 499 IPC covers as to what conduct amount to defamation with the exception along with illustration. To be more precise, Explanation 1 to 4 provides certain aspects which would amount to defamation and deals with the expression harming the reputation of such person which is necessary and integral part of Section 499 IPC so as to constitute defamation. So therefore, the offence of definition consists of the essential ingredients (i) making or publication of imputation concerning a person; (ii) such imputation must have been made by words either spoken or intended to be read or by science or by visible representation; and (iii) the said imputation must have been made with the intention of harming or with a knowledge of having reason to believe that it would harm reputation of the person.

10. The offence of defamation is punishable under Section 500 IPC and the object of the provision is to protect the fundamental right of a person i.e. reputation which is part of right to enjoyment of life or liberty and property. In this regard, it would be apposite to make a mention of the judgment of the Apex Court **in Kiran Bedi Vrs. Committee of Inquiry and Another 1989 (1) SCC 494,** wherein, the observations from **D.F. Marion Vrs. Davis 10 55 ALR 171** was reproduced which is to effect that the right to enjoyment of a private reputation unnecessarily by malicious slander is of ancient origin and is necessary to human society and good reputation is an element of personal security and is protected by the Constitution equally with the right of enjoyment of life, liberty and property. In **Board of Trustees of the Port of Bombay Vrs. Dillipkumar Raghavendranath Karmi and Others (1983) 1 SCC 124,** the Apex Court held that right to reputation is integral to right to life of a citizen under Article 21 of the Constitution. Similarly is the view expressed in **Vishwanath Vrs. Sau. Sarla Vishwanath Agrawal 2012 (6) SCALE 190**. So, therefore, reputation of a person is jealously to be guarded since because it is fundamental right to enjoyment of life and liberty and integral part of Section 21 of the Constitution.

11. In the case at hand, it is contended that none of the exceptions of Section 499 IPC applies as the mischief by the petitioners was intended to damage his reputation and therefore, considering the fact that the notice of termination was published in local newspapers widely circulated in the State of Odisha, the intention was to damage image and reputation of opposite party No.2 and therefore, the learned court below rightly took cognizance of the alleged offences vide Annexure-4.The question is whether mere publication of a notice in newspapers amounts to definition and was it intended to defame opposite party No.2? Whether the decision of the petitioners as the President of ADCCI and others published in local newspapers is an actionable definition? In **Rajiv Kumar Yadav Vrs. The Allahabad High Court** while dealing with a similar situation, wherein, the complainant was served with a public notice of having been suspended from service, it was claimed that the said act was intended to defame and damage his reputation but the Court in the decision (supra) held that an offence of defamation is not established. It is first and foremost to be considered if the necessary ingredients of Section 499 IPC are proved to establish an act of defamation. As earlier stated, an offence of defamation would constitute the basic ingredients of making or publishing any imputation about a person; imputation may be by words either spoken or intended to be read or by science or visible representation and it was with an intend to harm or with the knowledge or belief that it is likely to harm with person's reputation. In the instant case, for the reason that the public notice was published in local newspapers circulating the decision of membership termination, opposite party No.2 alleges that it was with the intention to defame him. The opposite party No.2 was the Ex-President of ADCCI and a local businessman of Angul and he was removed from the primary membership of the ADCCI, a decision which was taken by the Executive Committee headed by the petitioners and such unanimous decision was made to publish in the newspapers. The extract of the notice reproduced in complaint shows that the decision of the Executive Committee of ADCCI vide resolution dated 28th March, 2018 about the termination of opposite party No.2 and another member from the primarily membership of ADCCI for a period of eighteen years was published and information was shared with all concerned as well as the general public besides State of Central Government offices. Such publication of a notice in newspapers without more which merely notified termination of primarily membership of opposite party No.2 by itself would not constitute an offence of defamation. It is not an act by which any words spoken to or published in any newspapers affecting the reputation of opposite party No.2 by such notice published releasing the information regarding termination from primary membership of opposite party No.2 cannot be termed as an act of defamation punishable under Section 500 IPC. By no stretch of imagination, considering the notice published in local newspapers, it can be said that the petitioners allegedly committed an offence of defamation. Nothing can be read between the lines to say that the publication of notice amounts to an act with a hidden purpose and intention to defame opposite party No.2. An imputation should be direct or by such other

means which can be deduced. To allege defamation simply for a circulation of notice howsoever unjustified cannot be accepted. The language of the notice is no defamatory which declared the decision of the ADCCI. Any such decision even without any showcause could invite a challenge but certainly carries no criminal liability unless it falls with the ambit of defamation as defined in Section 499 IPC.

12. Accordingly, it is ordered.

13. In the result, the CRLMC stands allowed. Consequently, the impugned order dated 5th April, 2022 passed by the learned S.D.J.M., Angul is set aside. As a necessary corollary, the criminal proceeding in connection with 1CC Case No.26 of 2022 is hereby quashed vis-à-vis the petitioners.

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2023 (II) ILR – CUT - 1171

R.K. PATTANAIK, J.

CRLMC NO.973 OF 2021

KAMALA KANTA JENA .....Petitioner

.V.

STATE OF ODISHA & ANR. .....Opp. Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Offence punishable under sections 408,420,468 and 471 of IPC– Petitioner invokes inherent jurisdiction seeking the charge to be quashed – Duty of court – Held, the court should not interfere with the order unless there are very strong reasons to reach at a different conclusion – In the present case, the allegation against the petitioner are primarily documentary, based on audit report and at the end of investigation, it resulted in submission of charge sheet, where there appeared no glaring or patent error. (Para 8)

Case Laws Relied on and Referred to :-

1. 2012 (II) OLR 253 : Hemanta Kumar Patra Vs. State of Odisha.
2. AIR 1979 SC 366 : Union of India Vs. Prafulla Kumar Samal.
3. AIR 1992 SC 604 : State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors.
4. 1977 (4) SCC 551 : Madhu Limaye Vs. State of Maharashtra.
5. 1984 (I) OLR 585 : Okila Luha Vs. State of Odisha.
6. 2022(88) OLR 65 : Sibaram Sahoo Vs. State of Odisha (Vig.)
7. 2015(61) OCR 830 : Prakash Mishra Vs. State of Odisha & Ors.
8. 2021 OCR (83) SC 127 : Sanjaya Kumar Rai Vs. State of U.P. & Ors.
9. AIR 1977 SC 1489 : State of Karnataka Vrs. L. Muniswamy & Ors.
10. AIR 1990 SC 1962 : Niranjan Singh Karam Singh Panjabi & Ors. Vrs. Jitendra Bhimaraj Bijje & Ors.

11. AIR 1977 SC 2018 : State Bihar Vs. Ramesh Singh.
12. (2008) SCC 239 : State of Delhi Vs. Gyan Devi.
13. (2012) 9 SCC 460 : Amit Kapoor Vs. Ramesh Chandra and Anr.
14. (2010) 2 SCC 3981: P. Vijayan Vs.State of Kerala & Anr.
15. (2020) 2 SCC 786 : M.E. Shivalingamurthy Vs. Central Bureau of Investigation.
16. AIR 2010 SC 3292: Main Pal Vs. State of Haryana.
17. AIR 1977 SC 2018: State of Bihar Vs. Ramesh Singh.

For Petitioner : Mr. Himanshu Sekhar Mishra

For Opp Parties : Mr. S.S. Mohapatra, ASC
Mr. Santanu Kumar Sarangi,Sr. Adv.

JUDGMENT Date of Judgment:24.07.2023

R.K. PATTANAIK, J.

1. Instant petition under Section 482 Cr.P.C. is at the behest of the petitioner assailing the impugned action pursuant to Annexure-2 and Annexures-2-A and order under Annexure-3, whereby, the learned 1st Additional Sessions Judge,, Rourkela, Sundergarh confirmed the framing of charge by the J.M.F.C., Rourkela against him for the offences punishable under Sections 408, 420, 468 and 471 IPC while disposing of Criminal Revision No.11 of 2021 by an order dated 22nd April, 2021 with a consequential direction to redraw it in accordance with law.

2. The facts of the case are that a written report dated 5th April, 2013 was lodged at the Plantsite PS, Rourkela alleging therein that the petitioner while was working as Branch Manager-cum-Accountant was entrusted with the official work such as withdrawal of cash from bank, delivery of consignment etc. and in such capacity cheated the Economic Transport Organization Limited, Rourkela Branch and in such capacity committed breach of trust and also collected payments without intimating the organization and having not deposited the same with their bankers nor accounted for it and as a result, swindled away the entire amount, inasmuch as, the money so misappropriated stood at Rs.57,15, 474/- which was revealed after an audit report. As against the FIR, on completion of investigation, the chargesheet was submitted against the petitioner under the alleged offences, whereupon, the court 1st instance proceeded to frame charge and accordingly, it did so by order dated 27th January, 2021 (Annexure-2-A) which was challenged by him in Criminal Revision No.11 of 2021 but the same was dismissed but with a direction to redraw of charge. The framing of charge under Annexure-2-A and its confirmation vide Annexure-3 is under challenge by the petitioner on various grounds which are to be discussed hereinafter.

3. Heard Mr. Mishra, learned counsel for the petitioner, Mr. Mohapatra, learned ASC for the State and Mr. Sarangi, learned Senior Advocate for the informant opposite party No.2.

4. Mr. Mishra, learned counsel for the petitioner assailed the correctness of the impugned charge framed under Annexure-2-A and its confirmation vide Annexure-3 essentially on the ground that the same is a product of non-application of judicial mind by the learned courts below. While advancing the argument in support of the petitioner, Mr. Mishra referred to and relied upon the following decisions, such as, **Hemanta Kumar Patra Vrs. State of Odisha 2012 (II) OLR 253**; **Union of India Vrs. Prafulla Kumar Samal AIR 1979 SC 366**; **State of Haryana & Others Vrs. Ch. Bhajan Lal & Others AIR 1992 SC 604**; **Madhu Limaye Vrs. State of Maharashtra 1977 (4) SCC 551**; **Okila Luha Vrs. State of Odisha 1984 (I) OLR 585**; **Sibaram Sahoo Vrs. State of Odisha (Vig.) 2022(88) OLR 65**; **Prakash Mishra Vrs. State of Odisha and Others 2015(61) OCR 830**; **Sanjaya Kumar Rai Vrs. State of U.P. & Others 2021 OCR (83) SC 127**; **State of Karnataka Vrs. L. Muniswamy & Others AIR 1977 SC 1489**; **Niranjan Singh Karam Singh Panjabi and others Vrs. Jitendra Bhimaraj Bijje & Others AIR 1990 SC 1962** and **Yogesh @ Sachin Jagdish Joshi Vrs. State of Maharashtra decided in** Appeal (Crl.) 744 of 2008 and disposed of on 28th April, 2008**.** It is contended by Mr. Mishra that the entire allegation of FIR when based on an audit report, no conviction can lie as it cannot be considered to be a conclusive proof of the allegations made and hence, the framing of charge and confirmation thereof under Annexure-3 is not tenable in law and continuation of the criminal proceeding against the petitioner as such would amount to abuse of process of law and while claiming so, he cited the decision of this Court in **Hemanta Kumar Patra** (supra). With respect to framing of charge, Mr. Mishra refers to **Prafulla Kumar Samal** (supra) highlighting upon the duty of a court with the observation that it cannot merely a mouth piece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence produced before it with any basic infirmities appearing therein and so on reiterated in **State Bihar Vrs. Ramesh Singh** reported in **AIR 1977 SC 2018**. That apart the decision in **Ch. Bhajan Lal** (supra) is also cited by Mr. Mishra while contending that inherent jurisdiction under Section 482 Cr.P.C. should be exercised, moreover when, the learned J.M.F.C., Rourkela in a most mechanical manner without proper judicial application of mind and following the principles which are to be observed framed the charge under Annexure-2-A without recording the satisfaction reached at as to the commission of alleged offences by the petitioner.

5. On the contrary, Mr. Mohapatra, learned ASC for the State would submit that after the FIR was lodged, investigation was held and finally, the chargesheet was filed considering which the learned J.M.F.C., Rourkela having arrived at a subjective satisfaction with the material evidence on record rightly proceeded to frame the charge. In other words, it is submitted that after having gone through the chargesheet and all such evidence referred to therein, the court was of the opinion that there are grounds for resuming the petitioner to have committed the alleged offences and hence, no illegality was committed with the decision to frame charge

confirmed in Criminal Revision No.11 of 2021, wherein, a detailed discussion was held with reference to the ingredients of the offences and hence its calls for no interference. Mr. Sarangi, learned Senior Advocate for opposite party No.2 submits that after an elaborate investigation since the chargesheet was furnished and it prima facie revealed the involvement of the petitioner with the opinion expressed, the learned J.M.F.C., Rourkela rightly decided to frame the charge and accordingly, it was accomplished by order under Annexure-2-A which was upheld by the Revisional court. It is contended by Mr. Sarangi that a detailed enquiry is not required to be held at the time of framing of charge and what is sufficient is making out a prima facie case for enquiry and trial as the law is well settled that truth of the allegations, veracity and effect of the evidence proposed to be led by the prosecution during trial are not to be scrutinized at such stage. It is, thus, contended by Mr. Sarangi that since a prima facie case is apparently made out and in the considered view of the learned J.M.F.C., Rourkela that the allegations are required to be examined with reference to the chargesheet and connected materials, no ground, therefore, exists for any kind of interference in exercise of the Courts' inherent jurisdiction.

6. In so far as the FIR is concerned, as it is made to understand, the primary allegation against the petitioner is with regard to misappropriation of fund of Rs.57,15474/- and it was ascertained during an internal audit. The details of the facts and circumstances leading to the lodging of the FIR have been described. It has been alleged that the petitioner fabricated and forged challans and collected the payments of the organization which were not deposited subsequently with its bankers nor accounted for. With all such mischief being alleged against the petitioner, who by then was working as Branch Manager-cum-Accountant, the report was lodged which thereafter led to submission of the chargesheet, as earlier mentioned. The challenge is with regard to the framing of charge against the petitioner which has been directed by the Revisional court while disposing of Criminal Revision No.11 of 2021. In fact, it is made to reveal that the petitioner had challenged the framing of charge by the court of 1st instance by filing CRLREV No.82 of 2021 which was, however, disposed of on 16th March, 2021 with the liberty allowed in his favour to approach the Sessions court and exhaust the remedy and accordingly, it was availed of and thereafter, it resulted in passing of the impugned judgment dated 22nd April, 2021. So far as the contention of Mr. Mishra, learned counsel for the petitioner is concerned, it has been submitted that the learned J.M.F.C., Rourkela as well as the Revisional court fell into serious error and committed material irregularity and without proper application of the judicial mind and being oblivious of the principles decided by the Apex Court in the decisions (supra) held and confirmed the framing of charge followed by a direction for redrawal of charge in accordance with law. It is contended that the essential ingredients of the alleged offences have not been kept in mind at the time of framing of charge without specifying the details, inasmuch as, the charge was rather framed mechanically. It is contended that the offences of

cheating, criminal breach of trust and forgery should have been specifically mentioned at the time of framing of charge. It is claimed by Mr. Mishra, learned counsel for the petitioner that since no such exercise was undertaken by the court of learned J.M.F.C., Rourkela and Revisional court also committed the wrong rather directed redrawal of the charge head, the impugned orders under Annexure-2-A and 3 and therefore, to be set aside in the interest of justice. It is rather contended that the offences are not made out against the petitioner and considering the FIR and other materials, the charge was framed in a perfunctory manner and even though the Sessions court found it so instead of setting it aside simply directed redrawal charge that too while dismissing the revision. It is the further contention that the material on record along with the chargesheet should have been evaluated by the learned court below to ascertain whether the ingredients of the alleged offences are found to exist in order to frame charge against the petitioner. That apart, according to Mr. Mishra, the allegations and filing of chargesheet with the evidence against the petitioner cannot be accepted as a gospel truth which is also the settled position of law and where the role of a court is onerous since it deals with framing of charge.

7. Though the Revisional court did not consider it to be a case not to frame charge against the petitioner and therefore, dismissed his challenge but directed the learned J.M.F.C., Rourkela to redraw the head of the charge to supplement the necessary facts and figure and to rectify the error committed as a result. Whether on the basis of an internal audit report, a prosecution shall lie or otherwise would depend on the facts and circumstances of a case. Of course merely by relying upon an audit report, a conviction may not be sustained and in one of such cases, this Court in **Hemanta Kumar Patra** (supra) held so and quashed the order of cognizance in connection with a case of misappropriation. In the said case, the account holder at whose instance misappropriation against the accused was alleged later stated on oath of having no grievance against the latter and that he never misappropriated any such amount from his account, considering which, in the peculiar facts and circumstances, the order of cognizance was set aside by this Court. Referring to the aforesaid judgment, in so far as the present case is concerned, a similar conclusion cannot be drawn as there was prima facie evidence found against the petitioner. Furthermore, the charge is not to be held as groundless specially when the FIR and all the materials submitted along with chargesheet alleged his involvement in the misappropriation, truthfulness or otherwise of the allegation would be a subject of trial. In **Ch. Bhajan Lal** (supra), the Apex Court held and observed that in certain circumstances only, inherent jurisdiction under Section 482 Cr.P.C. may be exercised and not always. The categories of cases where extra-ordinary jurisdiction is exercisable have been detailed by the Supreme Court in **Ch. Bhajan Lal** case. In the case at hand in so far as the allegation against the petitioner is concerned, as per the FIR and chargesheet, he was an employee of the organization at the relevant point of time and was alleged of misappropriation. It is not that the FIR does not reveal any cognizable offences not to have been

committed. Rather, the allegations in the FIR have been found proved or prima facie substantiated with the submission of the chargesheet. In fact, none of the grounds as enumerated in **Ch. Bhajan Lal** (supra) has been shown to exist while seeking quashment of the charge framed against the petitioner. Mr. Sarangi, learned Senior Advocate for opposite party No.2 raised an objection as to the exercise of inherent jurisdiction under Section 482 Cr.P.C. as against the order of the Sessions court since no second revision lies on the premise that order of framing of charge can only be interfered with if there is any glaring wrong or error apparent on the face of the record. As to the principles to be followed while framing of charge, the law is well settled and same has been reiterated by the Apex Court time and again. This Court in **Sibaram Sahoo** (supra) held that charge can be framed even on very strong suspicion founded on the basis of material before the Magistrate. In the said case, apart from the audit report, statements of the witnesses and documentary evidence suggested that the accused therein was entrusted with the collection and hence, a strong suspicion existed against him for having committed the offences and by concluding so upheld the decision of the High Court and declined to discharge him. In **State of Delhi Vrs. Gyan Devi (2008) SCC 239**, the Apex Court held that at the stage of framing of charge, the trial court is not to examine details of the materials placed on record by the prosecution nor is it for the court to consider sufficiency of the materials to establish an offence alleged against the accused. It is further held therein that at such stage, the court is to examine the materials only with a view to be satisfied that a prima facie case for commission of the offence alleged has been made out. It is also well settled that when an accused invokes inherent jurisdiction Section 482 Cr.P.C. seeking the charge to be quashed, the Court should not interfere with the order unless there are very strong reasons to reach at a different conclusion. The Supreme Court very often observed that such an order can be passed only in exceptional cases and on rare occasions. Similarly, in **Amit Kapoor Vrs. Ramesh Chandra and Another (2012) 9 SCC 460**, the Apex Court held that while exercising power under Section 397 Cr.P.C. as the object of the provisions is to set right the patent defect or error of jurisdiction or law, it may not be appropriate for a court to scrutiny the orders which upon the face of it based on a token of careful consideration and appear to be in accordance with law. In so far as the Revisional court is concerned, in the instant case, the materials on record have been duly taken cognizance of while reaching at a conclusion that a charge is required to be framed against the petitioner, however, in order to fill the lapses in the charge head, directed the learned J.M,F.C., Rourkela the redraw the same. So therefore, in the considered view of the Court, the jurisdiction has been rightly exercised and in absence of any serious error having been committed, no ground exists to interfere with the same. In so far as the alleged offences are concerned, as the details were not placed on record and confronted to the petitioner as it also involved criminal breach of trust, hence, the Revisional court directed redrawal of the charge. So to say, the concern of the petitioner was attended and addressed by the Revisional court but the contention that there is no case made out against him did not find favour with which according to

the Court may not be unreasonable if the entire evidence is gone through. On a bare look without being indulged in material scrutiny, it would suggest that the petitioner was in-charge of accounts at the relevant point of time and was alleged of misappropriation when he had received the collections of the organization but did not account it for.

8. Mr. Sarangi, learned Senior Advocate for the opposite party No.2 submitted that if two views are possible and one of them gives rise to suspicion only as distinguished from grave suspicion, it would be a case for discharge that being the settled legal position. It is also submitted that a trial court is not a mute spectator and that apart, he has to shift and weigh the evidence in order to find out whether or not there is sufficient ground to proceed against the accused and if evidence proposed by the prosecution even if fully accepted before being challenged or rebutted by defence evidence cannot show that the accused committed the offence, under such circumstances, the proceeding may have to be quashed with a discharge and while considering all such aspects, the court is to take judicial notice of the broad probabilities, however, it not entitled to make a roving inquiry pros and cons and while contending so, he cited a decision of the Supreme Court in the case of **P. Vijayan Vrs.State of Kerala & Another (2010) 2 SCC 3981** besides another authority in **M.E. Shivalingamurthy Vrs. Central Bureau of Investigation (2020) 2 SCC 786**. In fact, the line of argument of Mr. Sarangi, learned Senior Advocate is primarily based on the principles enunciated by the Apex Court in the above decisions referred to. One more decision in case of **Main Pal Vrs. State of Haryana AIR 2010 SC 3292** is placed reliance on by Mr. Sarangi which is with regard to the framing of charge vis-à-vis the duty and responsibility of a court. In the said decision, it has been held that the object of framing of a charge is to enable an accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet and the charge must also contain the particulars of date, time and place and person against whom the offence was committed as are reasonably sufficient to give him notice of the matter with he is charged since law enjoins that the charge must reflect certainty and accuracy. There is no quarrel over the legal position that at the time of framing of charge, a roving enquiry or meticulous scrutiny of the material on record is to be undertaken but only a satisfaction to be reached at that the offences are prima facie established against the accused. The aforesaid principles of law has been reiterated by the Apex Court in one of its earlier judgment reported in the case of **State of Bihar Vrs. Ramesh Singh AIR 1977 SC 2018**, wherein, it has been held that on a combined reading of Sections 227 and 228 Cr.P.C.in juxtaposition to each other, it is crystal clear that at the beginning stage, truth and veracity of evidence which the prosecution is supposed to adduce not to be meticulously thrashed out; so also no weight can be attached to the probable defence of the accused and furthermore, it is not obligated for the court to consider in detail and weigh the evidence and to reach at a conclusion whether the facts on record do prove innocence of the accused or not. On the anvil of the above settled position of

law in so far as the case of the petitioner concerned and since the allegations are primarily documentary based and at the end of investigation, it resulted in submission of chargesheet, where there appeared no glaring or patent error noticed, rightly the learned J.M.F.C., Rourkela proceeded to frame the charge but having failed in its duty for not placing all the facts and details in relation to the mischief committed, it was duly rectified by the Revisional court. In other words, the learned court below did not commit any serious wrong or illegality by reaching at a conclusion that the case for framing of charge is made out but charge head is required to be redrawn and hence, therefore, no compelling reasons do exist to interfere with the impugned judgment under Annexure-3.

9. Accordingly, it is ordered.

10. In the result, the CRLMC stands dismissed.

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2023 (II) ILR – CUT - 1178

SASHIKANTA MISHRA,J.

RSA NO. 300 OF 2012

BISWANATH MUKHARJEE .....Appellant

.V.

NETAJI SANGHA & ORS .....Respondents

(A) CODE OF CIVIL PROCEDURE, 1980 – Section 11 – Rule of res-judicata – Necessary Contingencies which must be satisfied to constitute the principle of res-judicata – Explained. (Para 10-11)

(B) CODE OF CIVIL PROCEDURE, 1980 – Section 11 – The word "finally decided"– Explained. (Para 12-14)

(C) RES-JUDICATA – Whether dismissal of the former suit on the ground of disappearance of cause of action can operate as res-judicata in a subsequent suit – Held, No. – When the matter which directly and subsequently an issue in the previous suit and never adjudicated, the said issue was available for adjudication even after dismissal of the suit for disappearance of cause of action. (Para-15)

Case Laws Relied on and Referred to :-

1. AIR 1966 SC 1332 : Sheodan Singh Vs. Smt. Daryao Kunwar.
2. 2023 SCC OnLine SC 356 : Prem Kishore & Ors. Vs. Brahm Prakash & Ors.

For Appellants : Mr. Gouri Mohan Rath

For Respondents : Mr. Bibekananda Bhuyan
Mr. D.N. Mohapatra

JUDGMENT Date of Judgment: 05.07.2023

SASHIKANTA MISHRA, J.

1. The present appeal is directed against the reversing judgment passed by the Second Addl. District Judge, Cuttack in RFA No.107/2010 on 13th August, 2012. The present appellant was the Defendant No.1 in C.S. No.485/2007 of the Court of learned Civil Judge (Sr. Division), 1st Court, Cuttack. The said suit filed by the present Respondents Plaintiffs was for declaration that as per the resolution passed on 9th November, 2007 by the General Body of the Plaintiff Sangha, Defendant No.1 is no longer the Secretary of the said Sangha and has no authority to represent it in the body of Orissa Cricket Association (OCA)-Defendant No.2, as its representative with further declaration that the Sangha had not passed any resolution on 15th December, 2006 electing its office bearers and for appointment of receiver/observer for conducting the election of the office bearers of the Sangha on or before 23rd January, 2008. Further declaration was prayed for that the Plaintiffs are the lawfully elected care-taker office bearers of the Sangha as per extraordinary General Body Meeting dated 9th November, 2007 and are therefore authorized to represent the Sangha for all purposes and for a direction to the Defendant No.2 to recognize the elected representatives of the Sangha in its body as members. As per judgment passed on 6th October, 2010 followed by a decree, learned Civil Judge (Sr. Division), 1st Court Cuttack dismissed the suit on contest. The said judgment and decree as already stated was reversed by the First Appellate Court by decreeing the suit in part.

2. The present appeal has been admitted on the following substantial questions of law;

> "(i) Whether the learned 1st Appellate Court has committed gross error of law in arriving at a conclusion that the order dt.8.11.2007 vide Ext.Q passed in C.S. No.67/2004 will stand as resjudicata under Section 11 C.P.C. and thus debarred the learned trial Court from exercising its jurisdiction to adjudicate the issue relating to the resolution dt.15.1.2004, specifically when the said order dt.8.11.2007 was not passed on merit nor the same is based on any assessment of any evidence on record on the issue of validity of the resolution dt.15.1.2004 in the earlier suit.
>
> (ii) Whether the learned Court below committed gross error of law by holding that there is no valid resolution on 15.12.2006 re-electing the appellant as the Secretary of the Sangha, specifically when there is no challenge to the said resolution from any side in the earlier suit although it was very' much filed by the appellant in the previous C.S. No.67/2004 and hence the instant claim is barred under Section 11 Exp.IV of C.P.C."

For convenience, the parties are referred to as per their respective status in the trial Court.

3. Briefly stated, the facts of the case are that Netaji Sangha (Plaintiff No.1) is a Society registered under the Societies Registration Act, 1860 in the year 1971-72

having been established, inter alia, to develop sportsmanship among its members through participation in different sports events. The OCA granted affiliation to the Plaintiff Sangha with its Secretary being an ex-officio member of the association. Defendant No.1 was elected as the Secretary of the Plaintiff Sangha on 20th December, 2001.There being allegations of mismanagement of the affairs of the Sangha and mis-appropriation of its funds etc. an extraordinary General Body of the Sangha was held on 15th January, 2004, whereby he was removed from the post of Secretary as also from primary membership of the Sangha. One Siba Prasad Mukherjee was elected as President and one Tarun Kumar Mukherjee as Secretary of the Sangha. Challenging the Resolution dated 15th January, 2004 as illegal and unconstitutional, Defendant No.1 filed Civil Suit No.67/2004 in the Court of learned Civil Judge (Sr. Division), 1st Court, Cuttack seeking a declaration that he was still continuing as the Secretary of the Sangha and for permanent injunction against the so-called newly elected members. During pendency of the suit, an interim order was passed by the Trial Court whereby the Defendant No.1 (Plaintiff in the suit) was permitted to continue as the Secretary. On 8th November, 2007, the suit was dismissed for disappearance of cause of action. On 9th November,2007 an Extraordinary General Body Meeting was convened, whereby one Ashis Kumar Majumdar was chosen as the working President and Tarun Kumar Mukherjee as the working Secretary of the Sangha. Though such resolution was communicated to OCA, it did not recognize the same. On the other hand, Defendant No.1 claimed to have been elected as the Secretary pursuant to Resolution dated 15th December, 2006. As such, the Plaintiffs filed the suit claiming the reliefs as aforementioned.

The Defendant No.1 (present appellant) contested the suit mainly on the ground that he was elected for a period of 5 years as per resolution dated 20th December, 2001 and he continued as the Secretary till 20th December, 2006 whereupon he was re-elected for another term of 5 years. It was further claimed that there was no extraordinary General Body Meeting of the Sangha on 15th January, 2004. He denied the allegation of mis-management, misappropriation and acting in connivance with the OCA. He further questioned the locus standi of Tarun Kumar Mukherjee and Ashis Kumar Majumdar to file the present suit.

4. Basing on the rival pleadings, the Trial Court framed as many as thirteen issues. Issue Nos.III, IV, VI, VII, VIII and IX were considered together at the outset. After examining the oral and documentary evidence on record, the trial Court held that Defendant No.1 had continued as Secretary of the Sangha on the strength of interim order passed by the Court in the earlier suit (C.S. No.67/2004) and therefore, his tenure was for a period of five years. As such the subsequent election of the Plaintiffs for a period of one year after dismissal of the suit is illegal. The Trial Court therefore, held that the Plaintiffs are not the office bearers of the Sangha, rather Defendant No.1 is elected Secretary as per Resolution dated 15th December, 2006. Consequently the Resolution dated 9th November, 2007 was held to be prima

facie illegal. The Trial Court, thereafter took up the remaining issues and held that the Plaintiffs have no locus standi to institute the suit. The suit was thus dismissed.

5. Being aggrieved, the Plaintiffs carried the matter in appeal. The First Appellate Court took into consideration whether the judgment passed in the previous suit i.e. C.S. No.67/2004 would act as bar for the Trial Court to exercise its jurisdiction to adjudicate the same issue relating to the Resolution dated 15th January, 2004. After taking into account the settled position of law as laid down in several decisions of the Apex Court, the First Appellate Court held that the question relating to Resolution dated 15th January, 2004 was directly and substantially in issue, both in the former suit (C.S. No.67/2004) and the present suit. The First Appellate Court further observed that the interim order passed during pendency of the earlier suit as lodged with the final order of dismissal of the suit on the ground of disappearance of cause of action. It was further held that such dismissal was not on any technical ground, but must be treated as a judgment passed on contest. Moreover, the said judgment was never challenged by Defendant No.1 and therefore, the plea taken by him in the present suit denying the validity or legality of the Resolution dated 15th January, 2004 is hit by the principle of estoppel by accord. The First Appellate Court thus found that the Trial Court had overlooked the vital aspect of the suit being hit by resjudicata. The First Appellate Court further held that in view of the Resolution dated 15th January, 2004, the Defendant No.1 was no longer a Member of the Sangha and therefore, he could not have been elected as a office bearer by Resolution dated 15th December, 2006. The Resolution dated 9th November, 2007 passed immediately after dismissal of the earlier suit was also taken note of by the First Appellate Court whereby the plaintiffs were elected as working President and working Secretary of the Sangha which was not wrong. According to the First Appellate Court, the Trial Court was swayed away by the interim order passed during pendency of the former suit and therefore, wrongly dismissed the suit by holding the defendant no.1 to be entitled to continue as Secretary for five years.

On such findings, the First Appeal was allowed by setting aside the judgment and decree of the Trial Court. The suit was thus decreed in part by declaring that Defendant No.1 has no authority to represent the Plaintiff Sangha in OCA, that Resolution dated 15th December, 2006 was not passed by the Sangha and that the election of the Plaintiffs as working Secretary and President vide Resolution dated 9th November, 2007 was valid and legal.

6. Heard Mr. G.M.Rath, learned counsel for the Appellant (Defendant No.1), Mr. B.N.Bhuyan, learned counsel for the Respondent Nos.1 and 2 (Plaintiffs) and Mr. D.N. Mohapatra, learned counsel for the Respondent No.3-OCA (Defendant No.2).

7. Assailing the judgment of the First Appellate Court, Mr. Rath, would contend that the former suit was dismissed not on merits but on the technical ground

of disappearance of cause of action and therefore, the said judgment cannot operate as res judicata in the subsequent suit. Even otherwise the Plaintiffs having relied upon the Resolution dated 15th January, 2004, the burden of proving the same was on them which they failed to do. The First Appellate Court therefore, committed gross error of law in harping upon the so called weakness of the Defendant's case rather than insisting upon the Plaintiffs to prove their case independently. Mr. Rath, further argued that the Resolution dated 15th January, 2004 was never enforced. It was also argued that the bye-laws of the Society do not provide for a care-taker Governing Body, which the First Appellate Court did not take into consideration at all.

8. Mr. B.N. Bhuyan, on the other hand, has supported the impugned judgment by submitting that dismissal of the former suit was not on any technical ground but on the finding that the cause of action had disappeared by efflux of time. The said suit was hotly contested. In any event, the judgment passed in the former suit had not been challenged and therefore, attained finality.

9. Mr. D.N.Mohapatra submits that OCA being the parent body cannot have any say as regards the management of the Plaintiff Society or on the dispute among its office bearers which is an internal matter of the Society. He further contends that the OCA grants affiliation and membership basing on valid decisions taken by the Governing Body of the Plaintiff Sangha.

10. In view of the foregoing narration, the primary question that falls for consideration in the present appeal is, whether dismissal of the former suit (C.S. No.67/2004) on the ground of disappearance of cause action can operate as res judicata in a subsequent suit. Before proceeding further, it would be apposite to refer to Section 11 of C.P.C. which embodies the rule of res judicata and reads as under;

> *"11.Res-judicata-No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."*
>
> *xxx xxx xxx xxx*

11. It has been long settled by several pronouncement of the Apex Court as well this Court that the following contingencies must be satisfied to constitute res judicata;

> (i) There must be two suits one former suit and the other subsequent suit;
>
> (ii) The Court which decided the former suit must be competent to try to subsequent suit;
>
> (iii) The matter directly and substantially in issue must be the same either actually or constructively in both the suits.
>
> (iv) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the former suit.

(v) The parties to the suits or parties under whom they or any of them claim must be the same in both the suits;

(vi) The parties in both the suits must have litigated under the same title.

12. The above principles are so basic that it is not necessary to refer to any case law in this regard. Now, it is to be considered whether the former suit, dismissed for disappearance of cause of action would come within the mischief of Section 11 of C.P.C. and thereby act as a bar for a subsequent suit between the parties. As has already been seen, the requirement of law is that the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the former suit.

13. A similar question came up for consideration before the Apex Court in the case of **Sheodan Singh vs. Smt. Daryao Kunwar**; reported in AIR 1966 SC 1332, wherein the Apex Court observed in Paragraph-14 as under;

" xxx xxx xxx

Reliance in this connection is placed on the well-settled principle that in order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non joinder of parties or misjoinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision not being on the merits would not be res judicata in a subsequent suit.

xxx xx xxx xxx xxx xxx xxx"

(Emphasis added)

14. The same principle was considered by the Apex Court recently in the case of ***Prem Kishore and others v. Brahm Prakash and others***; reported in 2023 SCC OnLine SC 356, wherein under Paragraph 34 of the judgment, the Apex Court has reiterated the same proposition. Thus what follows is, a suit not decided on merits but on technical grounds cannot operate as res judicata.

15. Coming to the facts of the case, it is seen that Defendant No.1 had filed C.S. No.67/2004, inter alia, seeking a declaration that the meeting held on 15th January, 2004 under the Presidentship of Siba Prasad Mukherjee (Defendant No.2 therein) and the Resolution made therein removing the Plaintiff from the Secretariship and electing Tarun Kumar Mukheree (Defendant No.1 therein) as the Secretary of Netaji Sangha is illegal and unconstitutional. No doubt, the suit was contested and an interim order was passed by the Court allowing the Plaintiff (present Defendant No.1) to continue as the Secretary. However, a petition was filed by the defendants in the said suit being CMA No.39 of 2007 for dismissal of the suit

as the same had become infructuous. The Trial Court found that as per its bye-law the Secretary of the Sangha is to be elected each year before 23rd January and that in the year 2001 all the Members of the Sangha passed a Resolution deciding that the Secretary shall continue for five years. Thus, the tenure of the Plaintiff as Secretary was still 23rd January, 2006. Under such circumstances, the cause of action for filing the suit no longer remained to be adjudicated upon in view of the fact that after expiry of the previous tenure on 23rd January, 2006, the Plaintiff had been re-elected as Secretary vide Resolution passed on 15th December, 2006. The suit was thus dismissed as having become infructuous. It goes without saying that the matter directly and substantially in issue in the said suit i.e. validity and constitutionality of the Resolution dated 15th January, 2004 was never adjudicated. In view of what has been discussed herein before, the said issue was available for adjudication even after dismissal of the suit for disappearance of cause of action.

16. A reading of the judgment passed by the Trial Court in the present case reveals that it was held that the Resolution passed on 15th January, 2004 removing Defendant No.1 from the Secretaryship as well Membership of the Sangha is illegal on the ground that the procedure prescribed under the bye-laws had not been followed. The trial Court further took note of the Resolution dated 20th December, 2001 whereby Defendant No.1 was elected as Secretary for five years and treated it as genuine. Therefore, all the Resolutions passed electing the care-taker body and electing working Secretary and working President in between 15th January, 2004 to 8th November, 2007, i.e. the date of dismissal of the suit are illegal as the same were done in violation of the Court's order. The Resolution dated 20th December, 2001 electing the Defendant No.1 as Secretary for a period of five years was never challenged by any one. The Trial Court therefore held that the Plaintiffs are not office bearers of Netaji Sangha and rather Defendant No.1 was the elected Secretary as per Resolution dated 15th December, 2006. The Trial Court further took note of the fact that the suit was filed not by the original President and Secretary but by the working President and working Secretary. Since the bye-laws of the Sangha do not provide for any working President or working Secretary, the suit is not maintainable. Since Defendant No.1 had duly intimated the Court of his re election for a further period of five years as per Resolution dated 15th December, 2006, the Plaintiffs have no cause of action to file the suit. The suit was thus dismissed. After going through the reasoning adopted by the Trial Court as mentioned above, this Court finds nothing wrong therein so as to be persuaded to interfere therewith.

17. Coming to the judgment of the First Appellate Court, it is observed that the said Court proceeded on an entirely erroneous perception of law as regards the principle of res judicata to hold that the judgment passed in the former suit was on merit despite the fact that the same was dismissed for disappearance of cause of action. The Appellate Court further misdirected itself in holding that the Defendant No.1 was hit by estoppel by accord. In view of the analysis of facts and law made hereinbefore, it is evident that the finding of the First Appellate Court is erroneous

and cannot be sustained in law. In view of the findings of this Court as above, it becomes no longer necessary to examine the other findings as the same are based on incorrect application of law. The further finding that the Trial Court mostly relied on the temporary order of injunction granted in favour of Defendant No.1 in the former suit being oblivious of the bar contemplated under Section 11 of C.P.C. is also erroneous for the reason that the Trial Court has merely referred to the interim order of injunction to support its findings that the claim of the Defendant No.1 of being elected as Secretary for five years as per Resolution dated 20th December, 2001 was genuine.

18. Thus, from a conspectus of the discussion of law and facts made hereinbefore, this Court has no hesitation in holding that the impugned judgment being erroneous, warrants interference. Resultantly, the appeal is allowed. The impugned judgment passed by First Appellate Court is hereby set aside. The judgment and decree passed by the Trial Court is hereby confirmed.

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2023 (II) ILR – CUT - 1185

SASHIKANTA MISHRA,J.

CRLMC NO.1462 OF 2023

BANDHNA TOPPO .....Petitioner

.V.

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

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – Power of the High Court to direct further investigation/re-investigation and/or investigation by a specialized agency – Discussed with case laws. (Para- 8)

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 482 – The case involves death of human being with allegation of foul play of the investigating authority – The petitioner's allegation that the investigation was biased or in any case not impartial – Whether a fit case for direction to re-investigate by a specialized agency – Held, Yes – Proper and fair investigation is sine qua non of Criminal Jurisprudence – It is a fit case to direct reinvestigation by an independent agency like the C.I.D (Crime Branch). (Para 12-14)

Case Laws Relied on and Referred to :-

1. (2022) 15 SCR 692: (2023) 1 SCC 48: (2023) 1 SCC (Cri) 270 : Devendra Nath Singh Vs. State of Bihar.
2. (2011) 9 SCC 182: (2011) 3 SCC (Cri) 666 : State of Punjab Vs. C.B.I. State of Punjab Vs. CBI.
3. (2013) 5 SCC 762 : Vinay Tyagi Vs. Irshad Ali.

For Petitioner : Mr.Shivsankar Mohanty

For Opp.Parties : Mr.S.N. Das, Addl. Standing Counsel

JUDGMENT Date of Judgment :05.7.2023

SASHIKANTA MISHRA,J.

The present application filed under Section 482 of Cr.P.C. is for grant of the following prayer;

> *"It is therefore prayed that this Hon'ble Court may graciously be pleased to admit the application, call for records and be pleased to direct for fresh investigation or reinvestigation by any independent agency of the State Government or other agency including a Central Agency, which has acquired specialization in such matters by appointing a Superior Rank Officer than the accused in Infocity P.S. Case No.336 dated 24.11.2022 registered under Section* 302 and 34 I.P.C. to secure the ends of justice."

2. The facts of the case, briefly stated, are that on 28th February, 2022 at about 12 noon, the Petitioner received a call from one Birendra Lakra on his mobile phone that his son Anand Toppo (deceased) was un- conscious and shifted to Capital Hospital, Bhubaneswar in an Ambulance by one Manjeet Tete. The doctor however, declared him brought dead. Suspecting foul play, the Petitioner attempted to lodge a complaint before the I.I.C. of Infocity P.S. but the same was not accepted on the ground that an F.I.R. had already been lodged being Infocity P.S. U.D. Case No.14/2022 as a case of suicide. The Petitioner submitted a written complaint on 1st April, 2022 before the I.I.C. of Infocity P.S. by hand with request to register the same and convert the U.D. Case into a murder case. The I.I.C. received the same but did not give any acknowledgment. On repeated query by the Petitioner, it was given out that investigation is in progress. Being aggrieved by such inaction of the I.I.C, the Petitioner sent the substance of information along with his previous complaint in writing to the D.C.P. of Police, Bhubaneswar-Cuttack by registered post requesting to register the case under Section 302 of I.P.C. and to conduct proper investigation. No action being taken thereon the Petitioner sent another complaint on 17th May, 2022 by registered post to the Commissioner of Police, Bhubaneswar-Cuttack for redressal of his grievance. Since no action was taken despite such steps, the petitioner approached this Court in CRLMP Nos.2153 and 2154 of 2022.

3. During pendency of the aforementioned case, the Infocity Police acknowledged the written complaint of the Petitioner and registered the same as P.S. Case No. 3636 dated 24th November, 2022. Taking note of such facts, a coordinate Bench of this Court disposed of CRLMP No.2153/2022, inter alia, with the following observations;

"xxx xxx xxx xxx xxx xxx

> *"7. The inaction shown by the police is deplored. If there is even a shred of truth in the allegations made herein, such infamy by the police deserves strong condemnation. The core mission of the police is to protect citizens from the undesirable elements of society.*

But if its actions were to leave the community more vulnerable to criminal victimization, it would undermine the popular confidence in law enforcement. Looking at the recent surge of cases pertaining to delay in registration of F.I.Rs, it seems institutional lethargy has crept into the system, which is unfortunate.

8. Ergo, the Commissioner of Police, Bhubaneswar is directed not to assign the concerned policeman to any field posting for one year. Also, appropriate steps shall be taken at the end of the Police Commissioner, Bhubaneswar to send the said officer for sensitization training at the Biju Pattanaik Police Academy, Bhubaneswar for one month. The Deputy Commissioner of Police is directed to personally monitor the investigation of the concerned case while keeping all influences at bay and submit the Final Report within three months from today."

xxx xxx xxx".

4. On 15th December, 2022, the I.O. received viscera chemical report of the deceased, which revealed the presence of ethyl alcohol and drugs. The I.O. obtained opinion of a doctor of AIIMS, Bhubaneswar, who was of the view that the injury found on the neck of the deceased was ante mortem in nature. Ultimately on 7th February, 2023, final report was submitted stating that so far no prima facie evidence is made out to be a true case under Section 302 I.P.C. against the alleged accused persons beyond all reasonable doubts and accordingly, the report was submitted as mistake of fact.

Feeling aggrieved, the informant-Petitioner has filed the present application.

5. Heard Mr. S. Mohanty, learned counsel for the Petitioner and Mr. S.N.Das, learned Addl. Standing counsel for the State.

6. Mr. Mohanty argues that one of the accused persons namely, Birendra Lakra is a high ranking Police Officer being a DSP and therefore, despite clear evidence of foul play involved in the death of the deceased, final report was submitted as mistake of fact deliberately portraying the death as a case of suicide. According to Mr. Mohanty, there is ample evidence on record to suggest that the Petitioner was administered poison along with alcohol which caused his death and the accused persons attempted to cover up such fact by showing it as a case of suicidal hanging. Moreover, the I.I.C. of Infocity Police Station, Samita Mishra, against whom this Court had passed certain remarks touching upon her impartiality, deliberately tried to protect accused Birendra Lakra in connivance with the I.O. of the case Arpita Priyadarsini. Summing up his arguments Mr. Mohanty submits that a proper and fair investigation being essential requirement of criminal justice system, this is a fit case where fresh investigation should be conducted by any specialized agency of the State or Central Governments.

7. Opposing the contentions of Mr. Mohanty as above, Mr. S.N.Das, learned Addl. Standing Counsel for the State would submit that the post mortem report clearly reveals the case to be one of suicidal hanging. The ligature mark present on

the neck of the deceased is adequate proof of such fact. The chemical examination of the viscera revealed presence of alcohol and barbiturates, which is consistent with the version of the witnesses that the deceased had consumed alcohol prior to his death. The opinion of the doctor is also very clear that the injuries (ligature mark) could be suicidal in nature. Under such circumstances no foul play whatsoever can be said to have been involved. Mr. Das further argues that even otherwise if the Petitioner is aggrieved by submission of final report by the I.O., it is open to him to move the court below by filing protest petition, which can be considered in accordance with law, but under the facts, a case for further investigation/reinvestigation is not made out at all.

8. Before proceeding to examine the merits of the rival submissions noted above, it would be apposite to keep in mind the settled position of law as regards the power of the High Court to direct further investigation/reinvestigation and/or investigation by a specialized agency. The case of ***Devendra Nath Singh v. State of Bihar;*** reported in (2022) 15 SCR 692: (2023) 1 SCC 48: (2023) 1 SCC (Cri) 270 can be referred to this in this regard. In the said case, under paragraph 12.1, reference was made to an earlier decision of the Apex Court i.e., the case of ***Vinay Tyagi*** **v.** ***Irshad Ali***, (2013) 5 SCC 762; wherein it was observed as follows;

> "*43. At this stage, we may also state another well-settled canon of criminal jurisprudence that the superior courts have the jurisdiction under Section 482 of the Code or even Article 226 of the Constitution of India to direct "further investigation", "fresh"or"de novo" and even "reinvestigation"*. "Fresh", "de novo" and "reinvestigation" are synonymous expressions and their result in law would be the same. *The superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action. Of course, it is also a settled principle that this power has to be exercised by the superior courts very sparingly and with great circumspection.*
>
> *44. We have deliberated at some length on the issue that the powers of the High Court under Section 482 of the Code do not control or limit, directly or impliedly, the width of the power of the Magistrate under Section 228 of the Code. Wherever a charge-sheet has been submitted to the court, even this Court ordinarily would not reopen the investigation, especially by entrusting the same to a specialised agency. It can safely be stated and concluded that in an appropriate case, when the Court feels that the investigation by the police authorities is not in the proper direction and that in order to do complete justice and where the facts of the case demand, it is always open to the Court to hand over the investigation to a specialised agency. These principles have been reiterated with approval in the judgments of this Court in Disha v. State of Gujarat [Disha v. State of Gujarat, (2011) 13 SCC 337 : (2012) 2 SCC (Cri) 628] , Vineet Narain v. Union of India [Vineet Narain v. Union of India, (1998) 1 SCC 226 : 1998 SCC (Cri) 307] , Union of India v. Sushil Kumar Modi [Union of India v. Sushil Kumar Modi, (1996) 6 SCC 500] and Rubabbuddin Sheikh v. State of Gujarat [Rubabbuddin Sheikh v. State of Gujarat, (2010) 2 SCC 200 : (2010) 2 SCC (Cri) 1006] .*
>
> *45. The power to order/direct "reinvestigation" or "de novo" investigation falls in the domain of higher courts, that too in exceptional cases. If one examines the provisions of*

the Code, there is no specific provision for cancellation of the reports, except that the investigating agency can file a closure report (where according to the investigating agency, no offence is made out). Even such a report is subject to acceptance by the learned Magistrate who, in his wisdom, may or may not accept such a report. For valid reasons, the court may, by declining to accept such a report, direct "further investigation", or even on the basis of the record of the case and the documents annexed thereto, summon the accused.

xxx xxx xxx."

Again reference was made in Paragraph 12.2 to ***State of Punjab v. C.B.I. State of Punjab v. CBI***, (2011) 9 SCC 182: (2011) 3 SCC (Cri) 666, wherein it was observed as follows;

"22. Section 482CrPC, however, states that nothing in Cr.P.C shall be deemed to limit or affect the inherent powers of the High Court to make such orders as is necessary to give effect to any order under CrPC or to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Thus, the provisions of CrPC do not limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order of the court or to prevent the abuse of any process of the court or otherwise to secure the ends of justice. The language of sub-section (8) of Section 173CrPC, therefore, cannot limit or affect the inherent powers of the High Court to pass an order under Section 482CrPC for fresh investigation or reinvestigation if the High Court is satisfied that such fresh investigation or reinvestigation is necessary to secure the ends of justice.

23. We find support for this conclusion in the following observations of this Court in Mithabhai Pashabhai Patel v. State of Gujarat [Mithabhai Pashabhai Patel v. State of Gujarat, (2009) 6 SCC 332 : (2009) 2 SCC (Cri) 1047] cited by Mr Dhavan : (SCC p. 337, paras 13 & 15)

'13. It is, however, beyond any cavil that "further investigation" and "reinvestigation" stand on different footing. It may be that in a given situation a superior court in exercise of its constitutional power, namely, under Articles 226 and 32 of the Constitution of India could direct a "State" to get an offence investigated and/or further investigated by a different agency. Direction of a reinvestigation, however, being forbidden in law, no superior court would ordinarily issue such a direction. Pasayat, J. in Ramachandran v. R. Udhayakumar [Ramachandran v. R. Udhayakumar, (2008) 5 SCC 413 : (2008) 2 SCC (Cri) 631] opined as under : (SCC p. 415, para 7)

"7. At this juncture it would be necessary to take note of Section 173 of the Code. From a plain reading of the above section it is evident that even after completion of investigation under sub-section (2) of Section 173 of the Code, the police has right to further investigate under sub-section (8), but not fresh investigation or reinvestigation."

A distinction, therefore, exists between a reinvestigation and further investigation.

***

15. The investigating agency and/or a court exercise their jurisdiction conferred on them only in terms of the provisions of the Code. The courts subordinate to the High Court even do not have any inherent power under Section 482 of the Code of Criminal Procedure or otherwise. The pre-cognizance jurisdiction to remand vested in the subordinate courts, therefore, must be exercised within the four corners of the Code.'

24. It is clear from the aforesaid observations of this Court that the investigating agency or the court subordinate to the High Court exercising powers under CrPC have to

exercise the powers within the four corners of CrPC and this would mean that the investigating agency may undertake further investigation and the subordinate court may direct further investigation into the case where charge-sheet has been filed under sub-section (2) of Section 173CrPC and such further investigation will not mean fresh investigation or reinvestigation. But these limitations in sub-section (8) of Section 173CrPC in a case where charge-sheet has been filed will not apply to the exercise of inherent powers of the High Court under Section 482CrPC for securing the ends of justice." *[Emphasis supplied]*

After referring to several other decisions on the point, the following principles were culled out under Paragraph-13:

"(a) The scheme of the Code of Criminal Procedure, 1973 is to ensure a fair trial and that would commence only after a fair and just investigation. The ultimate aim of every investigation and inquiry, whether by the police or by the Magistrate, is to ensure that the actual perpetrators of the crime are correctly booked and the innocents are not arraigned to stand trial.

(b) The powers of the Magistrate to ensure proper investigation in terms of Section 156CrPC have been recognised, which, in turn, include the power to order further investigation in terms of Section 173(8) CrPC after receiving the report of investigation. Whether further investigation should or should not be ordered is within the discretion of the Magistrate, which is to be exercised on the facts of each case and in accordance with law.

(c) Even when the basic power to direct further investigation in a case where a charge-sheet has been filed is with the Magistrate, and is to be exercised subject to the limitations of Section 173(8) CrPC, in an appropriate case, where the High Court feels that the investigation is not in the proper direction and to do complete justice where the facts of the case so demand, the inherent powers under Section 482 CrPC could be exercised to direct further investigation or even reinvestigation. The provisions of Section 173(8)CrPC do not limit or affect such powers of the High Court to pass an order under Section 482 CrPC for further investigation or reinvestigation, if the High Court is satisfied that such a course is necessary to secure the ends of justice.

(d) Even when the wide powers of the High Court in terms of Section 482CrPC are recognised for ordering further investigation or reinvestigation, such powers are to be exercised sparingly, with circumspection, and in exceptional cases.

xxx xxx xxx xxx xxx." *[Emphasis supplied]*

The law being as referred to in the preceding paragraphs, the contentions urged by the parties shall now be considered.

9. From the case diary containing the statements of several persons including Birendra Lakra and Manjeet Tete, it appears that the deceased used to stay with Manjeet Tete in a Flat under Infocity Police Station, Bhubaneswar and Birendra Lakra used to visit them at times. The Petitioner appears to have had a relationship with said Manjeet Tete, which he wanted to continue even after his marriage to another girl in Jharsuguda. The deceased appears to have arrived in Bhubaneswar in the morning of 28th February, 2022 at about 7.30.A.M. According to the statement of

Manjeet Tete recorded under Section 164 of Cr.P.C., the deceased requested her to continue with the relationship despite his marriage to which she refused. He is also said to have forcibly pulled the hand of Manjeet and started drinking alcohol and kept on reiterating his request for continuance of the relationship. Manjeet was however, not agreeable and packed her suitcase with intent of leaving the flat. She went to the bathroom taking her ear phones with her but before that the deceased asked her for the saree that he had gifted her earlier. Manjeet is said to have asked him to search for the saree in the house. When Manjeet returned from the bathroom 10 to 15 minutes later, she found the deceased hanging from the ceiling fan by means of the gifted blue colour saree with his knees being 2" to 3" above the floor. Manjeet brought the deceased down and opened the knot of the saree and checked his pulse. There being no response she attempted mouth to mouth respiration which did not yield any result. She then called Birendra Lakra, who was in the other room. Birendra Lakra also checked the deceased and thereafter both of them called the Ambulance and Manjeet took the deceased to Capital Hospital where he was declared brought dead.

10. Birendra Lakra, in his statement recorded under Section 161 of Cr.P.C. more or less stated the same thing and specifically stated that he was playing a game on his mobile phone being connected with ear phones. He however, states that Manjeet had taken the deceased to Capital Hospital on an ambulance and he reached there later by which time the deceased had already been declared dead. He also claims to have paid Rs.60,000/- to the father of the deceased (present Petitioner) to defray the expenses of carrying the dead body. Several other witnesses have been examined, but all of them are post occurrence witnesses and have no direct knowledge about the incident. If the statements of Manjeet and Birendra Lakra are read objectively, it would show certain palpable incongruities and significant aspects that which have not been considered by the I.O. namely;

(i) The deceased was found hanging from the ceiling fan with his knees 2" to 3" above the floor which is strange since nothing has been said as to what was the position of his feet. This would obviously imply that the lower part of his leg (below the knees) must have been folded backwards with his feet touching the ground.

(ii) In such background, the statement of Manjeet that having seen the deceased hanging from the ceiling fan she herself brought him down and opened the noose of the saree seems difficult to believe.

(iii) The statement of Manjeet that she attempted mouth to mouth respiration and thereafter called Birendra Lakra militates against the natural reaction expected of a young girl on witnessing such a sight. In ordinary course, she should have shouted for help or called Birendra Lakra, who was in the adjacent room.

(iv) The statements of both Manjeet and Birendra Lakra that they had used ear phones at the relevant time appear to have been made out of context. Moreover, while Birendra Lakra himself stated that he was playing a game on his mobile phone, the I.O. mentioned in the charge sheet that he was listening to music on his IPod.

(v) Birendra Lakra admits that due to family disturbances, he had stayed in the said Flat for 20 days with permission of Anand Toppo (deceased) and also used to visit the Flat even in the absence of Anand. Implication of such admission has not been considered.

(vi) The post mortem report clearly shows the presence of a ligature mark on the neck of the deceased. The chemical examination report of the viscera shows the presence of alcohol and barbiturate. Implication of all these have not been properly considered.

(vii) The Additional Professor, Department of Forensic Medicine Toxicology, AIIMS, Bhubaneswar specifically opined as follows;

"Both alcohol and barbiturate are habit forming drugs. Very often these drugs are used for recreational liabilities. Combination of both is likely fatal to cause depression and death. Basing on the chemical analysis report, considering the post mortem findings and the subsequent answer to the queries, the cause of death was ante mortem hanging. I am of the opinion that the deceased had consumed intentionally both the compound prior to death".

It is surprising as to how the doctor could positively opine that the deceased had intentionally consumed both the compounds.

Nevertheless, in his final opinion the doctor states as follows;

"After perusing all the documents mentioned above, I am of the considered opinion that the cause of death was ante mortem hanging and its complication. However, the victim consumed alcohol and barbiturate before his death."

It is thus seen that the doctor has not given a conclusive opinion, rather his opinion suggests that the death could be either due to ante mortem hanging or the result of consumption of alcohol with barbiturate.

11. I have perused the case diary carefully. I do not find anything therein to even remotely suggest that investigation was directed to the aforementioned aspects. Of course, I would hasten to add that it is not the intention of this Court to impute any culpability to any person but only to highlight that investigation should have been directed towards the aspects referred above. It must be kept in mind that death of a human being has occurred. There is an allegation of foul play. The matter should therefore, have been investigated thoroughly touching all possible angles keeping in view the allegations. In fact, even the evidence collected by the I.O. is not such as would completely rule out foul play. There are glaring gaps in the investigation as discussed hereinabove, for which, it cannot be so easily concluded that the death of the deceased was certainly due to suicidal hanging and nothing else.

12. Proper and fair investigation is sine qua non of criminal jurisprudence. The very purpose of investigation is to find out the truth. But if relevant aspects have been ignored/over looked by the investigating agency, it cannot be said that there was fair and proper investigation. As observed by the Apex Court in ***Vinay Tyagi*** (supra) is as follows;

> "*what ultimately is the aim or significance of the expression "fair and proper investigation" in criminal jurisprudence? It has a twin purpose: Firstly, the investigation must be unbiased, honest, just and in accordance with law; secondly, the entire emphasis on a fair investigation has to be to bring out the truth of the case before the court of competent jurisdiction. Once these twin paradigms of fair investigation are satisfied, there will be the least requirement for the court of law to interfere with the investigation, much less quash the same, or transfer it to another agency. Bringing out the truth by fair and investigative means in accordance with law would essentially repel the very basis of an unfair, tainted investigation or cases of false implication. Thus, it is inevitable for a court of law to pass a specific order as to the fate of the investigation, which in its opinion is unfair, tainted and in violation of the settled principles of investigative canons*."

From the apparent gaps and incongruities as has been narrated earlier, this Court is left with little doubt that investigation in the present case cannot be said to have been conducted properly and that several areas still remain to be investigated.

13. Now whether direction should be for further investigation or fresh/reinvestigation is the question. As has already been referred to hereinbefore, this Court has power to direct both. In the instant case, the entire investigation has proceeded on the premise of suicide. All efforts of the investigating officer appear to have been made in this background. Under such circumstances, further investigation would be an exercise to only take forward what has already been investigated. It would obviously not meet the requirement of justice that the case demands. On the contrary, if the matter is reinvestigated in all aspects, including those that have hitherto not been looked at can also be taken into consideration. Since the case involves death of a human being with the allegation of foul play, which this Court, prima facie finds acceptable, it is a fit case to direct reinvestigation.

14. The question that now arises is, by which agency should the reinvestigation be conducted. It is the settled position of law that the High Court in exercise of its power under Section 482 of Cr.P.C. can direct investigation to be conducted by an independent/specialized agency in appropriate cases. In the present case, there is allegation that the I.I.C.of Infocity P.S. collaborated with the I.O. to ensure submission of final report as mistake of fact. This Court would not like to comment on the above aspect except for noting the fact that the concerned I.I.C. has already been hauled up by a coordinate bench of this Court for her gross inaction in acting upon the complaint submitted by the Petitioner for a long time. It is also borne out from the case record that Birendra Lakra is a high ranking Police Officer belonging to the grade of Deputy Superintendent (DSP). The Petitioner's allegation that the investigation was biased or in any case not impartial appears to be reasonable in the facts and circumstances of the case. Therefore, directing the same agency to reinvestigate would not be proper. Rather for the ends of justice, it would be proper for an independent agency like the C.I.D. (Crime Branch) to do so.

15. For the foregoing reasons therefore, the CRLMC is allowed. This Court directs that the case shall be reinvestigated by the C.I.D. (Crime Branch). Having regard to the fact that one of the accused persons is himself a Senior Police Officer in the rank of Deputy Superintendent of Police, it would be proper if the investigation is conducted by an Officer of the higher grade. This Court therefore, directs the Addl. Director General (Crime Branch) to entrust the investigation to a Senior Officer not below the rank of Deputy Inspector General of Police who shall reinvestigate the matter from all angles and submit report to the concerned Court accordingly. The previous I.O. is directed to transmit the entire case diary and all other records/documents collected during investigation to the C.I.D. (Crime Branch) forthwith.

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2023 (II) ILR – CUT - 1194

A.K. MOHAPATRA, J.

W.P.(C) NO. 7711 OF 2012

SARAT KUMAR SWAIN …….Petitioner

STATE OF ODISHA & ORS. …….Opp Parties

ORISSA PUBLIC DISTRIBUTION SYSTEM (CONTROL) ORDER, 2008 r/w NOTIFICATION DATED 29.03.2008 – Whether the police officer below the rank of Inspector can seize any Goods under the Essential Commodities Act or as per the said notification? – Held, No.

Case Laws Relied on and Referred to :-

1. OCR Volume 45 (2010)-414 : Tapan Kumar Samanta Vs. Collector-cum-District Magistrate, Balasore & Ors.
2. 2010 (I) OLR 221 : Tapan Kumar Samant Vs. Collector-cum-District Magistrate, Balasore & Ors.
3. 2007 (II) OLR (SC) 471 : Kailash Prasad Yadav & Anr Vs. State of Jharkhand.
4. Crimes Vol-(VIII) 1990(2)-744 : Nanda Kishore Singh Vs. State of Bihar.
5. 2011 (II) OLR-240 : Anand Samal Vs. State of Orissa & Ors.

For Petitioner : M/s. Gopal Krishna Nayak and S. Patra

For Opp. Parties : Mr. A. Behera, Addl. Standing Counsel

JUDGMENT Date of Hearing : 22.03.2023 :Date of Judgment : 27.04.2023

A.K. MOHAPATRA, J.

1. The present writ application has been filed by the petitioner calling in question the conduct and the procedure adopted by the Opposite Parties while

conducting the seizure of the PDS commodities by the S.I. Gangapur Police Station and the petitioner has further challenged the legality and propriety of the impugned order as well as the jurisdiction of the Collector, Ganjam in initiating the proceeding against the petitioner under Section 6-A of the Essential Commodities Act on the basis of illegal seizure. The petitioner has further prayed for quashing of notice under Annexure-4 to the writ application.

2. The back ground facts leading to filing of the present writ application is that the petitioner is an honest businessman having very good reputation in the locality and he is in the business of distribution of PDS commodities for last twenty years. The writ application further reveals that the petitioner has an unblemished career as a PDS retailer as he has not been implicated in any case relating to commission of any irregularity in the distribution of PDS commodities in the locality.

3. On 18.09.2011 at about 6.00 P.M., while the petitioner was coming with Kerosene Oil in a truck, the OIC of Gangapur P.S. stopped the said vehicle and seized the truck as well as Kerosene Oil on the ground that the petitioner could not produce proper documents. It has also been mentioned that the petitioner produced the documents in respect of 2000 liters of Kerosene, however, he could not produce documents in respect of another 1000 liters of Kerosene that was being transported. In the writ application, it has been further pleaded that one Bipra Charan Swain has purchased 1000 liters of Kerosene and due to heavy rain and bad weather and road condition, he was unable to shift such Kerosene Oil and accordingly decided to return the same.

4. Referring to clause-3 of the Control Order, 2008, it has also been stated in the writ application that the petitioner has not violated any guidelines and executive instructions issued by the Government. Furthermore, the petitioner, although, produced proper documents and stated before the OIC Gangapur P.S. that he has procured such Kerosene Oil from M/s. Gurumurty Oil Company and produced valid papers before the OIC, the OIC of Gangapur P.S. did not take any note of the same. It is also contended that on verification by police, M/s. Gurumurty Oil Company produced all the relevant documents for perusal. However, without considering the said documents, OIC, Gangapur P.S. was bent upon to seize and accordingly he had seized the Kerosene Oil that was being transported in the truck.

5. Learned counsel for the petitioner further contended before this Court that the petitioner has not violated any of the provisions of the PDS Control Order, 2008. He further submitted that although the petitioner produced valid paper/documents along with money receipt, but the appellate authority without following the guidelines and without giving an opportunity of show cause to the petitioner, seized 3000 liters of Kerosene Oil belonging to the petitioner. It is also contended that the Collector, Ganjam issued a notice dated 19.10.2011 under Annexure-4 without application of mind. The said notice under Annexure-4 purported to be one under the provisions of the E.C. Act, is stated to be illegal, arbitrary and in furtherance of

the mala fide intention of the Opposite Parties. He further contended that on the basis of such illegal report of the OIC, Gangapur P.S., the Collector, Ganjam without verifying the facts and without application of mind initiated an E.C. Case. Learned counsel for the petitioner further contended that although by the direction of the learned Additional Sessions Judge, Bhanjanagar in CRLREV No.34 of 2011, seized vehicle has been released by the police, however, the Collector, went ahead for issuance of notice and continued with the E.C. case against the petitioner.

6. Learned counsel for the petitioner assailed the notice issued by the Collector, Ganjam under Annexure-4 and further continuance of the E.C. case on the principal ground that the OIC Gangapur P.S. has no power and authority under the rules to seize the Kerosene Oil and as such, on the basis of such illegal seizure no confiscation proceeding under Section 6-A of the E.C. Act should have been initiated against the petitioner. Further referring to the notification dated 13.03.2008 issued by the Government of Odisha known as OPDS Control Order, 2008 and specifically referring to clause-23 thereof, it is argued that the licensing authority or any other officer authorized by the Government have the power of entry and to conduct search and seizure in respect of the essential commodities. Pursuant to the aforesaid provisions, the Food Supplies and Consumer Welfare Department, Government of Odisha came out with a notification dated 29.03.2008 specifying therein the officers, who can exercise such power. Referring to the notification dated 29.03.2008, learned counsel for the petitioner submitted that no police officer has been conferred with such power under clause-23 of the OPDS Control order, 2008 to carry out search and seizure as prescribed therein. Therefore, the notice issued by Collector under Annexure-4 based on the seizure made by OIC Gangapur P.S. is bad in law and without jurisdiction and authority. Accordingly, learned counsel for the petitioner has approached this Court by filing the present writ application with a prayer to quash the notice dated 19.10.2011 under Annexure-4 issued by the Collector, Ganjam.

7. Per contra, the State Opposite Parties have filed the counter affidavit. The counter affidavit filed on behalf of the Opposite Party No.2 i.e. Assistant Civil Supplies Officer, Bhanjanagar has supported the notice issued by the Collector, Ganjam in E.C. Case No.42 of 2011. It has also been pleaded in the counter affidavit that for illegal transportation and transaction in PDS Kerosene Oil by the petitioner, Gangapur P.S. has seized the Kerosene Oil and accordingly, lodged F.I.R. with an intimation to the licensing authority. Basing on such report, the licensing authority has initiated a proceeding under Section 6-A of the E.C. Act bearing E.C. No.42 of 2011.

8. Learned Additional Standing Counsel appearing on behalf of the State referring to the counter affidavit, further contended that for contravention of PDS Control Order, 2008, the quota of Kerosene Oil Sub-Wholesaler has been suspended and tagged with another distributor for smooth distribution of the PDS Kerosene Oil.

Learned Additional Standing Counsel further contended that the petitioner himself admitted the fact that he could not produce the documents in support of transportation of 1000 liters of Kerosene Oil and accordingly, the licensing authority has not committed any illegality in issuing a notice to the petitioner under the provisions of the E.C. Act. He also submitted that the conduct of the collector is neither illegal nor arbitrary and that the Licensing Authority-cum-Collector, Ganjam-Opposite Party No.2 is well within the authority and jurisdiction conferred upon him by the statute.

9. Learned Additional Standing Counsel appearing on behalf of the State in course of his argument, referring to clause-3-A of the Kerosene (Restriction on use and fixation of ceiling price) Order, 1966, submitted that the Sub-Inspector of Police is empowered for seizure of Kerosene Oil. He also referred to the notice dated 29.03.2008 and submitted that the police officers are empower for seizure of PDS commodities. Learned Additional Standing Counsel appearing on behalf of the State referred to the provisions under Section 102(1) of Cr.P.C. and submitted that any police officer can seize any property which may be alleged or suspected to have been stolen or which were found under the circumstances which creates suspicion of commission of any offence of which the concerned Police Officer is authorized to inspect under Section 156 of the Cr.P.C. Further the offences under the E.C. Act are cognizable in nature as provided under Section 10(A) of the E.C. Act.

10. Learned Additional Standing Counsel appearing on behalf of the State, in course of his argument, referred to the judgment of the Hon'ble Court in ***Tapan Kumar Samanta vrs. Collector-cum-District Magistrate***, ***Balasore and others*** : reported in ***OCR Volume 45 (2010)-414*** and contended before this Court that in the said judgment it has been observed that the police officer not below the rank of Sub-Inspector can make search and seizure and it was further held that for search and seizure by any officer in the rank of Assistant Sub-Inspector is illegal. In such view of the matter, learned Additional Standing Counsel submitted that the notice issued by the Collector on the basis of the report of Sub-Inspector of Police, is perfectly justified and lawful.

11. Having heard learned counsels appearing for the respective parties, and upon a careful examination of the contentions raised by such counsels and keeping in view the pleadings involved in the present case, this Court finds that the most pertinent question involved in the present writ petition is as to whether the search and seizure conducted by OIC, Gangapur P.S. is illegal valid and proper or not? And further on search and seizure whether the notice issued by the Licensing Authority-cum-Collector under Annexure-4 is legally sustainable? While answering the above noted two questions, this Court is required to look into the provisions of law as well as to determine as to, who is the competent authority, who can carry out the search and seizure as provided in PDS Control Order, 2008 as well as Kerosene Control Order, 1962.

12. Odisha Kerosene Control order, 1962, which has been framed in exercise of power conferred under Section 3 of the E.C. Act, 1955 provides in clause 3 that no person other than Wholesale Dealer and Sub-Wholesale Dealer under parallel marketing system is authorized to carry on the business as a Wholesale Dealer or Sub-Wholesale Dealer within the State of Odisha except in accordance with terms and conditions of a license granted in that behalf by the Licensing Authority. Clause-12 of the said Control Order provides that the Licensing Authority or any other officer appointed by the State Government in this behalf made with such assistance search, seizure and remove the stock of Kerosene and vehicles, vessels and use Kerosene in contravention of the provisions of the said order or of the condition of the license issued by the authorities.

13. Similarly, the provisions found in clause-3-A of the Kerosene (Restriction on use and fixation of ceiling price) Order, 1966 were modified by the Central Government in exercising of the power conferred Section 3 of the E.C. Act, 1955. Clause-3-A thereof provides for power of entry, search and seizure. Clause-3-A (1), further provides that any police officer not below the rank of Sub-Inspector or any other officer of the Government or above authorized in this behalf by the Central Government or State Government may carry out the search and seizure as provided in the said Control Order in the year 1966. The aforesaid order in the year 1966 was repealed and substituted by Kerosene (Restriction on use and fixation of ceiling price) Order, 1993 issued by the Central Government vide notification dated 02.09.1993. Under clause-9 of the order, 1993 power of entry, search and seizure has been conferred upon an officer of the department of Food Supplies of Government not below the rank of an Inspector authorized by such Government and notified by the Central Government or any officer authorized notified by the Central Government or any officer not below the rank of as well as officer of a Government company authorized by the Government and notified by the Central Government may with a view to ensure compliance of the provisions of this order exercise the power of entry, search and seizure.

14. The power exercisable under the Control Order, 1962, which has been referred to in the previous paragraph has been repealed by the Odisha Public Distribution System (Control) Order, 2008 notified by the Food Supplies and Consumer Welfare Department, Government of Odisha vide notification dated 13.03.2008. A careful scrutiny of the Control Order, 2008 reveals that clause-23 of the said order provides for power of entry, search and seizure etc. For better appreciation clause-23 of the OPDS Control Order 2008 has been quoted herein below:-

xx xx xx xx

"**23. Power of entry, search and seizure etc.** - (a) The Licensing Authority or any other officer authorized by Government in this behalf, may, with such assistance, if any, as he thinks fit :

(i) require the owner, occupier or any person in charge of the place, premises, vehicles or vessels in which he has reason to believe that any contravention of the provisions of

this order or of the conditions of any license issued there under has been, is being or is about to be committed, to produce any books, accounts or other documents showing transactions relating to such contravention;

(ii) enter, inspect or break open any place, premises, vehicles or vessels in which he has reason to believe that any contravention of the provisions of this order or of the conditions of any licence issued there under has been, is being or is about to be committed;

(iii) take or cause to be taken extracts from or copies of any documents showing transactions relating to such contravention which are produced before him/her;

(iv) test or cause to be tested the weight of all or any of the essential commodities found in any such premises;

Provided that in entering upon and inspecting any premises the persons so authorised shall have due regard to the social and religious customs of the persons occupying the premises.

(v) search, seize and remove the stocks of the essential commodities and the packages, coverings, animals, vehicles, vessels or other conveyances used, in carrying the said essential commodities in contravention of the provisions of this order or of the conditions of any licence issued there under and thereafter take or authorize the taking of all measures necessary for securing the production of the essential commodities and the packages, coverings, animals, vehicles, vessels or any other conveyances so seized in a Court and for their safe custody pending such production.

(b) The provisions of Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974) relating to search and seizure shall so far as may be, apply to searches and seizures under this clause."

xx xx xx xx

15. Upon a careful examination of clase-23(a), this Court observes that the Licensing Authority or any other officer authorized by the Government in this behalf may, with such assistance exercise such power as has been provided in clause-23 including the power of entry, search and seizure. Therefore, it is pertinent to ascertain as to who are the authorities competent to carry out the search and seizure?

16. A question arose as to whether a police officer is competent to seize PDS Wheat along with the truck and as to whether on the basis of such seizure, confiscation under Section 6-A can be initiated? A coordinate Bench of this Court in the case of ***Tapan Kumar Samant vrs. Collector-cum-District Magistrate***, ***Balasore and others*** : reported in 2010 (I) OLR 221 was required to adjudicate such issue. The coordinate Bench of this Court after detailed analysis of facts came to a conclusion that since the ASI of Police, who was not authorized to make seizure, seized the so-called PDS wheat, seizure itself being illegal proceeding under 6-A of the E.C. Act is unsustainable in law. It is further relevant to mention here that the aforesaid case also involved interpretation on clause-23 of OPDS Control Order, 2008. In paragraph-3 of the judgment the coordinate Bench of this Court also referred to the notification of the Food Supplies and Consumer Welfare Department bearing Notification No.7450-FS.IC.2/2008 dated 29.03.2008 and observed that

such notification specify and confer power of search and seizure as provided under clause-23 of the PDS Control Order, 2008 in Police Personnel and in paragraph-8 of the judgment of the coordinate Bench of this Court, it has been categorically held that since an ASI of Police, who was not authorized to make seizure, seized so-called PDS Wheat, the seizure itself being illegal, the proceeding under Section 6-A of the E.C. Act cannot sustain.

17. On analysis of the provisions of law applicable to the facts of the present case, this Court is of the considered view that a valid seizure is *sine qua non* for issuance of notice and initiating a proceeding under Section 6-A of the E.C. Act, 1955 for confiscation of the seized property. A valid seizure of the PDS commodities is the basis and foundation for initiating and continuing with such proceeding under Section 6-A of the E.C. Act to confiscate the seized properties. In other words, if the seizure is not valid and the same is not in conformity with the provisions of law, such seizure is non-est in the eye of law and no proceeding can be initiated basing upon said illegal seizure by an authority, who is not competent to do so. The view taken by this Court gets support from a judgment of the Hon'ble Supreme Court in the case of ***Kailash Prasad Yadav and another vrs. State of Jharkhand*** : reported in ***2007 (II) OLR (SC) 471***. At this juncture, it is also relevant to refer to another Supreme Court judgment in the case of ***Nanda Kishore Singh vrs. State of Bihar*** : reported in ***Crimes Vol-(VIII) 1990(2)-744***. In ***Nanda Kishore Singh case*** (supra), it was held by the Hon'ble Supreme Court that whether the seizure was made by a person not competent to seize the essential commodities, such seizure being illegal, the proceeding under Section 6(A) of the E.C. Act can stand. Therefore, the view taken by this Court gets support from the above noted two Supreme Court judgments in the case of ***Kailash Prasad Yadav and another vrs. State of Jharkhand*** (supra) as well as ***Nanda Kishore Singh's case*** (supra).

18. Learned counsel for the petitioner also referred to the judgment in the matter of ***Anand Samal vrs. State of Orissa and others*** : reported in ***2011 (II) OLR-240*** a coordinate Bench of this Court was deciding an issue as to whether a Police Officer is competent to seize PDS rice along with a truck on suspicion of the said rice was being sold in black market and whether on the basis of such seizure, a confiscation proceeding under Section 6(A) can be initiated? Learned coordinate Bench of this Court while answering the said issue referred to the notification of the State Government empowering officers to enter and to carry out search and seizure under clause-23 of the OPDS Control Order, 2008 vide notification dated 29.03.2008. On a careful analysis of the PDS Control Order, 2008, the coordinate Bench in the above noted judgment came to a conclusion that the S.I. of Police, who was not authorized to make seizure, seized the so-called PDS rice and as such, the seizure itself being illegal, the proceeding under Section 6(A) of the E.C. Act is unsustainable in law and accordingly, quashed the proceeding under Section 6(A) of the E.C. Act.

19. Keeping in view the aforesaid analysis of law as well as legal position as has been interpreted by various judgment of this Court as well as the Hon'ble Apex Court, this Court would now proceed to examine as to whether the OIC of Gangapur Police Station, who has admittedly carried out the search and seizure has been conferred with such power under the Statute and as such, competent to do so. With regard to the conferment of power an officer under clause-23(a) of the OPDS Control Order, 2008, learned Additional Standing Counsel for the State has filed copy of the notification dated 29.03.2008 to impress upon this Court that the officers are also authorized to carry out the said search and seizure. On perusal of the notification dated 29.03.2008 under Annexure-B/2 to the counter affidavit, it appears that the Police Officers not below the rank of Inspector, who were initially not included in the said notification dated 29.03.2008 have been included under Sl. No.28, subsequently, vide Notification No.7599 dated 29.04.2010, OGE No.379 dated 13.05.2010. For better understanding the said Notification has been quoted herein below:-

> "No7599—LS-PD-2/2010-FS & CW—In exercise of the powers conferred by sub-clause(a) of Clause 23 of the Orissa Public Distribution System (Control) Order, 2008, the State Government do hereby direct that the following amendment shall be made to the notification of the Government of Orissa in the Food Supplies & Consumer Welfare Department No.7450, dated the 29th March, 2008, namely :—
>
> AMENDMENT
>
> In The said notification, after Serial No.27, the following Serial No. and the entries against it under appropriate column shall be added, namely :—
>
> "28—Police Officers not below the Rank of Inspector.
>
> Within the local limit of their jurisdiction"
>
> By order of the Governor
> ASHOK K. MEENA
> Commissioner-cum-Secretary to Government"

20. On perusal of the notification dated 29.03.2008, it appears that the said notification had been issued in exercise of the power conferred by clause-23(a) of the OPDS Control Order, 2008 by the State Government and on further scrutiny it appears that initially no Police Officer was included under the said notification accordingly, the judgment of the coordinate Bench of this court in ***Tapan Kumar Samanta vrs. Collector-cum-District Magistrate, Balasore and others*** (supra) has been correctly decided. However, since the notification dated 29.03.2008 reveals that ***Police Officer*** not below the rank of Inspector has been included w.e.f. 13.05.2010, therefore, keeping in view the said notification the conduct of the Police Officer in the present case is to be examined. Before examining the facts of the present case, this Court would also like to observe that the judgment relied upon by the learned counsel for the petitioner in ***Ananda Samal's case*** (supra) has also been correctly decided. On careful scrutiny of the facts narrated in the judgment, it appears that the seizure took place 01/02.09.2008 by the OIC, Anandapur Police

Station. However, position of law as discussed hereinabove has changed w.e.f. 13.05.2010 and accordingly, Police Officer not below the rank of Inspector has been included in the notification dated 29.03.2008.

21. Reverting back to the facts of the present case and to decide the issue as to whether the Police Officer, who conducted the search and seizure was competent to do so under the OPDS Control Order, 2008, this Court would like to refer to the F.I.R. registered in the present case. The F.I.R. dated 19.09.2011 under Annexure-2 reveals that one Dinabandhu Behera S.I. of Police, Gangapur Police Station lodged the F.I.R. inter alia alleging that on 18.09.2011 at about 6.00 P.M., he along with Havildar, Subash Chandra Barada, Antaryami Padhy and Bhanja Kishore Behera were performing evening patrolling duty. At that time, they came across the seized truck and the PDS commodities, when they stopped the vehicle and found Kerosene Oil was being transported and on being asked, the driver of the vehicle could not produce any valid paper in respect of 1000 liters of Kerosene out of a total quantity of 3000 liters, the said Dinabandhu Behera, S.I. of Police Gangapur P.S. has categorically stated in the F.I.R. which is quoted herein below:-

> "…… hence, I seized the above noted 3000 liters of Kerosene along with Truck and 2 nos of retail invoice dated 14.09.2011 and 18.09.2011 in presence of above noted witnesses on 18.09.2011 at 7.00 P.M. for further verification. Then returned to P.S. along with seized kerosene Truck invoice with driver and called for Sub-dealer Sarat Kumar Swain to P.S. with other documents for further verification and produce before IIC and again as per direction of my IIC I proceeded to Surada for further verification of registers at the place of procurement."

22. Now, again coming back to the notification dated 29.03.2008, it is clear that by virtue of an amendment Police Officer not below the rank of Inspector has been included w.e.f. 13.05.2010. Thus, the truck as well as PDS commodities like Kerosene Oil involved in the present case having been admittedly seized by the Sub-Inspector of Police, who is definitely below the rank of Inspector, the seizure made in the present case is absolutely illegal and contrary to the OPDS Control Order, 2008. Therefore, this Court has no hesitation to come to a definite conclusion that the seizure made in this case is illegal and therefore, the proceeding under Section 6(A) of the E.C. Act, 1955 initiated pursuant to notice under Annexure-4 to the writ application is also void and non-est in the eyes of law. Above view of this Court also gets support from the judgment of the Hon'ble Supreme Court in ***Kailash Prasad Yadav*** (supra) wherein the Hon'ble Supreme Court has held that valid seizure is a sine qua non for passing an order of confiscation of property and also finding of the Hon'ble Supreme Court in ***Nanda Kishore Singh*** (supra) wherein seizure was made by a person not competent to seize the essential commodities and as such, said seizure being illegal, the proceeding under Section 6(A) of the E.C. Act is not sustainable in law.

23. In such views of the matter, this Court has no hesitation to hold that the seizure conducted in the present case by S.I. of Police is illegal and accordingly, the

proceeding initiated under Section 6(A) of the E.C. Act and by the licensing authority and the notice under Annexure-4 are illegal and void and accordingly, the notice under Annexure-4 as well as the entire proceeding bearing E.C. No.42 of 2011 under Section 6(A) of the E.C. Act, initiated by the Collector, Ganjam-Opposite Party No.2, are hereby quashed.

24. Accordingly, the writ petition stands allowed. However, there shall be no order as to cost.

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2023 (II) ILR – CUT - 1203

A.K. MOHAPATRA, J.

W.P.(C) NO. 21732 OF 2023

AIMS HIGHER SECONDARY SCHOOL OF SCIENCE, SAMBALPUR .....Petitioner

.V.

STATE OF ODISHA & ANR. .....Opp. Parties

(A) ODISHA EDUCATION ACT, 1969 – Section 6(6) 6 (A)(1) – The authority, High Power Committee reduce the sanctioned strength of the school from 320 to 256 without any show cause – Whether this action of the authority is punitive in nature? – Held, Yes – It is punitive in nature and therefore, the opposite parties were duty-bound to issue a show cause notice to the petitioner institution before implementing the decision of the HPC.

(B) NATURAL JUSTICE – Whether it is mandatory to provide an opportunity of hearing before taking an administrative decision against a party – Held, Yes – Every administrative decision which has civil consequences or is likely to be visited with punitive consequence to a party concerned is required to be passed after observing the Principle of Natural Justice. (Para 26-27)

Case Laws Relied on and Referred to :-

1. (2017) 15 SCC 719 : Krishna Mohan Medical College and Hospital & Anr. Vs. Union of India and Anr.
2. (1998) 8 SCC 1 : Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Ors.

For Petitioner : M/s. S.K. Dash, A.K. Otta, S. Das, P. Das & P. Harichandan

For Opp. Parties : Mr. Saswat Das, Addl. Govt. Adv.

JUDGMENT Date of Hearing : 25.07.2023:Date of Judgment/Order:31.07.2023/08.08.2023

A.K. MOHAPATRA, J.

The Petitioner-Educational Institution has approached this Court by filing the present writ petition assailing the withdrawal of recognition in respect of additional seats as indicated under Annexure-4 to the writ petition, i.e., from earlier sanctioned strength of 320 seats to 256 seats for the academic session 2023-24. Further, the Petitioner has prayed for a direction to the Opposite Parties to allow the Petitioner's institution to admit the students in the additional seats since increased from 256 seats to 320 seats in science stream.

2. The factual backdrop of the case leading to filing the present writ petition is that the Director of Higher Secondary Education, Odisha, Bhubaneswar (Opposite Party No.2) in exercise of power under Section-6(6) of the Odisha Education Act, 1969 vide Office Order No.4281/HPC-V-13/22 dated 19.04.2022 accorded permanent recognition to the Petitioner's school situated in Dhankuda Block of the District of Sambalpur. Further, it has been pleaded that the Petitioner's school is a renowned school of the locality and caters to the need of the local students including the residential school on self-financing mode.

3. The fact pleaded in the writ petition further reveals that the Petitioner's school was granted temporary recognition along with 14 other institutions in the district of Sambalpur as per the decision of the HPC in its meeting held on 02.07.2022 whereby the existing sanctioned strength of the Petitioner's school was increased from 256 to 320. The order according temporary recognition to the Petitioner's school along with other institution dated 15.11.2022 has been filed as Annexure-2 to the writ petition. On perusal of the said letter, it appears that the name of the Petitioner's school appears at Serial No.11 and the sanctioned strength in respect of science stream has been indicated to be 320 seats.

4. The temporary recognition granted to the Petitioner's school under Annexure-2 is subject to the conditions mentioned at the bottom of the said letter. The conditions so imposed reveal that the temporary recognition accorded to the Petitioner's school is subject to fulfillment of the conditions prescribed under Section-6(A)(1) of the O.E. Act, 1969 and the rules framed thereunder. Such temporary recognition is also subject to other terms and conditions as indicated under Clause-2 of the said letter. The proviso to Clause-2 of the letter under Annexure-2 further reveals that in the event of failure in complying with the conditions mentioned, the authorities shall impose additional restriction upon the institution in question from the next academic session, i.e., 2023-24 and that such institution will be solely responsible for the closure of the Higher Secondary Schools. Moreover, the institutions are to fulfill the conditions of recognition in all aspects as per O.E. Act & Rules within 7 year of its permission/temporary recognition, failing which, no further application for renewal of temporary recognition shall be entertained and action as deem fit shall be instituted against the institution for restriction on admission and thereby closure of the institution.

5. While this was the position, the Petitioner-Institution was included in the Student Academic Management System (SAMS) and the number of seats indicated in

the SAMS website in respect science stream of the Petitioner's school was initially 320 seats. The pleadings in the writ petition further reveals that when the online common application forms were invited on 30.06.2023, the number of seats indicated in the website of the SAMS in respect of the Petitioner's school was 320. However, all of a sudden, on 05.07.2023, i.e., just before publication of the first merit list, the seats were reduced from 320 to 256.

6. The Petitioner-Institution enquired about such abrupt and unnoticed reduction in the number of sanctioned seats in respect of the science stream of the Petitioner-Institution from the authorities. The Petitioner-Institution was intimated that since the institution could not fill up the additional seats sanctioned in respect of the previous years, as a punitive measure, the seats for the current academic year in respect of the Petitioner's school has been reduced from 320 to 256 seats. It has also been stated that in the last academic session 259 students were admitted by the Petitioner's institution through the SAMS portal.

7. The writ petition further reveals that for the current academic session, 311 students have already been opted for the Petitioner's school for taking admission in the science stream of the Petitioner's institution. Such abrupt reduction in the sanctioned strength of seats and corresponding amendment in the number of seats reflected in the SAMS portal has adversely affected the prospects of the institution as well as it has caused hardship to many local students who were interested to take admission in the Petitioner's school.

8. A counter affidavit has been filed on behalf of the Opposite Party No.2, i.e., Director of Higher Secondary Education, Odisha, Bhubaneswar. In its counter affidavit, it is also stated that in its order dated 18.07.2023, this Court had categorically directed the Opposite Party No.2 to file an affidavit clarifying the position as to whether the order passed by the High Power Committee has been communicated to the respective institutions and further whether before taking a decision to reduce the sanctioned students strength of the institutions, any opportunity to show cause was given to the respective institutions to put-forth their case?

9. In reply to the specific query of this Court, the Opposite Party No.2 in its counter affidavit has stated that it is a fact that permanent recognition was granted in favour of the Petitioner-Institution with 256 seats for each subject in +2 science stream for the Academic Session 2020-21 vide order dated 19.2.2022 basing on the decision of the HPC in its meeting held on 05.08.2021. During Covid pandemic period, pursuant to the decision of the HPC, the student strength was increased from 256 to 320 seats owing to the fact that a large number of students had passed the Annual H.S.C. Examination during the year 2021. Consequent upon aforesaid development, the HPC took a conscious decision to grant temporary recognition to some institutions thereby enhancing the number of seats as has been reflected under Annexure-2 to the writ petition. The counter affidavit further reveals that the Petitioner-Institution had admitted only 220 students during the Academic Session 2021-22 against sanctioned strength of 320 in the +2 science stream of the institution. The aforesaid arrangement of enhancement of the sanctioned strength by virtue of a temporary recognition also

continued for the Academic Session 2022-23 pursuant to the decision of the HPC dated 02.07.2022. Further, as against a claim of 259 students were admitted to the +2 Science Stream of the Petitioner-Institution, the counter affidavit reveals that 251 students were admitted for the Academic Year 2022-23. Since the number of student admitted for the Academic Year 2022-23 is below the sanctioned strength of 256 granted by way of permanent recognition, the additional enhanced 64 seats pursuant to the decision of the HPC was withdrawn in view of the subsequent decision of the HPC.

10. The counter affidavit further reveals that the HPC in its meeting held on 26.05.2023 took a decision to withdraw the increased seats in respect of 253 institutions including the Petitioner's institution from the Academic Year 2023-24. Such a decision was taken as the Petitioner's institution and other institutions have failed to enroll a single student against increased number of seats during the Academic Year 2021-22 and 2022-23. Such decision of the HPC dated 26.5.2023 was communicated to the Orissa Computer Application Centre (OCAC) by the Officer-in-Charge, Project Management Unit, SAMS under Directorate of Higher Secondary Education with a request to upload the reduced number of seats in the SAMS portal on 30.06.2023. Accordingly, the reduced numbers of seats were uploaded and reflected in the SAMS portal by the OCAC.

11. The Opposite Party No.2 in its counter affidavit has also stated that as on 22.07.2023 upto 5.00 P.M. in the evening only 255 numbers of students have taken admission in the Petitioner's institution after second round of counseling as against the sanctioned strength seat of 256 seats. Therefore, a contention has been raised that since the Petitioner's institution was unable to fill up the earlier sanctioned 256 seats, the enhanced number of seats have been withdrawn pursuant to the decision of the HPC. The Opposite Party No.2 has further stated that in view of the uploading of the data in SAMS portal on 30.06.2023, the Petitioner's institution as well as other similarly placed institution had knowledge about the decrease in number of seats prior to the commencement of e-admission process. It has also been stated that opportunity was available with all the institutions including the Petitioner's institution to raise their grievance before the competent authority resorting to the appeal remedies available under the Odisha Education Act and the rules framed thereunder.

12. Heard Mr. Susanta Kumar Dash, learned counsel appearing for the Petitioner and Mr. Saswat Das, learned Additional Government Advocate for the State-Opposite Parties. Perused the pleadings of the parties as well as the materials available on record.

13. Mr. S.K. Dash, learned counsel appearing on behalf of the Petitioner-Institution submitted before this Court that the impugned decision to reduce the number of seats from 320 to 256 in the midst of the Academic Session is an illegal, arbitrary and highhanded exercise of administrative power conferred on the Opposite Parties by virtue of the provisions contained in the Odisha Education Act, 1969 and the rules framed thereunder. To further substantiate his argument, Mr. Dash, learned counsel appearing for the Petitioner contended before this Court that the HPC initially enhanced the sanctioned seat strength from 256 to 320. However, the same was reduced to 256 by the HPC in its meeting held on 26.5.2023. It was argued on behalf of the Petitioner that the

reduction of seats in science stream of Petitioner's institution is in the nature of a punitive measure owing to failure of the Petitioner's school to admit students against the enhanced seats strength. Therefore, the authorities before implementing the decision of the HPC should have afforded an opportunity of hearing to the Petitioner before taking such a punitive measure.

14. He further contended that no opportunity, whatsoever, was ever given to the Petitioner's institution to put-forth its stand before the authorities. In the said context, learned counsel for the Petitioner submitted that every administrative action visited with a punitive action on a party has to be taken in due compliance of the principles of natural justice. So far the case of the Petitioner is concerned, no opportunity whatsoever was granted to the Petitioner-Institution while reducing the sanctioned students strength of the institution. Mr. Dash in course of his argument went to the extent of submitting that even the decision of the High Power Committee and the consequential order of the authorities to reduce the additional seats was never ever communicated to the Petitioner before implementing the said decision and thereby correcting the number of seats indicated in the SAMS web portal.

15. Learned counsel for the Petitioner also contended that the figures indicated in the counter affidavit by the Opposite Party No.2 are not correct. He further contended that during the last Academic Session, i.e., 2022-23, the Petitioner-Institution had admitted 259 students as against the claim of 251 by the Opposite Party No.2 in its counter affidavit. To substantiate his contention that the Petitioner's institution has taken admission of 256 students for the Academic Session 2020-21 and similarly 260 students for the Academic Session 2022-23, an additional affidavit was filed before this Court on 25.7.2023 after serving a copy thereof on the learned Additional Government Advocate.

16. On perusal of the additional affidavit filed on behalf of the Petitioner on 25.07.2023, this Court observed the same reveals that for grant of recognition to any institution, be it permanent or temporary, or refusing it, has to be for reasons to be recorded in writing by the State Government. Further, the prescribed authority is under an obligation to communicate the order passed by the Committee in such manner and with such particulars as may be prescribed. Such additional affidavit further reveals that for the first time the Petitioner-Institution came to know about the reduction in the additional seats on 05.07.2023 from the SAMS portal.

17. It has also been categorically stated that the decision of the HPC was neither communicated to the Petitioner nor any opportunity to show cause was given to the Petitioner's institution before taking a decision to reduce the number of additional seats. It has also been categorically stated in the additional affidavit that 260 students were admitted in the Academic Session 2022-2023 which would be evident from Annexure-6. So far the Academic Session 2023-24 is concerned, it was strenuously argued that 256 students have applied through SAMS portal, out of which, 255 have already participated in the first selection and one candidate did not take admission due to personal reason.

18. In course of his argument, learned counsel for the Petitioner submitted that 64 students are in the pipeline as per their first choice for the Petitioner's institution. As such, these 64 students are entitled to be admitted to the Petitioner's institution through

their slide-up request and the stage of slide-up in the admission process has not yet come. Besides the above, total 71 and 116 students respectively have already exercised their second and third choice for being admitted to the Petitioner's institution. Therefore, it has been stated that there is every likelihood that all 320 seats are likely to be filled up for the Academic Year 2023-24 considering the academic excellence of the Petitioner's institution.

19. Learned Additional Government Advocate, on the other hand, contended that pursuant to the decision of the High Power Committee dated 26.05.2023, a decision was taken by the Department on 3.6.2023. Accordingly, since the Petitioner's institution is unable to meet the standards fixed by the High Power Committee, the Department has taken a decision to reduce the additional strength sanctioned in favour of the Petitioner's institution by granting temporary recognition to the Petitioner's institution.

20. Learned Additional Government Advocate appearing for the State-Opposite Parties also contended that once the information was uploaded in the SAMS portal there is no need to communicate the decision to the institutions individually. He further contended that in the event the Petitioner-Institution feels aggrieved, then they should have approached the Departmental Authorities by ventilating their grievance. Above all, learned Additional Government Advocate appearing for the State-Opposite Parties also contended that the decision taken by the Department is an appealable one. Therefore, the present writ petition is not maintainable in view of the fact that an alternative and efficacious remedy in the shape of appeal to the Departmental Authority was available to the Petitioner.

21. Having heard the learned counsels appearing for the respective parties and on a careful examination of the pleadings as well as the materials on record, this Court observed that the decision of the High Power Committee taken in its meeting on 26.05.2023 was implemented by the Department by reducing the additional sanctioned strength of 64 seats. The question now, therefore, is that whether the decision taken by the authorities to reduce the sanctioned strength from 320 to 256 is punitive in nature? And in the event the facts of the present case demands that such a decision was required to be taken keeping in view the policy decision of the High Power Committee meeting held on 26.05.2023, whether the Opposite Parties were duty bound to provide an opportunity of hearing before implementing the decision by reducing the sanctioned additional strength of the students?

22. In reply to the first question, this Court has no hesitation to hold that the unilateral decision to reduce the sanctioned strength of the seats in respect of +2 Science Stream of the Petitioner-Institution from 320 to 256 is punitive in nature. Moreover, the proceedings annexed to the counter affidavit as Annexure-D/2 reveals that **for the Academic Year 2023-24, it was proposed to allow the increased seats in favour of those Higher Secondary Schools who were able to enroll students against these increased seats. The increased seats shall be withdrawn from 253 HSSs who failed to enroll a single student against the increased seats (13,821) from the AY: 2023-24**.

23. In view of the aforesaid decision of the Committee, it is understood by this Court that the schools which have failed to admit even a single student against the increased seats (so far the Petitioner's institution is concerned, one seat out of 64 seats additionally sanctioned), the entire additional sanctioned seats are liable to be withdrawn. The intention behind the decision taken by the HPC and the consequential conduct of the Department is punitive in nature as those institutions which have failed to admit any students against the enhanced strength, their sanctioned strength is liable to be reduced by withdrawing the additional strength sanctioned in their favour.

24. The proceeding of the meeting which culminated in a final decision to allow the increased seats in respect of those schools who had admitted students against the increased seats and to withdraw the sanctioned in respect of those schools who have failed to admit the students in respect of the increased seats prescribes a procedure to be followed or a decision to be arrived at before giving effect to the decision of the HPC. In the instance case, the Opposite Parties were supposed to examine the number of students admitted by the Petitioner's school in the previous academic year against the additional sanctioned strength. Without determining the same first by giving opportunity to the Petitioner, the Opposite Parties have directly implemented the decision by withdrawing the additional sanctioned strength of the Petitioner's institution. On a careful analysis of the pleadings of both the sides, it appears that there exits a dispute/ambiguity in the number of students admitted by the Petitioner for the Academic Year 2022-23. Therefore, the Opposite Parties were duty bound to issue a show cause notice to the Petitioner-Institution before implementing the decision of the HPC.

25. With regard to the second question that whether the Opposite Parties were duty bound to provide an opportunity of hearing to the Petitioner's institution before withdrawing the additional sanctioned strength, this Court would like to observe that every administrative decision which has a civil consequence or is likely to be visited with a punitive consequence to a party concerned is required to be passed after observing the principles of nature justice. Law in this regard is fairly well settled by a catena of judgments of the Hon'ble Supreme Court as well as this Court. This Court, however, at this juncture would like to refer to a judgment of the Hon'ble Supreme Court in ***Krishna Mohan Medical College and Hospital and Anr. v. Union of India and Anr., reported in (2017) 15 SCC 719***.

26. In the aforesaid judgment, the Hon'ble Supreme Court has categorically observed that the rule of 'fair hearing' which is no longer *res integra* is an integral part of the principles of natural justice and the same is embraced in every facet of fair procedure. The rule of fair procedure requires that the affected parties should be afforded an opportunity to meet the case against him effectively. Further, it has also been observed that the right to fair hearing takes within its sweep the right to show cause supplemented by reasons and rationale. The Hon'ble Supreme Court further gone on to observe that a reasonable opportunity of hearing or right to 'fair hearing' casts a steadfast and sacrosanct obligation on the adjudicator to ensure fairness in procedure and action, so much so that any remiss or dereliction in connection therewith would be at the pain of invalidation of the decision eventually taken. Thus, every executive authority

empowered to take an administrative action having the potential of visiting any person with civil consequences must take care to ensure that justice is not only done but also manifestly appears to have been done.

27. With regard to the contention raised by the learned Additional Government Advocate that the Petitioner did not raise any grievance or objection before the Departmental Authority, this Court is of the considered view that when decision has not been officially communicated at least there is nothing on record to show that the impugned decision has ever been communicated to the Petitioner, therefore, the question of objecting to the same does not arise at all. Admittedly, the Petitioner came to know about the reduction in number of seats through the SAMS web portal in the midst of the admission procedure. Therefore, the Opposite Parties cannot put the blame on the Petitioner for not approaching them before coming to this Court. With regard to the next contention of the learned Additional Government Advocate that the impugned order is an appealable order, therefore, the present writ petition is not maintainable, this Court would like to observe that availability of alternative remedy is not an absolute bar. The same is practised by the Courts as a measure of caution while exercise the jurisdiction under Article 226 of the Constitution of India. In the instant case, the availability of alternative remedy would not stand as an absolute bar inasmuch as the Opposite Parties have failed to comply with the principle of natural justice. Such view of this Court also get support from the judgment of Hon'ble Supreme Court in ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors.*** reported in ***(1998) 8 SCC 1***. The aforesaid view of this Court answers the second question formulated by this Court for adjudication of the issues involved in the preset writ petition.

28. In view of the aforesaid analysis of fact as well as the legal position, this Court is of the considered view that the conduct of the Opposite Parties in reducing the additional sanctioned 64 seats granted by way of temporary recognition is absolutely illegal and arbitrary and the same is violative of the principles of natural justice.

29. Accordingly, Annexure-4, so far as it relates to Science Stream of the Petitioner-Institution for the Academic Session 2023-24, is hereby quashed. The Opposite Parties are further directed to allow the Petitioner-Institution to admit students in the additional 64 seats by accepting the number of seats of the Petitioner's institution in the Science Stream to be 320 and, accordingly, necessary corrections be carried out in the SAMS portal.

30. With the aforesaid observation and direction, the writ petition is allowed. However, there shall be no order as to cost.

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2023 (II) ILR – CUT - 1211

V. NARASINGH, J.

W.P.(C) NO. 9518 of 2014

SARAT CH. KHADOGROY …….Petitioner

.V.

CHAIRMAN-CUM-MD, OSRTC & ORS. …….Opp. Parties

ORISSA STATE ROAD TRANSPORT CORPORATION EMPLOYEE CLASSIFICATION RECRUITMENT AND CONDITION OF SERVICE REGULATION,1978 – Regulation 118 and 167 – The petitioner was prematurely retired by the authority – The same order was upheld by the appellate authority as well as the Reviewing Authority – Though the review was filed before the chairman-cum-managing director but the same was disposed by the General Manager who was the appellate authority – Whether the order of review sustain in the eyes of law? – Held, No. – One should not be a judge of one's own cause – As such the principle of natural justice is patently violated and the exercise of the power by the reviewing authority thus militates against fairness of procedure, matter is relegated to the stage of review. (Para 8-A-11)

Case Laws Relied on and Referred to :-

1. AIR 1984 SC 1572 : M/s. J. Mohapatra and Co. Vs. State of Odisha
2. AIR 1970 SC 150 : A.K. Kraipak Vs. Union of India.

For Petitioner : Mr. J.K. Mohapatra

For Opp Parties : Mr. A. Tripathy

JUDGMENT Date of Hearing & Judgment : 05.07.2023

V. NARASINGH, J.

1. Heard Mr. Mohapatra, learned counsel for the petitioner and Mr. Tripathy, learned counsel for the Opposite Parties-OSRTC.

2. The petitioner while working as a driver in the Opposite Party-OSRTC was prematurely retired by order dated 30.01.1999 at Annexure-2. The said order was up held by the appellate as well as the Reviewing Authority vide Annexure-8 and 10 respectively. Assailing the same, the petitioner has preferred the present Writ Petition.

3. It is the submission of the learned counsel for the petitioner that the order of premature retirement at Annexure-2 and the subsequent order passed by the appellate as well as reviewing authority are liable to be set aside since the same is in patent violation of Regulation-118of OSRTC Employees (Classification, recruitment and condition of service) Regulation-1978, herein after referred to as Regulation-1978.

3.A. The Writ Petition has been filed seeking the following relief(s);

> "……the writ petition be allowed and the order of premature retirement dated 30.01.1999 under Annexure-2, order of rejection dated 12.12.2013 passed in appeal petition under Annexure-8 and order dt 09.04.2014 passed in review application under Annexure-10 may be declared as void and illegal and necessary direction be passed directing the Opp. Parties to give the service as well as retiral benefit to the petitioner within a stipulated period taking the age of retirement as 60 years"

4. At the outset, Mr. Mohapatra, learned counsel for the petitioner submitted that the office order at Annexure-2 is patently illegal inasmuch as the office order to retire the petitioner prematurely was passed on 30.01.1999 and the petitioner was made to retire the very next day on 31.01.1999 and that the same is in gross violation of the very Regulation-118 which has been referred to therein. For convenience of ready reference the said Regulation, is extracted herein;

> ***"118.*** *Superannuation and Retirement- (1) The age of compulsory retirement of an employee other than workmen and those holding Class IV posts is the date on which he attains the age of 58 years. But the Corporation may, at its discretion, authorise by a general or special order and subject to such conditions as it may specify the retention of such employees up to age of 60 years.*
>
> *(2) For Workmen and Class IV employees the date of compulsory retirement is 60 years.*
>
> *Provided that any employee other than "Workman and Class IV employee" may retire from service at any time after completion of 30 years qualifying service, or on attaining the age of 50 years on giving a notice in writing to the competent authority at least 3 months before the date on which he wishes to retire. The appropriate authority of Corporation may also require any office to retire in the public interest at any time after he completed 30 years qualifying service or attained the age of 50 years on giving a notice on writing to the employee at least 3 months before the date on which he required to retire :*
>
> *Provided further that an employee who is highly skilled, skilled, semi-skilled or un-skilled artisan, shall be ordinarily retired in service upto the age of 60 years. Such employees may however be required to retire in public interest at any time after attaining the age of 55 years after having given a month's notice or on a month's pay in lieu thereof. Such an employee may also retire at any time after attaining the age of 55 years by giving one months notice."*

5. Per contra, Mr. Tripathy, learned counsel for the OSRTC submits that there is no illegality in the order, so passed.

6. It is seen that the petitioner preferred an appeal assailing the said office order at Annexure-2 and the appeal was disposed of by order dated 12.12.2013 at Annexure-8 affirming the order of compulsory retirement. Against such order, the petitioner preferred a review in terms of the Regulations.

7. The Regulations authorizing entertaining a review had been dealt with in Regulation-167 of Corporation. The same is extracted herein below for convenience of ready reference;

> ***"167.*** *Corporations Power of Review-Not withstanding anything contained in these Regulations, the Corporation may, on its own motion or otherwise after calling for the records of the case, revise any order which is made is appealable under these Regulations and –*
>
> *(a) impose any penalty or confirm, modify or set aside the order; or*
>
> *(b) remit the case to the authority which made the order or to any other authority, directing such further action or inquiry as it considers proper in the circumstances of the case, or*
>
> *(c) pass such other orders as it deems fit:*
>
> *Provided that-*
>
> *(i) an order imposing or enhancing a penalty shall not be passed unless the employee concerned has been; given an opportunity or making any representation which he may wish to make against such penalty; and*
>
> *(ii) If the corporation proposes to make any of the penalties specified in items (ix) and (x) of Regulation 138 in a case where an inquiry in accordance with the provisions of Regulations 141 (1 to 12) has not been held, it shall, subject to the provisions of regulations 146, direct that such inquiry be held and, thereafter on consideration of the proceedings of such inquiry, pass such orders as it may deem fit."*

8. It is inter alia urged by Mr. Mohapatra, learned counsel for the petitioner that though the review was filed before the Chairman-cum-Managing Director OSRTC but surprisingly, the Review was disposed of by the same authority i.e., General Manager(A) OSRTC, who admittedly passed the Appellate order. Hence, it is submitted that on this count alone the order of compulsory retirement is ought to be set aside.

8.A. One of the facets of principle of natural justice is that "One should not be a judge of one's own cause". "Nemo Judex In causa Sua". In the instant case admittedly the appellate authority and the reviewing authority are one and the same. As such the principle of natural justice is patently violated and the exercise of the power by the reviewing authority thus militates against fairness of procedure.

9. The concept of "Nemo Judex In causa Sua" was dealt extensively by the Apex Court in its judgment reported in ***AIR 1984 SC 1572 M/s. J. Mohapatra and Co. vs. State of Odisha*** and in the said decision referring to the earlier judgment of the Apex Court in the case of ***A.K. Kraipak vs. Union of India (AIR 1970 SC 150)*** it was held that this doctrine not only applies to judicial proceeding but in equal measure is applicable to quasi judicial and administrative proceeding.

10. The principle as discussed in the judgment of the Apex Court in case of ***M/s. J. Mohapatra (Supra)*** is extracted hereunder for convenience of ready reference;

> "9……Nemo Judex in causa sua, that is, no man shall be a judge in his own cause, is a principle firmly established in law. Justice should not only be done but should manifestly be seen to be done. It is on this principle that the proceedings in Courts of law are open to the public except in those cases where for special reason the law requires

> or authorizes a hearing in camera. Justice can never be seen to be done if a man acts as a judge in his own cause or is himself interested in its outcome. This Principle applies not only qausi judicial and administrative proceedings……..."
>
> "10. …….The Court held that the rule that no man should be a judge in his own cause was a principle of natural justice and applied equally to the exercise of qausi-judicial as well as administrative powers."
>
> (Ref: *A.K. Kraipak (Supra))*

11. Assessed on the touch stone of the decisions of the Apex Court in the case of ***M/s. J. Mohapatra*** and ***A.K. Kraipak (Supra)*** and for the reasons stated above, the order passed by the reviewing authority at Annexure-10, confirming the order in appeal, is set aside and the matter is relegated to the stage of review.

12. On instruction, Mr. Tripathy submits that the Corporation is now manned by an officer designated as Chairman-cum-Managing Director who is higher in the hierarchy than the General Manager(A).

13. Taking note of the same, since ex-facie the consideration of the review was by the self same appellate authority who rejected the appeal, this Court is persuaded to direct the Chairman-cum-Managing Director, OSRTC to reconsider the review of the petitioner within a period of six weeks from the date of receipt/production of the copy of this order independently, without being influenced by the earlier order passed by the General Manager(A) acting as a reviewing authority.

14. It is needless to state that this Court has not expressed any opinion regarding the merits of the matter.

15. With the above observations, this Writ Petition stands disposed of. No costs.

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2023 (II) ILR – CUT - 1214

V. NARASINGH, J.

W.P.(C) NO.16781 OF 2015

TUSAR KANTI TRIPATHY & ANR. ……Petitioners

.V.

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

(A) CONSTITUTION OF INDIA, 1950 – Article 226 – Maintainability of Writ – Petitioners challenges the selection of Opp. parties No. 4 to 12 for the post of Assistant Town Planner/Junior Town Planner of BDA – Whether the writ petition is maintainable in absence of any specific prayer for their own claim? – Held, No. – The present lis is not

dealing with a public interest litigation rather it is a service dispute where the selection and appointment of Opp. 4 to 12 is only under challenge – In absence of any pleading and/or prayer with respect of the petitioners themselves in the present writ petition, they cannot be treated as aggrieved party in service dispute for which this court is firm view that, the case at hand does not warrant any consideration.

(Para 37)

(B) SERVICE LAW – Selection/Appointment – Fraud – Petitioners candidature have been rejected and petitioners have deliberately suppressed such material fact – The Petitioner have not challenged their rejection order rather challenges that selection of private Opp. Party No. 4 to 12 – Effect of – Held, on account of suppression of material facts which amounts to committing fraud on court and making deliberately wrong submission in the writ petition thereby approaching this court with unclear hands, this lis invoking plenary jurisdiction of Writ Court under Article 226 of the constitution of India is not entertainable. (Para 36-42)

Case Laws Relied on and Referred to :-

1. 2008 (12) SCC 481 : Apex Court in KD Sharma Vs. SAIL
2. (2016) 1 SCC 454 : Madras Institute of Development Studies & Anr. Vs. K .Sivasubramaniam & Ors.
3. AIR 2016 SC 5069 : Ashok Kumar Vs State of Bihar.
4. AIR 2003 SC 1344 : Federation of Railway Officers Association Vs. Union of India.
5. AIR 2020 SC 2060: (Ranjit Singh Kardam Vs. Sanjeev Kumar
6. (1997) 9 SCC 527 : Raj Kumar & Ors. Vs. Shakti Raj & Ors.
7. (2011) 3 SCC 436 : Orissa & anr Vs. Mamata Mohanty
8. (2008) 12 SCC 481 : K.D. Sharma Vs. Steel Authority Of India Ltd. & Ors.
9. 2013 (10) SCC 253 : Vijay S. Sathye Vs. Indian Air Lines Ltd.
10. AIR 1988 SC 2181: Bharat Singh Vs. State of Haryana
11. (1997) 9 SCC 527 : Raj Kumar & Ors. Vs. Shakti Raj & Ors.
12. 2010 (12) SCC 576 : Manish Kumar Sahi Vs. State of Bihar & Ors.
13. (2008) 4 SCC 171 : Dhanjaya Malik & Ors. Vs. State of Uttaranchal & Ors.
14. (2008) 12 SCC 481 : A.D. Sharma Vs. Steel Authority Of India Ltd. & Ors.
15. (2001) 2 SCC 721: Executive Engineer,Dhenkanal Minor Irrigation Division Vs. N.C. Budharaj.

For Petitioner : Mr. B. S. Tripathy

For Opp. Parties : Mr. T.K. Praharaj, SC
Mr. S. Das,
Mr. B.B. Mohanty,
Ms. P. Rath.

JUDGMENT Date of Final Hearing :18.07.2023 : Date of Judgment: 31.07.2023

V. NARASINGH, J.

1. The present Writ Petition has been filed assailing the selection/appointment of Opposite Party Nos.4 to 12 as Assistant Town Planner (ATP)/Junior Town

Planner (JTP) in Bhubaneswar Development Authority (BDA), Opposite Party No.2.For convenience of ready reference the prayer is extracted hereunder;

> "The petitioners, therefore, most respectfully pray that your Lordship may graciously be pleased to admit this writ application and issue rule nisi to the OPs to show cause as to why the selection/appointment of OP Nos.4 to 12 as Asst. Town Planner/Jr. Town Planner shall not be quashed;
>
> And on their failing to show cause or showing insufficient cause issue a writ of certiorari quashing the impuend orders of appointment of OPs Nos.4 to 12 as Asst. Town Planner/Jr. Town Planner under annexures-4 and 5 respectively.
>
> And pass such further order/orders as may be deemed fit and proper in the facts and circumstances of the case;
>
> And allow this writ petition with cost;
>
> And for this act of kindness the petitioners shall, as in duty bound, ever pray"

2. The petitioners applied for the post of Assistant Town Planner/ Junior Town Planner under Planning Authority and Urban Local Bodies in the state of Odisha. It is claimed by the petitioners that an advertisement bearing number 17254 dated 21.05.2013 was issued by government in Housing and Urban Development Department (OP No 1) and the authorities had moved the Odisha Public Service Commission (OPSC) for publication of such advertisement. OPSC raised certain objection regarding education qualification prescribed in the said advertisement as per letter number 3871 dated 27.06.2013 and requested the Government to amend the relevant recruitment rules. Referring to such suggestion Opposite Party No.1 issued a notification Dtd 6.9.2014 at Annexure-1 cancelling the said advertisement and indicated that steps are being taken to issue "a fresh advertisement"xxx"after formulation of new service rules". For better appreciation the said Annexure-1 is culled out hereunder:

Government of Odisha
Housing and Urban Development Department
*****

NOTIFICATION
Bhubaneswar, dated 6.9.14

> No. HUD-TP-MISC-0014-2014 17784 /HUD. The Advertisement bearing No.17254/2013-14, Dt. 21.5.2013 published for recruitment to the post of Assistant Town Planners/ Junior Town Planners/Deputy Municipal Planners/ Assistant Municipal Planners in different Planning Authorities/ Urban Local Bodies of the State is hereby cancelled on the following grounds.
>
> 1. The Odisha Public Service Commission has advised that, the candidate without having Bachelor's Degree cannot be eligible for the post which require Bachelor's Degree as minimum essential qualification as stipulated in the advertisement since Degree qualification in Planning cannot be construed as Post Graduate Degree in Planning.

> **2.** Accordingly, the Housing and Urban Development Department have taken steps to formulate the new service rule with regard to requisite qualification and experience for recruitment to the post of Assistant Town Planner/ Junior Town Planners in the State which is under consideration of the Government. **A fresh advertisement will be issued for above posts after formulation of new Service Rules.**
>
> By order of the Governor
> P.D.-cum-Joint Secretary to Government"

3. It is the grievance of the petitioners that without waiting for amendment of the recruitment rules the secretary BDA issued another advertisement on 14/1/2015 at Annexure-2 for appointment of Assistant Town Planner and Junior Town Planner under BDA and the consequential selection of Opp. Parties 4 to12 is under challenge. It is further claimed by the petitioners that they fulfilled the requisite criteria as prescribed in the advertisement and accordingly they applied for the said post. They participated in the recruitment process. However because for formation of a defective selection committee by office order dated 03.02.2015 under the chairmanship of Vice Chairman BDA consisting of 9 members the selection committee with ulterior motive selected Opp. Parties 4 to 12 whereas ignored the legitimate claim of the petitioners.

4. It is the further stand of the petitioners that the selection committee was not duly constituted as per the Rules in vogue. It was also urged that the selection committee is not the final authority after the process of selection since such select list has not been approved by the 'authority'. It is their further submission that the self-same advertisement was also challenged by one Balhab Chandra Sahu before this High Court in WP(C) No. 2025 of 2015 wherein by way of filling a counter affidavit by the Senior Administrative Officer of BDA admitted that under the Odisha Development Authorities Rule, 1983 particularly Rule 5 and 6 thereof no prior approval of the Authority was taken and accordingly in absence of any approval of the Development Authority in the present case the appointment/ selection of Opposite Parties No. 4 to 12 is liable to be quashed.

5. Per contra, the Opposite Party Nos. 2 and 3, Bhubaneswar Development Authority (BDA), filed counter affidavit disputing the stand of the petitioners and contended that the provisions of the ODA Act as well as rules framed there under are not at all violated as claimed by the petitioners. The BDA being a statutory body duly exercised its power by issuing the advertisement at Annexure-2 and also conducted the selection process in terms of the relevant provisions of the statutory Rules. It is further submitted by the BDA that the objection raised by OPSC with respect to the educational qualification and the consequential decision of the government to cancel the previous advertisement with the further stipulation to take up the selection process after amendment of the rule has no bearing vis-a-vis the impugned advertisement at Annexure-2.

6. The BDA being a statutory and independent body the advise or objection raised by the OPSC is not applicable. The recruitment of **ATP** and **JTP** are meant for the posts in BDA and for that purpose the advertisement was published and such post are executive post(s) under BDA and therefore, the consultation with the OPSC is not required for filling up of such post. Not only that, it is further submitted that the decision of the H and UD Department under letter dated 06.09.2014 is not binding on BDA, as such notification has its application relating to the posts under the government.

7. To justify the selection process, it is further stated on behalf of BDA that it was approved in the 127th meeting of BDA to fill up the additional post like ATP and JTP to meet the urgency/exigency in public work. Such posts are created after due approval of the government under the ODA Act and rules. BDA is the competent authority to fill up the post by following due process of selection. The authority has inherent power to fill up the post under its organization in view of exigency of public service or in the interest of organization, in absence of any recruitment.

8. General plenary power of the employer is always available for filling of its own post by issuing open advertisement and adopting a selection process in a transparent manner. As such there is no infirmity in publishing the advertisement at Annexure-2. It is vehemently contended by the BDA that the petitioners were not having the requisite qualification prescribed in the advertisement that is a degree in Town Planning. So far as petitioner number 1 and 2 are concerned although they possess a degree in architecture both the petitioners were not included in the shortlist drawn for the candidates for appearing in the interview for the reason that they did not possess the requisite educational qualification to apply such post in terms of the qualification prescribed in the advertisement.

The relevant Paragraph 7 of the Counter filed by BDA is extracted as under for convenience of reference;

> **"7**. That in reply to the averment made in Para-5 of the writ application it is humbly submitted that the petitioners were lacking the requisite qualification prescribed in the advertisement. The petitioner no.1 & 2 do not possess a Degree in Town Planning although they possess a Degree in Architecture, Petitioner no.1 had applied for the post of ATP and petitioner no.2 had applied for the post of JTP. Both of the petitioners were not included in the Shortlist drawn up for the candidates for appearing in the interview."

9. With respect to the constitution of the selection committee it was stated by BDA that there is no illegality in such constitution of selection committee under the chairmanship of the Vice Chairman of BDA comprising of 8 other members out of which 6 were outsiders i.e. the Dean XIMB Bhubaneswar, Chief Architect Bhubaneswar, Additional Secretary H&UD department, HOD, Architecture IIT Kharagpur, Director of Town Planning Odisha and representative of ST&SC Department, Odisha. The committee also followed a transparent method of selection

i.e. basing on evaluation of comparative merit by assigning 80% for career marking and 20% marks for interview. The ratio of 80% in career marking and 20% in the interview mark was fixed to select the most meritorious candidate having a bright academic career. After following such transparent procedure of selection the Ops 4 to 12 were selected for the post of ATP and JTP. Such selected Opposite parties had not only possessed the required qualification prescribed in the advertisement but also possessed degree and experience in Town Planning. Therefore their selection is just and proper.

10. With respect to the allegation of not conducting any written test examination it is contended by BDA that the post of ATP and JTP being technical in nature there was no necessity to conduct a written test. Selection was made basing upon the 80% of career mark and 20% interview mark, as already noted, which clearly shows that meritorious candidates have been selected possessing bright academic career.

11. It is further stated by the BDA that the procedure adopted by the OPSC for selecting the candidates cannot be equated with the present selection process and as such there is no illegality or irregularity as claimed by the petitioners. It is also urged that the post of ATP and JTP have been created with the concurrence of the H&UD department, Odisha, after receiving prior approval of the "Authority".

Accordingly the advertisement was published and selection process was completed and the merit list was drawn up. The select list was not given effect due to pendency of the W.P(C) 2025 of 2015 and operation of interim order. The select list has been given effect to soon after disposal of the said writ petition as per order dated 31st August 2015. All the selected candidates joined in the post much prior to the receipt of interim order dated 21. 9. 2015 passed in Misc Case No 15983 of 2015 in this writ petition, after taking into consideration the disposal of the WP(C) No. 2025/2015 which was disposed of on 31.8.2015"as withdrawn".

12. The private opposite parties no.4 to 12 are the beneficiaries of such selection process for the post of ATP/JTP and being appointed they are continuing as such. Opp Parties 4, 6-7 &10-12 represented by Ms. Pami Rath, learned counsel disputed at the outset the stand of the petitioners with respect to possessing the desired qualification. It is stated by the said Opposite parties that by way of notice dtd.-6.2.2015 the status of the candidates who participated in the selection process was published. Referring to the list enclosed to Annexure-A/4 it is stated that Petitioner no 1's name appears in the **list of applicants not fulfilling the eligibility criteria** for the post of ATP at Sl no 4 and JTP at Sl no. 84 and that of Pet no. 2 for JTP at Sl no.101.

12.A. Such rejection was admittedly never challenged by the petitioners. Since the petitioners were never shortlisted for the interview and were declared ineligible from inception therefore, the statement of the petitioners in their writ petition that they are eligible and had applied for the post having the required qualification even after

publication of the rejection list, is not only a false and deliberate misrepresentation but also amounts to fraud and deceit for suppressing the material fact. Accordingly the said Opposite parties. claimed that the petitioners have not approached this court with clean hand even though they were aware about rejection of their candidature rather deliberately made false submission.

13. To justify such stand, these opposite parties relied upon the decision of the Apex Court in KD Sharma vs. SAIL reported **2008 (12) SCC 481** wherein it is held that in case the applicant makes a false statement or suppresses material fact or attempt to mislead the court, the court may dismiss the action on that ground alone and may refuse to enter into the merit of the case.

14. So far the allegation with respect to non conducting of the written test examination as well as issuing the advertisement prior to amendment of the educational qualification as opined by the OPSC, it is answered by these opposite parties by saying that after participating in the selection process and after they were held to be ineligible they cannot take such a plea being unsuccessful and more so being found ineligible to participate in the selection process and when such inclusion in "ineligible list" was admittedly not assailed.

15. It is further stated that the petitioners after participating in the recruitment process and declared ineligible and also unsuccessful cannot challenge the appointment of these opposite parties on the ground that the recruitment was only consisted of career marking and interview without adopting the procedure of written test as one of the modalities.

16. The present opposite parties have been appointed in terms of a public advertisement and after being declared successful by a duly constituted selection committee they were appointed following a proper procedure of selection maintaining fair play for which their selection cannot be allowed to be set aside at the behest of the petitioners who resorted to deliberate misrepresentation making allegation which are unsubstantiated and in fact in derogation of the Act and Rules, governing the field.

17. The Opposite Party No.5 filed a separate counter being represented by learned Advocate Mr. B.B. Mohanty and submitted that he is a selected and appointed candidate as a Junior Town Planner and disputes the maintainability of the present writ petition on the ground of doctrine of estoppel and acquiscence and has prayed for dismissing the said writ petition in limine without delving into the merits and contention of the writ petition. It is contended that the petitioners along with the selected candidates arrayed as Opposite parties had participated in the selection process in terms of the conditions laid down in the advertisement whereas the petitioners' candidature were rejected on account of their unsuitability for not possessing the requisite educational qualification prescribed in the advertisement. Neither the conditions stipulated in the advertisement is under challenge nor the

rejection of candidatures of the petitioners is under challenge. Instead of doing so the petitioners deliberately suppressed the fact and did not disclose their rejection of candidature but simultaneously made a false statement in the writ petition by saying that they do possess the requisite qualifications as per advertisement and had participated in the selection process. Moreover they have never challenged method of selection and decision to fill up the post of ATP and JTP created in terms of Annexure A/1 dated 31.12.2014.As such the petitioners cannot maintain the present writ petition as they are fence sitters.

18. He relied upon the decision in Madras Institute of Development Studies and another Vs. K Sivasubramaniam and others reported in **(2016) 1 SCC 454** to fortify his stand. In the said decision the Apex Court held as under:-

> *"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.*
>
> *15. In Dr. G. Sarana vs. University of Lucknow & Ors., (1976) 3 SCC 585, a similar question came for consideration before a three Judges Bench of this Court where the fact was that the petitioner had applied to the post of Professor of Athropology 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:-*
>
> *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's case 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: "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 & Ors. vs. State of J&K & Ors. (1995) 3 SCC 486, similar view has been reiterated by the Bench which held that:-*
>
> *"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 the case of Om Prakash Shukla v. Akhilesh Kumar Shukla1 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 vs. State of Bihar, (2010) 12 SCC 576, this Court reiterated the principle laid down in the earlier judgments and observed:-

"We also agree with the High Court 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 the case of Ramesh Chandra Shah and others vs. Anil Joshi and others, (2013) 11 SCC 309, recently a Bench of this Court following the earlier decisions held as under:-

"In view of the propositions laid down in the above noted 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 and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents.""

19. He further submitted that the grounds raised by the petitioner with respect to improper constitution of selection committee being in violation of ODA Rule 1983 is figment of imagination and is misconceived. The said opposite party has justified his stand by referring to the relevant provision of law as to how the petitioners have misinterpreted the word "Authority" with respect to taking approval before issuance of appointment orders.

Learned Counsel Sri B.B. Mohanty submitted with vehemence that "Authority" as has been defined under the ODA Act is none other than the BDA and under no circumstances it can mean "the government". So far selection process as well as malafide of vice chairman including non conducting of a written test examination etc., the opposite party no. 5 has relied upon the decision of Apex court wherein it has been stated that a candidate after participating in the selection process cannot claim and cannot challenge the process of selection after being found to be unsuccessful. Since the selection committee rejected candidature of the petitioners on the ground of not having the requisite eligibility in terms of the qualification such

rejection being not under challenge the grievance of the petitioner with respect to selection procedure as well as the conduct of the vice chairman etc. is not sustainable in the eye of law.

20. Learned counsel Sri Mohanty appearing for the opposite party No. 5 also submitted that even if the qualification as suggested in Annexure- 2 to the writ petition basing upon the views expressed by Orissa Public Service Commission have not been incorporated but the same has nothing to do with the present selection process where taking into consideration the newly created posts and requirement to man such post the BDA authorities decided to go ahead with the selection process on the basis of the qualification in terms of their own guidelines and prescribed procedures.

21. To justify his stand the opposite party No. 5 has relied upon the decision in Ashok Kumar versus state of Bihar reported in **AIR 2016 SC 5069** wherein Apex court has categorically held that after surrendering to a procedure of selection and after participating in the selection process the challenge to the result of selection and the process of selection is not permissible by an unsuccessful candidate in the selection process as it would be hit by the principle of estoppel. Paragraph No.11, 12 and 15 as relied upon by the Learned Counsel are as under :-

> *" 11. The appellants participated in the fresh process of selection. If the appellants were aggrieved by the decision to hold a fresh process, they did not espouse their remedy. Instead, they participated in the fresh process of selection and it was only upon being unsuccessful that they challenged the result in the writ petition. This was clearly not open to the appellants. The principle of estoppel would operate.*
>
> *12. The law on the subject has been crystalized in several decisions of this Court. In Chandra Prakash Tiwari v. Shakuntala Shukla, this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In Union of India v. S. Vinodh Kumar, this Court held that:*
>
> *"18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same...*
>
> *(See also Munindra Kumar v. Rajiv Govil and Rashmi Mishra v. M.P. Public Service Commission)."*
>
> *The same view was reiterated in Amlan Jyoti Borroah (supra) where it was held to be well settled that candidates who have taken part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful.*
>
> *In Manish Kumar Shah v. State of Bihar, the same principle was reiterated in the following observations :*

"16. We also agree with the High Court 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. Reference in this connection may be made to the Judgments in Madan Lal v. State of J. and K.MANU/SC/0208/1995: (1995) 3 SCC 486, Marripati Nagaraja v. Government of Andhra Pradesh and Ors. MANU/SC/8040/2007 : (2007) 11 SCC 522, Dhananjay Malik and Ors. v. State of Uttaranchal and Ors. MANU/SC/7287/2008 : (2008) 4 SCC 171, Amlan Jyoti Borooah v. State of Assam MANU/SC/0077/2009 : (2009) 3 SCC 227 and K.A. Nagamani v. Indian Airlines and Ors. (supra)."

In Vijendra Kumar Verma v. Public Service Commission, candidates who had participated in the selection process were aware that they were required to possess certain specific qualifications in computer operations. The appellants had appeared in the selection process and after participating in the interview sought to challenge the selection process as being without jurisdiction. This was held to be impermissible.

In Ramesh Chandra Shah v. Anil Joshi, candidates who were competing for the post of Physiotherapist in the State of Uttrakhand participated in a written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the respondents would not have raised any objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under Article 226 and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. This Court held that:

"18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome."

In Chandigarh Administration v. Jasmine Kaur, it was held that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non-selection. In Pradeep Kumar Rai v. Dinesh Kumar Pandey, this Court held that :

"Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time.

Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted."

This principle has been reiterated in a recent judgment in Madras Institute of Development v. S.K. Shiva Subaramanyam.

> *15. In this view of the matter, the Division Bench cannot held to be in error in coming to the conclusion that it was not open to the appellants after participating in the selection process to question the result, once they were declared to be unsuccessful. During the course of the hearing, this Court is informed that four out of six candidates, who were ultimately selected figured both in the first process of selection as well as in the subsequent selection. One candidate is stated to have retired."*

22. It was reiterated that on this aspect law laid down by the Apex court is clear that when a candidate appears at an examination without objection and is subsequently found to be not successful, he is precluded from assailing the same**.** The question of entertaining a petition challenging a selection would not lie where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein merely because the result is not palatable.

23. With respect to the allegation of malafide against Vice chairman of BDA it is contended by the opposite party no.5 relying upon a decision of Apex court in the matter of Federation of Railway Officers Association and others Vs. Union of India reported in **AIR 2003 SC 1344** in which Apex court while answering to the issue relating to malafide, held that allegation regarding mala fides cannot be vaguely made and it must be specified and clear. Paragraph 12 relied upon is extracted as under:

> *"12. In examining a question of this nature where a policy is evolved by the Government judicial review thereof is limited. When policy according to which of the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be unrestricted discretion. On matter affecting policy and requiring technical expertise Court would leave the matter for decision of those who are qualified to address the issue. Unless the policy of action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of the power, this Court will not interfere with such matter."*

24. Further the allegation against whom the malafide is raised should have been made as a party to meet such allegations. In the present case admittedly that has not been done. Relying upon the said decision it is further contended by Learned Counsel for O.P.No.5 that where a policy is evolved by the government, scope of judicial review thereof is limited. The policy decision of the competent authority cannot be a subject matter of adjudication and interference unless inconsistent with the Constitution of India or resulting in arbitrary or abuse of power.

25. The Petitioners have filed rejoinder affidavit supplementing their earlier stand with additional grounds that the select list is not sustainable. **However, with respect to the rejection of candidatures of the petitioners on the ground of not having the minimum eligibility as much as not having made any prayer for any kind of relief for the petitioners themselves is undisputed.**

25.A. The averment in counter filed by Ops 4,6,7 and 10 to12 in para 4 runs thus;

> **"4.** That the Petitioner at para 5 have stated that they had applied in pursuance to advertisement dated 14.1.2015 and have also further stated that they applied with the knowledge that they were holding the requisite criteria.
>
> This statement is totally false and has been deliberately made to misguide the court. The day on which they have sworn the affidavit for filing this writ application they knew very well that the statement made at Para 5 is false.
>
> By way of notice dated 6.2.2015, the status of eligibility and non-eligibility of all the candidates were published. The present petitioners' candidature was clearly rejected on the ground of being found not possessing the educational qualification. The said rejection has also not been challenged by the Petitioners'.
>
> A copy of notice dated 6.2.2015 along with the list showing the status of the candidates as to whether they fulfill the educational qualification is annexed as **ANNEXURE A/4**.
>
> Thus the Petitioners were never short listed for the interview and were declared in-eligible. This statement is not only false and a deliberate misrepresentation made on affidavit but amounts to fraud and deceit. The petitioner cannot be said to have approached the Court with clean hands.
>
> On the day of filing the writ application they knew that their applications were rejected. It was not a case were one does not get appointment due to not being high up in merit, but in the instant case they were specifically declared in-eligible on ground of lack of education qualification……..."

25.B. Paragraph-3 of the counter affidavit filed by the Opposite Party No.5 is also extracted hereunder for convenience of ready reference;

> **"3.** That at the threshold the O.P.No.-5, who was selected and appointed as Junior Town Planner humbly submits that the present Writ Petition is not maintainable in law being hit by doctrine of estoppels and acquiescence and thus may be dismissed in limine without delving onto the merits of the Contentions as the Writ Petitioner who were candidates in pursuance of the Advertisement dated 14.01.2015 filed the present Writ Petition invoking Extraordinary Writ Jurisdiction of this Hon'ble Court after they failed to make it to the list of shortlisted candidates to appear at the Interview in terms of qualification and Career marking which was adopted as criteria of selection in the Advertisement sought to be raised. To be particular and emphatic the Writ Petitioner did neither challenge the Advertisement before the last date of receipt of candidatures nor has challenged the same specifically in the present Writ Petition on what so ever ground. Besides, without challenging the method of selection and the decision to fill up the posts of ATP and JTP created only by letter dated 31.12.2014 and only after they had surrendered to the terms of the Advertisement they have now sought to assail the result when the same became unpalatable to them. Hence going by the settled Position of Law {2016 (1) SCC Page 454 in the matter of Madras Institute of Development Studies and another Vs. K. Sivasubramaniyan & Others} the Petitioners are fence sitters who are not to be granted with any opportunity by the Hon'ble Court to invoke the Extraordinary Writ Jurisdiction as they have acquiesced their right to challenge the selection and appointment having participated in the selection and failed. Hence the present writ petition is not maintainable in the eyes of Law."

25.C. Rejoinder by petitioner (para7 runs thus)

> **"7.** That with regard to the averments made in the paragraph-7 of the counter affidavit filed by the OP Nos.2 & 3 and the averments made in paragraphs-4, 5 & 6 of the counter affidavit filed by the OP Nos. 4, 6, 7, 10, 11, 12 and 5 it is humbly submitted that the qualifications, experience, age and procedure for direct appointment of ATPs/JTPs in the rank of Class-I & Class-II should not be at variance with those prescribed by statues/ Rules. But in the instant case, the entire process of direct appointment to the post of ATPs/JTPs was in contravention of the established rules prescribed by State Govt. All the selected candidates (OP No.4 to 12) who have been appointed to the post of ATPs/JTPs do not possess minimum requisite qualification i.e. **Degree in Regional/ Town Planning** from a recognized University or Institution and all such does not come under the eligibility criteria for selection in pursuant to the advertisement made by OP Nos.2 & 3. What would be the qualification for the post but as the selected candidates i.e., OP Nos.4 to 12 do not possess minimum mandatory requisite qualification **Degree in Regional /Town Planning**, they are not eligible for appointment to the post of ATPs/JTPs in the rank of class-1 and class-II respectively till amendment of relevant Rules i.e. the Odisha Town Planning Service Rules 1970. OP Nos.2 & 3 applying double standards in their treatment. They unfairly allowed the OP Nos. 4 to 12 that, they fulfilled the required educational qualification. i.e. Degree in Regional / Town Planning, that they have not actually possess. But on the other hand they unfairly rejected petitioners' application on the same ground i.e. lack of educational qualifications i.e. Degree in Regional/ Town Planning. Such type of double standards policy are unfair in the eye of law. Hence appointment order is vitiated. The entry to the post of ATPs/JTPs in BDA, Bhubaneswar were through back door method made by the Vice-Chairman, BDA who is not competent to give appointment. This is an act of nepotism and favoritism and thus such appointments under anenxures-4 & 5 dtd.04.9.15 are illegal appointments in wholly arbitrary process.

26. Learned Counsel for the petitioners Sri Tripathy relied upon decisions of Apex court in **AIR 2020 SC 2060** (Ranjit Singh Kardam Vs. Sanjeev Kumar) to justify their stand that the court has the power to interfere with the process of selection where there is any illegality in selection process and mere participation in the selection process will not stand as an estoppel.

27. Mr. Tripathy, Learned counsel for the petitioners argued that if the recruitment agency had not published any criteria on the basis of which candidates were owing to be subjected for selection process and the candidates participated in the selection without knowing the criteria of selection they cannot be prevented from challenging the process of selection when ultimately they came to know that the recruiting agency systematically has diluted the merit in the process of selection.

28. When the criteria of selection is published for the first time along with final result they cannot be estopped from challenging the criteria of selection and the entire process of selection. Accordingly the writ petitioners who had participated in the selection are not estopped from challenging the selection in the facts and circumstances of the case at hand. When there is allegation of alteration of criteria of selection affecting merit then it is malice-in-law and not malice-in- fact. Under such circumstances the writ petition is maintainable even in absence of specific allegation against the members of the selection committee and without impleading them as parties.

29. Similarly relying upon the decision in Raj Kumar & others Vs. Shakti Raj & others reported in **(1997) 9 SCC 527** it is submitted by the petitioners that the principles of estoppel does not apply to cases where malafidies and illegality have been adopted to give appointment to preferential candidates.

30. Petitioner also relied on the judgement of the Apex Court in the case of state of Orissa & anr v Mamata Mohanty reported in **(2011) 3 SCC 436** more particularly para 20 thereof to substantiate his assertion that since the action of the authorities (Ops 2&3) is illegal from inception ,all consequential actions and in the present case, selection of pvt Opp parties is liable to be set aside.

31. The opposite parties No.2 and 3 (BDA) also filed a reply to the rejoinder affidavit filed by the petitioners disputing the stand taken and have also given proper justification defending the selection of pvt Opp parties by relying upon the facts as well as provisions of law.

32. Similarly, the private opposite parties No. 4,6,7,10 to 12 have also filed a separate reply disputing the stand of the petitioners and reiterated their stand that the petitioners do not have any right to question the selection because they are ineligible candidates and they have deliberately suppressed their ineligibility to pursue this litigation,only to harass the petitioner.

33. Ms. Rath, learned Counsel for such Opp. Parties has relied upon on several decisions of Apex court. Referring to decision reported in **(2008) 12 SCC 481** in the matter of K.D. Sharma Vs. Steel Authority Of India Ltd. & Others it is argued that Jurisdiction of the Apex Court under Article 32 and of the High Court under Article 226 of the constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is therefore, of utmost necessity that the petitioner approaching the writ court must come with clean hands, put forward all the facts before the court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material fact or the petitioner is guilty of misleading the court, his petition may be dismissed at its threshold without considering the merits of the case. While exercising extraordinary power a writ court would certainly bear in mind the conduct of the parties who invokes the jurisdiction of the court. If the applicant makes a false statement or suppresses any material fact or attempts to mislead the court the court may dismiss the action on that ground only and may refuse to enter into the merit of the cases by stating "we will not listen to your application because of what you have done".

The Apex Court in K.D. Sharma Vs. Steel Authority Of India (supra) has held that "*Fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. In fraud one gains at the loss and cost of another. Even the most solemn proceedings stand vitiated if they are actuated*

by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personal."

33.A. Similarly relying upon the decision reported in **2013 (10) SCC 253** Vijay S. Sathye Vs. Indian Air Lines Ltd. and also in the matter of **AIR 1988 SC 2181** Bharat Singh Vs. State of Haryana it is submitted by Ms. Pami Rath, Ld counsel that where by filing a false affidavit if the relief has been claimed that cannot be sustained in the eye of law. Furthermore, where a party has not denied the facts and arguments advanced by the opposite parties then it amounts to admission.

33.B. To counter the decision relied upon by the petitioners in Raj Kumar & others Vs. Shakti Raj & others reported in **(1997) 9 SCC 527**, Ms Rath,the Ld counsel also relied upon the decision reported in **2010 (12) SCC 576** Manish Kumar Sahi Vs. State of Bihar & others where Apex court held that after participating in a recruitment process and accepting the process of selection an unsuccessful candidate cannot challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamt of challenging the selection. Since the petitioner invokes jurisdiction of High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list such conduct of the petitioner clearly disentitles him from questioning the selection and there is no error by refusing to entertain the writ petition.

33.C. Similarly in another case reported in **(2008) 4 SCC 171** Dhanjaya Malik & others Vs. State of Uttaranchal & others the Hon'ble Apex court observed that the petitioner unsuccessfully participated in the selection without any demur and hence he is estopped from challenging the selection cretirion inter alia that the advertisement and selection with regard to requisite educational qualification was contrary to rules. If they think that the advertisement and selection process were not in accordance with rules they could have challenge the advertisement and selection process without participating in the selection process.

34. The respective parties have filed their written notes of submission and also the memo of citations.

35. After going through the pleadings and the submission of respective learned counsels the following issues are required to be answered:

1. Whether the writ petition is maintainable?

2. If the writ petition is maintainable what relief can be granted in favour of the petitioners in absence of any specific prayer for their own appointment in place of the private opposite parties number 4 to 12.

3. Whether there is any suppression of facts by the petitioners and commission of fraud on the part of petitioners as alleged by pvt Opp. parties and if so what will be the legal consequences thereof?

36. To answer the first issue which is intertwined with issue no 2, admittedly this Court in the present lis is not dealing with a Public Interest litigation rather it is

a service dispute where the selection and appointment of OP No. 4 to 12 is only under challenge. The prayer of the petitioners in the writ petition is for quashing selection and appointment of the opposite parties number 4 to 12 as Assistant Town Planner and Junior Town Planner and to issue writ in the nature of certiorari quashing the impugned order of appointment. As pointed out by the respective Learned Counsel for the Opp. parties Ms. Pami Rath(Ops 4,6-7 and 10-12) and Sri B.B. Mohanty(Op no.5) - the selected candidates, in fact, there is no prayer by the petitioners relating to their own claim as well as there is no such averments even in the writ petition indicating whether the petitioners once successful in the case at hand can be appointed qua the selected private opposite parties. It is also not the prayer in the writ petition to declare the constitution of the selection committee or the selection procedure adopted by the BDA to be illegal or unjust.

37. Therefore in absence of any pleading and/or prayer with respect to the petitioners themselves in the present writ petition they cannot be treated as aggrieved party in a service dispute for which this Court is of the firm view that the case at hand does not merit consideration.

38. Coming to the 3rd issue with respect to suppression of material facts as well as committing fraud on this Court the findings are as under:-

On perusal of the pleadings it transpires that petitioners have deliberately misrepresented the facts and they have not approached this court with clean hand. Admittedly the candidature of the petitioners was rejected and such rejection list was in public domain and presumption can easily be drawn that petitioners were very much aware of the same. Not only that the petitioners have deliberately suppressed such material fact about the rejection of their candidature as much as they have failed to challenge the said rejection of their candidature in the present writ petition.

38.A. **Such aspect with supporting documents were vehemently urged by both State opposite parties, as well as Private opposite parties relying on the recitals in their respective counters. But, the same was uncontroverted and the petitioner did not choose to challenge the same.**

38.B. Thus it can be safely concluded that the petitioners had deliberately suppressed the material fact and such attempt has been adopted by the petitioners only with an intention to affect the Opp parties by misleading this court and to obtain an interim order.

38.C. There is no iota of doubt that this Court would not have entertained this present Writ Petition at the threshold had the petitioners placed on record the factum of their inclusion in the rejection list and the same not being admittedly assailed.

It is manifestly clear that the advertisement at Annexure-2 allegedly being contrary to the notification issued by the government in H and UD Department dated

06.09.2014 is what weighed with this Court in issuing notice. The same is borne out from the order dated 21.09.2015, quoted hereunder;

> "Heard Mr. B.S. Tripathy, learned counsel for the petitioners.
>
> The petitioners in this petition have assailed the advertisement dated 14.1.2015 vide Annexure-2, whereby applications have been invited for appointment of Assistant Town Planner & Junior Town Planner in the Bhubaneswar Development Authority, on the ground that the advertisement issued is contrary to the notification issued by the Government in Housing and Urban Development Department dated 6.9.2014. It is urged that such advertisement has been issued without approval of the authority, which is violative of Rule 6 of the Development Authority Rules.
>
> Issue notice to the opposite parties by registered post with A.D., requisites for which shall be filed by the Wednesday (23.9.2015). A short returnable date be fixed.
>
> Call this matter along with W.P.(C) No.2025 of 2015.
>
> Sd/-"

39. The decision in **AIR 1988 SC 218**1 Bharat Singh Vs. State of Haryana relied upon by Ms. Rath is squarely applicable in the present case. Relevant extract of the said decision is quoted hereunder:-

> *"In our opinion, when a point, which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or the counter-affidavit, as the case may be, the Court will not entertain the point. There is a distinction between a hearing under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, i.e. a plaint or written statement, the facts and not the evidence are required to be pleaded. In a writ petition or in the counter affidavit, not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it."*

40. Further the principle decided in **(2008) 12 SCC 481** in the matter of A.D. Sharma Vs. Steel Authority Of India Ltd. & Other as relied by the Opp. Parties is also applicable**.** Relevant extracts of the said decision are quoted hereunder:-

> *"15. It is well settled that "fraud avoids all judicial acts, ecclesiastical or temporal" proclaimed Chief Justice Edward Coke of England before about three centuries. Reference was made by the counsel to a leading decision of this Court in S.P. Chengalvaraya Naidu (Dead) by Lrs. V. Jagannath (Dead) by Lrs. & Ors., (1994) 1 SCC 1 wherein quoting the above observations, this Court held that a judgment/decree obtained by fraud has to be treated as a nullity by every Court.*
>
> *17. The Court defined fraud as an act of deliberate deception with the design of securing something by taking unfair advantage of another. In fraud one gains at the loss and cost of another. Even the most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam."*

41. The decisions relied on by the learned counsel for the petitioner on the face of it have no application in the factual matrix of the case at hand and in citing the

said judgments, the petitioner chose to ignore the cardinal principle of interpretation of judgment as stated by the Apex Court in the case of Islamic Academy of Education and another vs. State of Karnataka and others reported in **(2003) 6 SCC 697** more particularly paragraphs 139 to 145 at page 771-772.

Paragraph-139 of the said judgment which referred to the earlier judgment of the Apex Court in the case of Executive Engineer, Dhenkanal Minor Irrigation Division vs. N.C. Budharaj reported in **(2001) 2 SCC 721.**

> "139. A judgment, it is trite, is not to be read as a statute. The ratio decidendi of a judgment is its reasoning which can be deciphered only upon reading the same in its entirety. The ratio decidendi of a case or the principles and reasons on which it is based is distinct from the relief finally granted or the manner adopted for its disposal.

42. Hence on a conspectus of materials on record, this Court is of the considered view that on account of suppression of material facts which amounts to committing fraud on court and making deliberately wrong submission in the writ petition thereby approaching this court with unclean hands, this lis invoking plenary jurisdiction of writ court under Article 226 of the Constitution of India is not entertainable.

43. The Writ Petition is accordingly dismissed. Interim order stands vacated.

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2023 (II) ILR – CUT - 1232

BIRAJA PRASANNA SATAPATHY, J.

W.P.(C) NO.19688 OF 2021

OUAT WORKERS UNION …….Petitioner

.V.

UNION OF INDIA & ORS. …….Opp. Parties

EMPLOYEE PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952 – Section 2(f) – Whether the NMR/DLR casual workman working in OUAT are eligible for their coverage under the provision of ESI scheme as per the Act, 1952 – Held, Yes. (Para 10-10.1)

Case Law Relied on and Referred to :-

1. Civil Appeal No.353 of 2020 : Pawan Hans Ltd. & Ors. Vs. Aviation Karmachari Sanghathan & Ors.

For Petitioner :M/s. L. Pangari, Sr.Adv.

For Opp. Parties :M/s. P.K. Parhi, D.S.G.I
M/s. A. Pal.
M/s. P.K. Mohanty
M/s. S.S. Mohanty
M/s. M.K. Balabantaray, AGA

JUDGMENT Date of Hearing: 09.05.2023:Date of Judgment: 27.06.2023

BIRAJA PRASANNA SATAPATHY, J.

This Writ Petition has been filed by the OUAT Workers Union inter alia with a direction on the Opp. Parties to implement the provisions of ESI and EPF Scheme for the workman working under OUAT from the date of their entitlement.

2. It is the case of the Petitioner that even though around 400 DLR/NMR/Casual employees are working under OUAT for the last 20 years, but when no step was taken to extend the benefit of ESI and EPF in favour of such DLR/NMR/Casual employees, the Union submitted a 8 point Charter of Demands before the Vice Chancellor, Orissa University of Agriculture and Technology (OUAT) on 28.12.2016 under Annexure-1. In the said Charter of Demands available at Annexure-1, the Union in Paragraph 7 of the same makes the following demand:

> *"7. That, the management should introduce EPF & ESI Scheme to all the above workmen according to the EPF & ESI Act."*

2.1. It is contended that on receipt of the Charter of Demands available at Annexure-1, Opp. Party No.4 vide his letter dt.18.09.2017 under Annexure-2 requested Opp. Party No.2 to implement the provisions of ESI Scheme for the workmen working under OUAT and to provide the compliance. Similarly, vide letter dt.20.09.2017 under Annexure-3, Opp. Party No.5 requested Opp. Party No.3 to implement the provisions of EPF Scheme in favour of workmen working under OUAT. It was clearly indicated in the said letter that non-enrolment of employees of the Union as PF members is contrary to the provisions of EPF & MP Act, 1952.

2.2. It is contended that on receipt of the communications issued by the ESI and EPF authority under Annexures-2 & 3, Opp. Party No.3 vide her letter dt.10.04.2018 requested the Dean/Principal, OUAT to indicate the financial implication for extending the benefit of ESI and EPF in favour of the NMR/DLR/ Casual employees working under the OUAT. On the face of such communications issued under Annexures-2 to 4, when no action was taken by the University in registering the establishment under the provisions of EPF Act, Opp. Party No.5 once again vide letter dt.25.04.2018 under Annexure-5 requested Opp. Party No.3 to take immediate step for enrolment of the workmen under the provisions of EPF & MP Act, 1952.

2.3. On receipt of Annexure-5, Opp. Party No.3 once again requested the authorities of OUAT to furnish the names and number of casual labourers working

under their control. Not only that, when OUAT did not take any action to extend the benefit of ESI & EPF in favour of the workmen, a conciliation was taken up by the Conciliation Officer-cum-District Labour Officer, Khurda at Bhubaneswar. In the said conciliation proceeding, the management of OUAT as reflected in Annexure-7 also agreed to cover all the DLR/NMR workers under the provisions of EPF and ESI Scheme within a period of one month.

2.4. It is contended that in spite of the undertaking given before the Conciliation Officer-cum-District Labour Officer, when no action was taken by the University to extend the benefit of EPF & ESI, Opp. Party No.5 once again vide letter dt.14.12.2018 under Annexure-8 requested Opp. Party No.3 to enroll the workmen under the provisions of EPF & MP Act, 1952 or else suitable action will be taken in the matter.

2.5. As in the meantime, Government in the Department of EPF & ESI vide letter dt. 23.05.2019 requested the Opp. Party Nos.4 & 5 to clarify regarding coverage of EPF & ESI Scheme to the workers engaged under OUAT under Annexure-9, Opp. Party No.5 vide letter dt.30.05.2019 under Annexure-10 clearly indicated that employees working under OUAT are entitled to be covered under the provisions of EPF & ESI Act in terms of the notification issued by the Government on 25.08.2011. Similarly, vide letter dt.03.06.2019 under Annexure-11, Opp. Party No.4 also indicated the coverage of the employees of OUAT under the provisions of EPF & ESI Scheme. In spite of issuance of such clarification by the Government, when no action was taken to include the workmen under the provisions of EPF & MP Act, Opp. Party No.4 vide letter dt.08.07.2019 under Annexure-12 requested the Opp. Party No.2 to take immediate action to enroll the workmen working in OUAT under the provisions of EPF & MP Act, 1952.

2.6. It is contended that in consideration of the request made by the Opp. Party Nos.4 & 5, Opp. Party No.3 vide her Office Order dt.19.07.2019 also agreed to extend the benefit of EPF & ESI in favour of the casual labourers of OUAT engaged in different establishment and who have been getting their wages in conformity with the minimum wages fixed by the Government.In the said order, it was also indicated that the benefit of EPF & ESI to the casual labourers shall be brought in force after due registration of Establishment under the provisions of EPF & ESI Act. It is also contended that vide letter dt.23.07.2019 issued by the Government in the Department of Agriculture & Farmers' Empowerment addressed to Opp. Party No.3, it was also clearly indicated that the provisions of EPF & MP Act, 1952 as well as ESI Act, 1948 are applicable to the casual labourers engaged in OUAT. After issuance of Annexure-14,Opp. Party No.6 vide letter dt.25.09.2019 under Annexure-15 requested the Opp. Party No.3 to intimate the action taken report with regard to implementation of the provisions of the EPF & ESI Act in favour of the casual labourers engaged in OUAT.

2.7. It is contended that in spite of the order passed by the University under Annexure-13 and the communications made by the Government under Annexures-14 & 15, when no action was taken to extend the benefit of EPF & ESI, Opp. Party No.5 vide letter dt.04.10.2019 under Annexure-16 requested Opp. Party No.3 to take necessary action for registration of establishment under the EPF Act and to register all the coverage employees through Online under Shram Suvidha Portal. However, when no action was taken by the OUAT, Opp. Party No.6 once again vide letter dt.21.10.2019 under Annexure-17 requested the Opp. Party No.3 to submit a compliance report showing the extension of benefit of EPF and ESI in favour of the casual labourers working in the OUAT.

2.8. It is contended that in spite of all the communications so made, when no final decision was taken extending the benefit of EPF & ESI in favour of the casual labourers, the OUAT Workers Union moved the Opp. Party No.2 on 10.02.2020 under Annexure-18 with a request to implement the same or else the Union will go on strike. Thereafter vide letter issued under Annexures-19 & 20 though Opp. Party Nos.4 & 5 requested the University to implement the provisions of EPF & ESI but when no action was taken, the present Writ Petition was filed inter alia with the prayer to direct the University to extend the benefit of EPF & ESI in favour of the workmen working under the OUAT.

2.9. Mr. Laxmidhar Pangari, learned Sr. Counsel appearing on behalf of the Petitioner vehemently contended that on the face of the communications made from Annexures-2 to 19 though there is no dispute that NMR/DLR/Casual workmen working under OUAT are eligible for their coverage under the provisions of EPF & ESI Act, but Opp. Party Nos.2 & 3 are sitting over the matter and not taking any decision to extend the benefit. It is contended that since Opp. Party No.6 vide letter issued under Annexures-14 & 15 has clearly held that the casual Labourers engaged in OUAT are liable for their coverage under the provisions of EPF & ESI Act, the authorities of OUAT have no other option than to extend the benefit. However, on the face of all the communications available under Annexures-2 to 19, the workmen are yet to get the benefit of EPF & ESI Scheme.

3. Mr. A. Pal, learned counsel appearing for the Opp. Party Nos.2 & 3 on the other hand made his submission basing on the stand taken in the counter affidavit so filed by the OUAT.

3.1. It is contended that EPF & ESI Act is not applicable to the casual labourers working under the OUAT as they are all seasonal Agricultural workers engaged as per the requirement. It is also contended that Industrial Dispute Act, 1947 is not applicable to OUAT as OUAT is not an industry. It was also contended that OUAT is an University involved in the teaching research and extension of education in the field of agriculture and allied subjects. It is also contended that casual labourers are hired by the Project Iinvestigator and most of the employer so hired are seasonal in nature based on the commodities and requirement of the Projects. It is also

contended that Project Investigators are the authorities to hire such manpower and they are under the administrative control of different Deans/Directors. The casual labourers so hired by the Project Investigators do not have any fixed number and they differ from season to season and from year to year as per agricultural operations.

3.2. It is also contended that payments of wages to those casual labourers are made from the contingency head of the concerned research Project. Since the casual labourers are working under the Project Investigators and not by the Registrar or Vice Chancellor, they can not be treated as employees working under OUAT. It is contended that as provided under Section 16 of the EPF/MP Act, 1952 the provisions of the said Act applies to every establishment which is a factory engaged in any industry specified in Schedule-I and in which twenty or more persons are employed, and to any other establishment employing 20 or more persons or class of such establishments which the Central Govt. may, by notification in the official Gazette specify in this behalf. It is however contended that Section 16 of the EPF and MP Act does not apply to certain establishment. The exception given to Section 16 is applicable to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of contributory Provident Fund or Old age pension in accordance with any scheme or rule framed by the Central Government or the State Government governing such benefits. It is accordingly contended that in absence of specific notification issued by the Central Government to include OUAT, with regard to applicability of the provisions of the Act, OUAT is not covered under the provisions of EPF & MP Act, 1952.

3.3. Regarding applicability of the provisions of ESI Act, Mr. Pal contended that as per Section 1(4) & (5) of the Act, it shall apply, in the first instance, to all factories including factories belonging to the Government other than seasonal factories. It is accordingly contended that there has to be specific notification by the State Government to include OUAT for the applicability of the provisions of ESI Act. Since there is no such notification bringing OUAT within the ambit of ESI Act, the prayer made by the Petitioners' Union to extend the benefit of ESI Act to the casual laborers does not arise.

It is also contended that vide letter dt.26.11.2022 under Annexure-A/2 to the counter, Government-Opp. Party No.6 has been moved to give its opinion in the matter of implementation of EPF and ESI in respect of casual workers working in different agriculture and allied research projects under OUAT and no such clarification has yet been issued by Opp. Party No.6.

4. To the aforesaid submission of Mr. Pal, Mr. Pangari, learned Senior Counsel contended that as per the provisions contained under Section 2(f) of the EPF and MP Act, DLR/NMR/Casual employees are employees coming under the establishment of Opp. Party No.2. Section 2(f) of the EPF & MP Act, 1952 reads as follows:

'employee' means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of)an establishment) and who gets his wages directly or indirectly from the employer, and include any6 persons-

(i) Employed by or through a contractor in or in connection with the work of the establishment;

(ii) Engaged as an apprentice, not being an apprentice engaged under the Apprentice Act, 1961 (52 of 1961) or under the standing orders of the establishment."

4.1. It is also contended that as provided under Section 1(3) (b) of the EPF & MP Act, the provisions of the Act subject to the provisions contained in Section 16 applies to any other establishment employing 20 or more persons or class of such establishment which the Central Government may by notification in the official Gazette specify in this behalf provided that Central Government may after giving not less than two months notice of its intention so to do by notification in the official Gazettee apply the provisions of this Act to any establishment employing such number of persons less than 20 as may be specified in the Notification.

4.2. It is contended that in terms of the provisions contained under Section 1(3) (b) of the Act, Central Government vide its notification dt.09.02.1982 has made the provisions of the Act applicable to Universities like Opp. Party No.2. The Notification dt.06.03.1982 issued by the Government of India under Section 1(3)(b) of the Act is quoted hereunder.

"1. Short tile, extend and application.-

3. Subject to the provisions contained in Section 16, it applies-

(b) *to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specifiy in this behalf: provided that Central Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazettee apply the provisions of this Act to any establishment employing such number of persons less than 20 as may be specified in the Notification.*

For the purpose of Section 1(3) (b) of the Act vide notification No.S.O.986 dated 09.02.1982 exercising power under Section 1(3) (b) of EPF and MP Act, 1952, the Central Government has made the provisions of the Act applicable to Universities like the OP. NO.2. The notification dated 06.03.1982 issued by the Government of India under Section 1(3) (b) of the Act is extracted below:-

"S.O.986- In exercise of the powers conferred by clause (b) of sub-section (3) section 1 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), the Central Government hereby specified the following classes of establishments in each of which twenty or more persons are employed, as establishments to which the said Act shall apply, namely:-

(i) Any University
(ii) Any College, whether or not affiliated to a University
(iii) Any school, whether or not recognized or aided by the Central or State Government
(iv) Any scientific institution

(v) Any institution in which research in respect of any matter is carried on
(vi) Any other institution in which the activity of imparting knowledge or training is systematically carried on."

4.3. It is also contended that as per the provisions contained under Section 16(b) of the EPF and MP Act, the provisions of the said Act shall not apply to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of Contributory Fund or Old age pension in accordance with any Scheme or Rule framed by the Central Government or the State Government governing such benefit. It is contended that since the workman working under OUAT are neither entitled to the benefit of contributory provident fund or old age pension rule, the bar contained under Section 16(b) of the Act is not applicable to the claim of the workman.

4.4. Mr. L. Pangari, learned Senior Counsel in support of his submission as well as the claim made in the Writ Petition relied on a decision of the Hon'ble Apex Court in the case of ***Pawan Hans Ltd. and Others Vs. Aviation Karmachari Sanghathan & Others, Civil Appeal No.353 of 2020*** decided on 17.01.2020. Hon'ble Apex Court in Paragraph 6 of the said judgment has held as follows.

"6. Discussion and analysis

6.1. *It is first required to be seen whether the appellant Company is excluded from the applicability of the provisions of the EPF Act and the EPF Scheme framed thereunder as contended by them.*

6.2 *As per Section 1(3) of the EPF Act, the EPF Act is applicable to every establishment in which 20 or more persons are employed, which is either a factory engaged in any industry specified in Schedule I, or an establishment which the Central Government may by notification in the Official Gazette specify in that behalf. Section 1(3) of the EPF Act reads as:*

Section. 1. (3)Subject to the provisions contained in Section 16, it applies—

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed, and

(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided that the Central Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than twenty as may be specified in the notification."

Section 1(3) is subject to Section 16 of the EPF Act. Sub-section (1) of Section 16 enlists those establishments which are excluded from the applicability of the EPF Act. As per clause (b) of sub-section (1), an establishment belonging to or under the control of the Central or State Government, and whose employees are entitled to the benefit of contributory provident fund in accordance with any scheme or rules framed by the Central or State Government governing such benefits, is excluded from the purview of the EPF Act.

Sub-section (1) of Section 16 reads as:

Section 16. ***Act not to apply to certain establishments****.—*

(1) This Act shall not apply—

(a) to any establishment registered under the Cooperative Societies Act, 1912 (2 of 1912), or under any other law for the time being in force in any State relating to cooperative societies employing less than fifty persons and working without the aid of power; or

(b) to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the Central Government or the State Government governing such benefits; or

(c) to any other establishment set up under any Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits;

(2) If the Central Government is of opinion that having regard to the financial position of any class of establishments or other circumstances of the case, it is necessary or expedient so to do, it may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt whether prospectively or retrospectively, that class of establishments from the operation of this Act for such period as may be specified in the notification."

This Court in Provident Fund Commr. v. Sanatan Dharam Girls Secondary School [Provident Fund Commr. v. Sanatan Dharam Girls Secondary School, (2007) 1 SCC 268 : (2007) 1 SCC (L&S) 167] laid down a twin-test for an establishment to seek exemption from the provisions of the EPF Act, 1952. The twin conditions are:

First, the establishment must be either "belonging to" or "under the control of" the Central or the State Government. The phrase "belonging to" would signify "ownership" of the Government, whereas the phrase "under the control of" would imply superintendence, management or authority to direct, restrict or regulate.

Second, the employees of such an establishment should be entitled to the benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the Central Government or the State Government governing such benefits.

If both tests are satisfied, an establishment can claim exemption/exclusion under Section 16(1)(b) of the EPF Act.

Applying the first test to the instant case, the Central Government has a 51% ownership in the appellant Company, while the balance 49% is owned by ONGC, a Central Government PSU. As per Section 2(45) of the Companies Act, 2013, a "government company" means any company in which not less than 51% of the paid-up share capital is held by the Central Government. Since 51% of the shares of the appellant Company are owned by the Central Government, the first test is satisfied as the appellant Company can be termed as a government company under Section 2(45) of the Companies Act, 2013.

With respect to the second test, it is relevant to note that the Company had its own Scheme viz. the Pawan Hans Employees Provident Fund Trust Regulations in force. The

Company however restricted the application of the PF Trust Regulations to only the "regular" employees. The PF Trust Regulations of the Company were not framed by the Central or the State Government, nor were they applicable to all the employees of the Company, so as to satisfy the second test.

The Regional Provident Fund Commissioner, Bandra issued letter dated 24-5-2017 addressed to the Company wherein it was stated that the benefit of contributory provident fund was not being provided to contractual/casual employees of the Company; and was directed to implement the provisions of the EPF Act.

The relevant extract from the letter is set out hereinbelow:

"approximately 370-400 employees have been engaged by M/s Pawan Hans Ltd. on contract basis in various cadres. But no social security benefit is being extended to them. The EPF & MP Act, 1952 under Section 2(f) lays down that any person employed for wages in any kind of work in or in connection with the work of the establishment and includes a worker engaged by or through a contractor. There is no distinction between a person employed on permanent, temporary, contractual or casual basis under Section 2(f) of the EPF & MP Act, 1952.

You are, therefore, requested to implement the provisions of the EPF & MP Act, 1952 in respect of all the contractual/causal employees engaged by M/s Pawan Hans Ltd. who are still not getting benefits of PF and pension."

In our view, the Company does not satisfy the second test, since the members of the respondent Union and other similarly situated contractual workers were not getting the benefits of contributory provident fund under the PF Trust Regulations framed by the Company, or under any scheme or any rule framed by the Central Government or the State Government. Consequentially, the exemption under Section 16 of the EPF Act would not be applicable to the appellant Company.

In view of the above discussion, we hold that the Company has failed to make out a case of exclusion from the applicability of the provisions of the EPF Act.

6.3. *The next issue which arises for consideration is whether the members of the respondent Trade Union are entitled to the benefit of provident fund under the PF Trust Regulations or under the EPF Act.*

Clause 1.3 of the Regulations would show that the PF Trust Regulations were made applicable to "all employees" of the appellant Company.

Clause 2.5 of the Regulations, defines an "employee", to include any employee who is employed for wages/salary in any kind of work, monthly or otherwise, or in connection with the work of the Company, and who gets his wages/salary directly or indirectly from the Company. Clause 2.5 excludes only a person employed by or through a contractor in connection with the work of the Company, and any person employed as an apprentice or trainee.

In the present case, the respondent Union submitted that even though the appointment letters refer to the employees as "contractual" employees, they were not engaged through any contractor. They were being paid directly by the Company, which is evidenced from the pay-slips issued to them. It was submitted that about 250 contractual employees receive wages directly from the Company, and are eligible to be included under the PF Trust Regulations framed by the Company.

6.4. *We find that the members of the respondent Union have been in continuous employment with the Company for long periods of time. They have been receiving wages/salary directly from the Company without the involvement of any contractor since the date of their engagement. The work being of a perennial and continuous nature, the employment cannot be termed to be "contractual" in nature.*

In our considered view, Clause 2.5 of the PF Trust Regulations would undoubtedly cover all contractual employees who have been engaged by the Company, and draw their wages/salary directly or indirectly from the Company.

6.5 *As per Section 2(f) of the EPF Act, the definition of an "employee" is an inclusive definition, and is widely worded to include "any person" engaged either directly or indirectly in connection with the work of an establishment, and is paid wages. [Provident Fund Office v. Godavari Garments Ltd., (2019) 8 SCC 149 : (2019) 2 SCC (L&S) 483]*

In view of the above discussion, we find that the members of the respondent Union and all other similarly situated contractual employees, are entitled to the benefit of provident fund under the PF Trust Regulations or the EPF Act. Since the PF Trust Regulations are in force and are applicable to all employees of the Company, it would be preferable to direct that the members of the respondent Union and other similarly situated contractual employees are granted the benefit of provident fund under the PF Trust Regulations so that there is uniformity in the service conditions of all the employees of the Company.

6.6 *The question which now arises is the date from which the benefit of provident fund is to be extended to the contractual employees. This Court vide order dated 24-10-2019 had passed the following order:*

'Provident fund is normally managed on actuarial basis; the contributions received from employer and the employee are invested and the income by way of interest forms the substantial fund through which any pay-out is made. For all these years the Fund in question was subsisting on contributions made by the other employees and, if at this stage, the benefit in terms of the judgment [Aviation Karmachari Sanghatana v. Pawan Hans Ltd., 2018 SCC OnLine Bom 2644 : (2019) 160 FLR 135] of the High Court is extended with retrospective effect, it may create imbalance. Those who had never contributed at any stage would now be members of the fund. The fund never had any advantage of their contributions and yet the fund would be required to bear the burden in case any pay-out is to be made. Even if employees concerned are directed to make good contributions with respect to previous years with equivalent matching contribution from the employer, the fund would still be deprived of the interest income for past several years in respect of such contributions.'

In order to have clear perspective in the matter and to see if there could be any solution to the problem as posed above, we call upon the petitioner to depute a person who is well versed in the matter and who has been managing the Provident Fund Scheme of Pawan Hans Ltd. to have a dialogue with Respondent 3 before 15-11-2019 (a representative of the respondent(s) is also at liberty to remain present during such discussion) so that a workable solution could then be presented by such person and the representative of Respondent 3 before us on the next occasion.

6. List the matter on 29-11-2019 at 10.30 a.m."

6.7 *The learned ASG submitted that no workable solution could be worked out at the meeting held between the representative of the appellant Company, Respondent 3, and*

the representative of the respondent Union. The learned ASG however offered that the appellant Company was willing to extend the benefit under the PF Trust Regulations to the members of the respondent Union and other similarly situated employees, from the date of the impugned judgment.

6.8. *Respondent 3-the Regional Provident Fund Commissioner submitted that since the Company had remained out of the purview of the EPF Act, the direction to deposit contribution from the date of eligibility of the contractual employees till the date of remittance was not workable, and could not be sustained."*

4.5. Making all these submissions Mr. Pangari, learned Senior Counsel contended that since Government of India vide its Notification dt.06.03.1982 has already held that the provisions of EPF & MP Act is applicable to any University which also includes OUAT, the benefits of EPF and MP Act is required to be extended in favour of the workmen belonging to the Petitioner Union. Similarly in view of the notification issued by the State Government on 24.08.2011, so published in the Gazette on 25.11.2011, the provisions of ESI Act is also applicable to the workmen working in OUAT. Accordingly it is contended that the prayer as made in the Writ Petition is required to be allowed by this Court.

5. To the aforesaid submission of Mr. L. Pangari, Mr. Pal learned counsel appearing for the OUAT made further submission, taking into account the stand taken by the Opp. Party Nos.2 & 3 in the affidavit filed on 08.05.2023. It is contended that since the employees of OUAT are covered under the Old age Pension Scheme and Family Pension Scheme Scheme similar to the employees of the Orissa Government and OUAT vide notification dt.21.05.2014 has approved and implemented the contributory Pension Scheme to OUAT employees, no further order is required to be passed in the matter.

5.1. It is also contended that in view of the bar contained under Section 16(b) of the EPF Act, the casual employees working under the University are not entitled to be covered under the Provisions of EPF Act.

6. Mr. Sisir Sundar Mohanty, learned counsel appearing for the Opp. Party No.5 on the other hand while supporting the case of the Petitioner contended that the workmen working in OUAT are liable to be covered under the provisions of EPF & MP Act and in spite of various communications issued by the Opp. Party No.5 directing the Opp. Party Nos.2 & 3 to register the workmen under the provisions of EPF & MP Act, no concrete decision is being taken by the University.

7. Similarly Mr. P.K. Mahony, learned counsel appearing for Opp. Party No.4 also while supporting the case of the Petitioners' Union contended that the workmen working in the OUAT are also liable to be covered under the ESI Act, in view of the notification issued by the Government on 25.08.2011 vide Notification No.7752-SS-II-42/2011/LE.

8. I have heard Mr. L. Pangari, learned Senior Counsel appearing for the Petitioner, Mr. P.K. Parhi, learned DSGI appearing for Opp. Party No.1, Mr. A. Pal, learned counsel appearing for Opp. Party Nos.2 & 3, Mr. P.K.Mohanty, learned counsel appearing for Opp. Party No.4 and Mr. S.S.Mohanty, learned counsel appearing for Opp. Party No.5 along with Mr. M.K. Balabantaray, learned Additional Govt. Advocate appearing for Opp. Party Nos.6 & 7.

9. On the consent of the learned counsel appearing for the parties with due exchange of the pleadings, 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, it is found that the petitioner representing the casual labourers working under OUAT is before this Court with a prayer to direct the Opp. Party Nos.2 & 3 to extend the benefit of EPF and PF Act as well as ESI Act in favour of such casual employees. As found from the communications available from Annexures-2 to 17, it is quite apparent that the casual employees working under OUAT are liable for their coverage under the provisions of EPF and P.F Act as well as ESI Act. It is also found from the record that Opp. Party Nos.2 & 3 vide communications issued under Annexure-13 though decided to cover the casual employees under the ESI and EPF Scheme, but no final decision was taken in that regard. It is also found from Annexures-14 & 15 that the casual employees working under OUAT are liable for their coverage under the provisions of EPF & ESI Act. The stand taken by the University taking recourse to the provisions contained under Section 16(b) of the Act is not applicable as the casual employees are not getting the benefit of Contributory Provident Fund or Old Age Pension Rule. Even though it is admitted in the further affidavit so filed by the OUAT that the employees of the University are covered under the provisions of CPF and Old Age Pension Rule, but no specific averment is made therein that such benefit is also extended to casual employees to which the Petitioner Union represents. It is also found from the record that Opp. Party Nos.4 & 5 time and again though have issued direction to the University to register the Workmen under the provisions of EPF & ESI Act but the University all through on the face of Annexure-13 order is not taking any action to extend the benefit.

10.1. Therefore, in view of such materials available in the record and the decision relied on by the learned Senior Counsel appearing for the Petitioner, this Court is of the view that the NMR/DLR/Casual workmen working in OUAT are eligible for their coverage under the provisions of EPF & ESI Act. While holding so, this Court directs Opp. Party Nos.2 & 3 to extend the benefit of EPF & ESI in favour of the casual employees working in the OUAT within a period of three (3) months from the date of receipt of this order.

The Writ Petition is accordingly allowed and as such the same stands disposed of.

2023 (II) ILR – CUT - 1244

SANJAY KUMAR MISHRA,J.

W.P.(C) NO. 27906 OF 2019

JANAKI BALLAV MOHANTY .....Petitioner

.V.

PRINCIPAL SECRETARY TO GOVT., DEPARTMENT OF WATER RESOURCES (DOWR),BHUBANESWAR & ORS. .....Opp. Parties

W.P.(C) NO.18737 OF 2019
NIRANJAN MOHANTY-Vs- PRINCIPAL SECRETARY TO GOVT., DEPARTMENT OF WATER RESOURCES (DOWR), BHUBANESWAR & ORS.

W.P.(C) NO.18738 OF 2019
ABHIMANYU SASMAL-Vs- PRINCIPAL SECRETARY TO GOVT., DEPARTMENT OF WATER RESOURCES (DOWR), BHUBANESWAR & ORS.

W.P.(C) NO.27909 OF 2019
JAGADISH CHANDRA JENA -Vs- STATE OF ORISSA & ORS.

SERVICE LAW – No work no pay – If an employee is prevented by the employer from performing his duties whether the employee can be blamed for not performing the work and no work no pay principles will applicable to him – Held, No. – The principle is not applicable to the employee where they have been prevented to perform their duty.

(Para 22-23)

Case Laws Relied on and Referred to :-

1. AIR 2013 SC 3066 : State of Uttar Pradesh Vs. Dayanand Chakrawarty & Ors.
2. 2015 (II) OLR 214 : Premalata Panda Vs. State of Odisha & Ors.
3. (WP(C) No.15225 : Ullash Chandra Khandayatray Vs. State of Odisha & Ors.
4. IR 2021 SC 3457:Okhla Industrial Development Authority & Ors. Vs. B.D. Singhal & Ors.
5. AIR 2006 SC 365 : Harwindra Kumar Vs. Chief Engineer, Karmik & Ors.
6. 2007 (11) SCC 507 : Chairman, Uttar Pradesh Jal Nigam & Anr Vs. Radhey Shyam Gautam and Anr.

For Petitioners : Miss. Deepali Mahapatra,(in all Writ Petitions)

For Opp. Parties : Mr. Saroj Kumar Samal (AGA)
Mr. C.A. Rao, Sr. Adv.
Mr. S.K. Behera

JUDGMENT Date of Hearing:04.07.2023 & Date of Judgment:14.07.2023

SANJAY KUMAR MISHRA,J.

As W.P.(C) Nos. 18737, 18738 and 27909, all of 2019, are having identical issue, so also the impugned Orders passed therein being identical to the present Writ Petition, all the matters were heard together and are disposed of vide this common judgment and W.P.(C) No.27906 of 2019 is taken up as lead case.

2. The Petitioner, who was working as a Junior Assistant-Cum-Typist in the office of the Water and Land Management Institute (WALMI), has filed this Writ Petition seeking direction to the Opposite Parties to pay his salary w.e.f. 01.05.2018 to 26.10.2018 and to quash the letter dated 18.03.2019 under Annexure-8.

3. The factual matrix of the case, in nutshell, is that the Petitioner was appointed as Junior Assistant-Cum-Typist under the WALMI vide office order dated 01.12.1989, pursuant to which he joined on 13.12.1989. After completion of 6 years, he was given promotion to the rank of Senior Assistant vide office order dated 15.03.1995 .He served in the said post for more than 23 years without any complaint from any quarter.

4. While the matter stood thus, by virtue of the Resolution dated 28.06.2014, the State Government enhanced the age of superannuation from 58 to 60 years. However, the WALMI, though a Government of Odisha Undertaking, did not implement the said Resolution of the Government. The Petitioner, before attaining the age of superannuation i.e. 58 years, was served with a notice of superannuation vide letter dated 21.04.2018. It is stated that before service of said notice, the Petitioner approached this Court in W.P.(C) No.2577 of 2018 praying therein to enhance his age of superannuation from 58 to 60 years. The said Writ Petition along with similar Writ Petitions i.e. W.P.(C) Nos.3539 & 3540 of 2018, were disposed of by this Court vide a common order dated 19.04.2018 with the following observation:

> " W.P.(C) Nos.3539, 2577 & 3540 of 2018
>
> Heard Mr. Nirmal Kishore Rath & Mr. Asim Amitabh Dash, learned counsels appearing for the petitioners and Mr. B.P. Tripathy, learned Additional Government Advocate appearing for the State-opposite parties and Mr. C.A. Rao, learned counsel appearing for the Water and Land Management Institute (WALMI).
>
> The grievance raised in this writ petition is that the petitioners who are the employees of Water and Land Management Institute (WALMI) which is under the Department of Water and Resources and the service conditions related to the age of superannuation was/is 58 years, but the State Government by virtue of Resolution dated 28.06.2014 has taken decision to enhance the age of superannuation from 58 to 60 years.
>
> **The grievance of the petitioners is that although the State Government has enhanced the age of superannuation from the age 58 years to 60 years, but the said benefit has not been extended in their favour, even though the similar nature of grievance, this Court has adjudicated the issue in the case of Premalata Panda v. State of Odisha and another, 2015(II) OLR 214.**
>
> Learned counsels appearing for the petitioners submit that the matter requires consideration in the light of the judgment rendered in the case of Premalata Panda (supra).
>
> They further submit that **in the case of WALMI also one Sri Dhaneswar Sethi has approached this Court by filing a writ petition being W.P.(C) No.5423 of 2015 and this Court, while disposing of that writ petition, has remitted the matter to consider the case of the petitioners to take decision in the light of the case of Premalata**

Panda (supra) and as such, they submit that the matter of the petitioners is also required to be considered, taking into consideration the fact that some of the petitioners are to attain the age of superannuation i.e. the age of 58 years on 30.04.2018.

Mr. Rao, learned counsel appearing for the opposite party-WALMI, however, has disputed the contention of the petitioners by submitting that the judgment rendered in the case of Premalata Panda (supra) on fact is distinguishable. However, he submits that the case of Sri Dhaneswar Sethi is now being considered but decision has not yet been taken.

Mr. B.P. Tripathy, learned Additional Government Advocate appearing for the State-opposite parties, however, submits that so far as the Government Resolution dated 28.6.2014 is concerned, it is not in dispute, but so far as the claim of the petitioner, it is to be decided by the opposite party-WALMI.

Heard the learned counsel for the parties and on their rival submissions, it is evident that the issue raised in these cases are for enhancement of age of superannuation from 58 years to 60 years by the employees who are working under WALMI, in the light of the Government Resolution dated 28.6.2014.

The petitioners have put reliance upon the judgment in the case of Premalata Panda (supra) as also in the case of Sri Dhaneswar Sethi v. State of Odisha and others in W.P.(C) No.5423 of 2015.

This Court, without making any comment on the merit of the claim of the petitioners, is of the view that **since this Court has already passed order in the case of Sri Dhaneswar Sethi in W.P.(C) No.5423 of 2015 whereby and whereunder this Court has directed the opposite party-WALMI to take decision within a stipulated time on its own merit,** however Mr. Rao has prayed for adjournment for filing counter affidavit, **but this Court thinks that since the opposite parties are to take decision in the light of the orders already passed as above, as such, this Court thinks it proper to dispose of the writ petition directing the opposite party-WALMI to decide the claim of the petitioners on its own merit by taking decision within three weeks from the date of receipt of certified copy of this order."** (Emphasis supplied)

5. It has been averred that in spite of order of this Court in the aforesaid writ petitions, the Opposite Parties superannuated the Petitioner w.e.f. 30.04.2018 for which he initiated contempt proceeding, which was registered as CONTC No.1111 of 2018. It was disposed of on 26.07.2018 with a direction to the Opposite Parties to comply the Order dated 19.04.2018 passed in the said W.P.(C) Nos.2577, 3539 and 3540 of 2018. It is further averred that before disposal of the Contempt Petition, the Opposite Party No.1 directed Opposite Party No.3 to submit the financial implication relating to enhancement of age of superannuation. Thereafter, the Opposite Party No.3 vide letter dated 27.10.2018 enhanced the age of Petitioner from 58 to 60 years. Accordingly, the Petitioner joined in his duty on 27.10.2018 and was getting his salary regularly. But, the Opposite Parties have not paid his salary w.e.f. 01.05.2018 to 26.10.2018. Due to non-payment of salary for the aforesaid period, the Petitioner made a representation on 01.01.2019 to the authority to pay his salary w.e.f. 01.05.2018 to 26.10.2018. On receipt of the representation,

the Opposite Party No.1, vide letter dated 18.03.2019, rejected the same treating the said period of the Petitioner as 'no work no pay'. It is further stated that the Petitioner along with similarly placed four persons again represented through Opposite Party No.3 to the Opposite Party No.1, reiterating the same plea, which was taken earlier in his representation to pay the salary for the said period.

6. On being noticed, the Opposite Party Nos. 2 and 3 (WALMI) have filed a detailed Counter Affidavit taking a stand therein that the superannuation age of the Petitioner has been enhanced from 58 to 60 years with immediate effect vide WALMI office order dated 27.10.2018 and the Petitioner joined in service on 27.10.2018. The period of absence from duty of the Petitioner along with similarly situated employees of WALMI has been treated as 'no work no pay' in terms of Department of Water Resources letter dated 18.03.2019.

7. Though in addition to the prayer for payment of salary of the Petitioner w.e.f. 01.05.2018 to 26.10.2018, a prayer has been made to quash the letter dated 18.03.2019 (Annexure-8) of the Under Secretary to Government, Government of Odisha, Department of Water Resources, Bhubaneswar, vide which it was communicated to the Director, WALMI, Cuttack to treat the said period of Petitioner as "no work no pay", no Counter Affidavit has been filed by the State-Opposite Party No.1 to justify the said communication/decision.

8. Miss. Mahapatra, learned Counsel for the Petitioner submitted that in view of the ruling of the Apex Court in **State of Uttar Pradesh v. Dayanand Chakrawarty and others**, reported in AIR 2013 SC 3066, the principle of 'no work no pay' is not applicable to the Petitioner, who is guided by specific rules like leave rules etc, relating to absence from duty. Such principle can be applied to only those employees who were not guided by any specific rules relating to absence from duty. She further submitted that if an employee is prevented by the employer from performing his duties, the employee cannot be blamed for having not worked, and the principle of 'no work no work' will not be applicable to such employee. To substantiate her argument, Miss. Mahapatra further relied upon the judgment of this Court in case of **Premalata Panda v. State of Odisha and others**, reported in 2015 (II) OLR 214.

9. Mr. Rao, learned Senior Advocate for the WALMI submitted that vide letter dated 18.03.2019, the Government instructed WALMI authority to the effect that the entitlement for the relevant period of absence in favour of the Petitioner along with four other employees be worked out notionally and salary be paid to them accordingly from the date of their joining in service. Mr. Rao further submitted that the Resolution of the Finance Department, as at Annexure-1, with respect to enhancement of retirement age on superannuation of State Government employees is not directly applicable to the employees of WALMI as it is a Society registered under Societies Registration Act, 1860, which is a Grant-In-Aid Institute of Water Resources Department. It was further submitted by Mr. Rao that as per letter dated

18.03.2019 of the Government (Annexure-8), the Petitioner is not entitled for any wages as he has not worked for the said period, which is treated as 'no work no pay'. To substantiate his argument, Mr. Rao relied on a recent judgment of this Court in **Ullash Chandra Khandayatray v. State of Odisha and others** (WP(C) No.15225 of 2015, disposed of on 20.09.2022), so also judgment of the Apex Court in **New Okhla Industrial Development Authority and others v. B.D. Singhal and others**, reported in AIR 2021 SC 3457.

10. From the pleadings on record, so also submissions made by the learned Counsel for the Parties, it is to be considered as to whether the principle of 'no work no pay' will be applicable to the Petitioner for the period from 01.05.2018 to 26.10.2018 and whether the State-Opposite Party No.1 was justified to issue letter dated 18.03.2019, as at Annexure-8, vide which it was communicated to WALMI authority to treat the said period of the Petitioner as 'no work no pay' and it was ordered by State-Opposite Party No.1 to work out the said period of absence notionally and to pay the salary of the Petitioner and similarly placed others accordingly from the date of their rejoining in service.

11. In **Premalata Panda** (supra), this Court, relying on the judgments of the Apex Court in **Dayanand Chakrawarty** (supra), **Harwindra Kumar v. Chief Engineer, Karmik & others**, reported in AIR 2006 SC 365, so also **Chairman, Uttar Pradesh Jal Nigam & another v. Radhey Shyam Gautam and another**, reported in 2007 (11) SCC 507 and various Orders passed by it, vide Paragraph-16, held as follows:

> **"16.** Keeping in view the law laid down by the apex Court in **Dayanand Chakrawarty** (supra), this Court is of the opinion that the following consequential and pecuniary benefits should be allowed to different sets of CDA employees including the Petitioner who were ordered to retire at the age of 58 years and this Court so directs.
>
> **(a) The employees, who moved the Court of law irrespective of the fact whether interim order was passed in their favour or not, shall be entitled to full salary up to the age of 60 years and arrear salary shall be paid to them after adjusting the amount, if any, paid.**
>
> (b) The employees, who never moved before any Court of law and had retired on attaining the age of superannuation, shall not be entitled for arrears of salary. However, they will be deemed to be continuing in service up to the age of 60 years. In their case, the CDA shall treat their age of superannuation as 60 years, fix the pay accordingly and re-fix the retirement benefits like pension, gratuity etc. On such calculation, they shall be entitled to arrears of retirement benefits after adjusting the amount already paid.
>
> (c) Needless to say that the arrears of salary and arrears of retirement benefits should be paid to such employees within a period of six months from the date of receipt of copy of the judgment.
>
> (d) **So far as the petitioner is concerned, since she had approached this Court before completion of 58 years of age and during pendency of the writ petition, she was made to retire on attaining the age of 58 years, this Court directs the opposite party**

> **no.2 to bring her back into service forthwith and allow her to continue till she attains the age of 60 years and grant all the consequential service and financial benefits as due and admissible to her in accordance with law."** (Emphasis supplied)

Relying on the said judgment of this Court, the Writ Petitions preferred by the present Petitioner and similarly placed others were disposed of by this Court on 19.04.2018. A contempt proceeding being initiated based on the said Order of this Court, the Petitioner and similarly placed others were reinstated in service and were permitted to continue in employment till they attained the age of 60 years.

12. Admittedly, the judgment passed in **Premalata Panda** (supra), has attained finality. As relied upon by the learned Senior Counsel for the WALMI, in Ullash Chandra Khandayatray's case, the issue before this Court was whether the action of Government of Odisha in Finance Department to enhance the retirement age of State Government employees vide Resolution dated 28.06.2014 ought to have been made applicable retrospectively to the employees of Odisha State Financial Corporation (OSFC), who have already been superannuated. The said judgment was passed relying on the judgment of the Apex Court in **New Okhla Industries Development Authority** (supra). In the said judgment, the issue before the Apex Court was whether the High Court can give direction to the authority to the effect that decision of the Employer to enhance the age of retirement shall apply retrospectively to the employees, who had already been superannuated before the said decision was taken by the Employer. While deciding the said issue, the Apex Court took note of its judgments in **Harwindra Kumar** (supra) and **Chairman, Uttar Pradesh Jal Nigam** (supra) and in Paragraph-25 of the said judgment, it was held as follows:

> "25. The reliance placed by the Respondents on Dayanand Chakrawarthy (supra) to argue that they were willing to work till they attained the age of sixty years but were not permitted to, and thus the principle of 'no work no pay' would not be applicable is misplaced. In Dayanand Chakrawarthy, the issue before the two judge Bench of this Court was whether prescription of different ages of retirement based on the mode of Recruitment under the UP Jal Nigam (Retirement on attaining age superannuation) Regulations, 2005 was unconstitutional for violating Article 14 of the Constitution. This Court held that the differential superannuation age was discriminatory. However, by virtue of Regulation 31 of the UP Jal Nigam Services of Engineers (Public Health Branch) Regulations, 1978 the service conditions of State government employees is applicable to the UP Jal Nigam employees. Therefore when the Jal Nigam through an Office memorandum had resolved that the age of retirement for its employees shall be fifty eight years, though it was sixty years for State government employees, it was set aside by this Court in Harwinder Kumar v. Chief Engineer, Karmik MANU/SC/2030/2005 : (2005) 13 SCC 300. In harwinder Kumar and the subsequent cases (U.P. Jal Nigam v. Jaswant Singh MANU/SC/5073/2006 : (2006) 11 SCC 464; U.P. Jal Nigam v. Radhey Shyam Gautam MANU/SC/7258/2007 : **(2007) 11 507) involving the age of retirement of the UP Jal Nigam employees, this court had held that employees who had approached the courts shall be entitled to full salary until the age of sixty years.** It was in this context that a two judge bench of this Court speaking through Mukhopadhaya made the following observation in **Dayanand Chakrawarthy**:

> **48.**……..We observe that the principle of "no pay no work" is not applicable to the employees who were guided by specific Rules like Leave Rules, etc. relating to absence from duty. Such principle can be applied to only those employees who were not guided by any specific Rule relating to absence from duty. **If an employee is prevented by the employer from performing his duties, the employee cannot be blamed for having not worked, and the principle of "no pay no work" shall not be applicable to such employee.**
>
> In Dayanand Chakrawarthy the court directed payment of arrears deeming the employees to have worked till sixty years in spite of no interim order being issued in that regard because (i) the Office memorandum was held ultra vires; (ii) **Harwinder Kumar, Jaswant Singh, and Radhey Shyam Gautam had already held that the age of retirement of the Jal Nigam employees shall be 60 years unless a Regulation prescribing a lower retirement age is issued in terms of Regulation 31**, and had extended this benefit to all the parties who had filed writ petitions. Therefore, the above observation must be read in the context of the distinct factual situation in the case.**"**
>
> (Emphasis supplied)

13. In **Harwindra Kumar** (supra), at Paragraphs 9, 10 and 11, the apex Court held as follows:

> **"**9. Reference in this connection may be made to a decision of this Court in the case of V.T. Khanzode and others v. Reserve Bank of India and another AIR 1982 SUPREME COURT 917. In that case, under Section 58(1) of the Reserve Bank of India Act, powers were conferred upon the Central Board of Directors of the Bank to make regulations in order to provide for all matters for which provision was necessary or convenient for the purpose of giving effect to the provisions of the Act which section in the opinion of their Lordships included the power to frame regulation in relation to service conditions of the bank staff. In that case, instead of framing regulations, the bank issued administrative circulars in relation to service conditions of the staff acting under Section 7(2) of the Reserve Bank of India Act which was a general power conferred upon the bank like Section 15(1) of the present Act. It was laid down that "there is no doubt that a statutory corporation can do only such acts as are authorized by the statute creating it and that, the powers of such a corporation cannot extend beyond what the statute provides expressly or by necessary implication." It was further laid down that "so long as staff regulations are not framed under Section 58(1), it is open to the Central Board to issue administrative circulars regulating the service conditions of the staff, in the exercise of power conferred by Section 7(2) of the Act." As in the said case, no regulation was at all framed under Section 58 of the Reserve Bank of India Act, as such, the administrative circulars issued by the Central Board of Directors of the Bank under Section 7(2) of the Reserve Bank of India Act in relation to service conditions were held to be in consonance with law and not invalid.
>
> **10. In the present case, as Regulations have been framed by the Nigam specifically enumerating in Regulation 31 thereof that the Rules governing the service conditions of government servants shall equally apply to the employees of the Nigam, it was not possible for the Nigam to take an administrative decision acting under Section 15(1) of the Act pursuant to direction of the State Government in the matter of policy issued under Section 89 of the Act and directing that the enhanced age of superannuation of 60 years applicable to the government servants shall not apply to the employees of the Nigam. In our view, the only option for the Nigam was to make suitable amendment in Regulation 31 with the previous approval of**

the State Government providing thereunder age of superannuation of its employees to be 58 years, in case, it intended that 60 years which was the enhanced age of superannuation of the State Government employees should not be made applicable to employees of the Nigam. It was also not possible for the State Government to give a direction purporting to Act under Section 89 of the Act to the effect that the enhanced age of 60 years would not be applicable to the employees of the Nigam treating the same to be a matter of policy nor it was permissible for the Nigam on the basis of such a direction of the State Government in policy matter of the Nigam to take an administrative decision acting under Section 15(1) of the Act as the same would be inconsistent with Regulation 31 which was framed by the Nigam in the exercise of powers conferred upon it under Section 97(2)(c) of the Act.

11. For the foregoing reasons, we are of the view that so long Regulation 31 of the Regulations is not amended, 60 years which is the age of superannuation of government servants employed under the State of Uttar Pradesh shall be applicable to the employees of the Nigam. However, it would be open to the Nigam with the previous approval of the State Government to make suitable amendment in Regulation 31 and alter service conditions of employees of the Nigam, including their age of superannuation. It is needless to say that if it is so done, the same shall be prospective." (Emphasis supplied)

14. This Court in **Premalata Panda** (supra), vide Paragraph 8 held as follows:

"8. It appears that the employee of the Greater Cuttack Improvement Trust were transferred to CDA by virtue of Section 128-2(a) of the Development Authority Act, 1982. Greater Cuttack Improvement Trust, in its resolution No11/48, dated 08.02.1971 in Annexure-B/2, resolved as under:

"Item No.11/48 **adoption of Orissa Service code and T.A. Rules govern Trust employees**.

The Trust adoption the Orissa service Code and T.A. Rules and resolved that the Trust employees shall be governed by the provisions of the Orissa Service Code and T.A. Rules."

The authority of CDA in its resolution No.4 dated 11.06.1984 adopted the Government Servant Conduct Rule, Orissa Civil Services (Classification, Control and Appeal) Rule and T.A. Rule for the employees of CDA. As per rule-71 of the Orissa Service Code, the retirement age of the employees of the Government excepting Group-D has been fixed at 58 years. In view of such adoption of Orissa Service Code, the petitioner was to retire at the age 58 years. But subsequently, the Government amended that Rule 71(a) by enhancing the age of superannuation of the State Government employees from 58 years to 60 years and consequential resolution was passed vide Annexure-3 dated 28.06.2014, by which benefit of enhancement of age of superannuation from 58 years to 60 years has been granted to the State Government employees. **Since CDA has adopted the Orissa Service Code for its employees in absence of Rules framed by it, the enhancement age of superannuation made by the State Authority by virtue of the resolution vide annexure-3 so far it relates to the State Government Employees, is also applicable to the employees of the CDA**." (Emphasis supplied)

15. This Court in **Premalata Panda** (supra), relying on the judgments of the Apex Court as detailed above, further held that the employees, who moved the Court

of law irrespective of the fact whether interim order was passed in their favour or not, shall be entitled to full salary up to age of 60 years and arrear salary shall be paid to them after adjusting the amount, if any, paid. Since the Petitioner had approached this Court before completion of 58 years of age and during pendency of the Writ Petition, she was made to retire on attaining the age of 58 years, the Employer was directed to bring the Petitioner back into service forthwith and allow her to continue till she attains the age of 60 years and grant all the consequential service and financial benefits, as due and admissible to her, in accordance with law.

16. In the present case, the Petitioner and similarly placed others approached this Court before they attained the age of superannuation of 58 years, relying on the judgment in **Premalata Panda** (supra), so also Order passed in Dhaneswar Sethi in W.P.(C) No.5423 of 2015, with a prayer to extend the benefit of enhancement age of superannuation from 58 to 60 years in terms of the decision of the State Government. Without carrying out the said direction given by this Court in W.P.(C) No.3539 of 2018 and batch, the Petitioner and similarly placed others were superannuated at the age of 58 years . Contempt proceeding being initiated by Petitioner and others, being directed in the said contempt proceeding for compliance of Order dated 19.04.2018 passed by this Court in the Writ Petition, vide letter dated 27.10.2018, the age of the Petitioner was enhanced from 58 to 60 years . He joined his duty on the very same day and was allowed to continue till he attained the age of 60 years. However, the salary for the period from 01.05.2018 to 26.10.2018 i.e. the date of alleged retirement till his re-engagement, was not paid to him, which is the subject matter of the present Writ Petition.

17. In view of the facts as detailed above, so also submissions made and the judgments cited by the learned Counsel for the Parties, this Court is of the view that the facts and circumstances of the present case are different from the facts and issue involved in **New Okhla Industries Development Authority** (supra), based on which a co-ordinate Bench in **Ullash Chandra Khandayatray** (supra) dismissed the Writ Petition with an observation that the prayer of the Petitioner for retrospective enhancement of age of retirement does not merit consideration.

18. Admittedly, despite direction of this Court in W.P.(C) No.3539 of 2018 and batch to take a decision on the representation of the Petitioners, before taking any decision thereon, the present Petitioner was superannuated from service w.e.f. 30.04.2018. However, on being directed by this Court in CONTC No.1111 of 2018 to comply the Order dated 19.04.2018 passed in the Writ Petitions, instead of defending its action in superannuating the Petitioner at the age of 58 years to be legal and justified, with due approval of the State Government, WALMI authority extended the age of superannuation of the Petitioner to 60 years and the Petitioner was reinstated in service on 27.10.2018. From the conduct of the WALMI it can be well construed that as the case of the Petitioner and similarly placed others is squarely covered by judgment of this Court in **Premalata Panda** (supra), his and

similarly placed others age of retirement were extended to 60 years and the Petitioner reported for duty on 27.10.2018.

19. As there is no such specific averment in the Writ Petition, so also in the Counter Affidavit filed by WALMI, a query being made, learned Counsel for the Petitioner, so also Counsel for WALMI fairly submitted that there is no such specific approved Service Rules of WALMI governing the service conditions of its employees, including Rules regarding age of superannuation. Learned Counsel for the WALMI further submitted that by virtue of Governing Council's Resolution, the Odisha Service Code has been adopted and is made applicable to employee of WALMI.

20. Despite such submission made by the learned Counsel for the Parties, on being directed, both the learned Counsel for the Petitioner so also the Deputy Director, WALMI, being physically present before this Court on 04.07.2023, filed their respective documents, such as Bye-laws of WALMI, Proceeding of the 21st Governing Council Meeting of WALMI and the draft "The Water And Land Management Institute Odisha Employees Service Rules, 2018."

Item No.19 of the said Proceeding of 21st Governing Council Meeting of WALMI held on 20.07.1994 in the office chamber of the Commissioner-Cum-Secretary to Government, Department of Water Resources, Orissa, Bhubaneswar, being germane to the present *lis,* is extracted below:

> Item.19 : Applicability of Orissa service Code. T.A. Rules, circulars, orders etc. of Govt. of Orissa to WALMI, Orissa.
>
> **It has been approved that till finalization of own service rules of WALMI, which is under preparation by Sri R.C. Das, Ex- Addl. Secretary to Govt., Deptt. of Revenue, the Orissa Service Code, T.A. Rules, Govt. Servant Conduct Rules and other Rules, Circulars, orders etc. of Govt. of Orissa as issued and amended from time to time any be made applicable mutatis mutandis in WALMI, Orissa.**
>
> However, Director, WALMI should expedite the preparation of own service rules by Sri Das, Ex. Addl. Secy. and put up the same for approval of the President, WALMI."

As to the Draft Service Rules, 2018, the Sub-Rule (5) in Rule 1 prescribes that the said Rules shall come into force on such date as the Government may, by order specify. Sub-Rule (5) in Rule 1 of the said Rules, 2018 is extracted below:

> "(5) They shall come into force on such date as (with effect from the date of their publication in Odisha Gazette after the approval of the Governing Council and Government) the Government may, by order specify.

Similarly, Rule 18 of the said proposal Rules, 2018, which is pertaining to age of superannuation of employees of WALMI, is reproduced below:

> "18. Age of Superannuation of employees of WALMI
>
> (1) **The age of superannuation of all employees of WALMI shall be 60 years or as amended by the Government of Odisha from time to time**.

> (2) An employee shall retire on the last day of the month in which he or she completes the age of superannuation. But whose date of birth is first day of the month shall retire from service in the afternoon of the last day of the preceding month."
>
> (Emphasis supplied)

21. The Officer of WALMI, being present before this Court, filed various documents on 04.07.2023, including photocopy of the Proceedings of the 39th Governing Council Meeting of WALMI. Agenda No.7 of the said Proceedings of Governing Council Meeting of WALMI, being germane to the present issue, is extracted below:

> "AGENDA NO.-07
>
> Implementation of Superannuation age to 60 years instead of 58 years in respect of WALMI Employees.
>
> (A) Govt. in DoWR have been pleased to enhance the superannuation age from 58 years to 60 years for the petitioners like Sri Niranjana Mohanty, VAW, Sri J.B. Mohanty, Sr. Asst. Sri J.C. Jena, Dispatcher, Sri U.C. Rath, Laboratory Attendant & Sri A. Sasmal, Jr. Clerk of WALMI based on the orders of the Hon'ble High Court of Orissa and further suggested to place the matter before the G.C. for approval.
>
> The enhancement of superannuation age from 58 years to 60 years was approved by the G.C. for the 5 nos. of employees as stated above in (A) with necessary deployment for effective utilization of their services."

22. Admittedly, in terms of Sub-Rule (5) in Rule 1 of the said Rules, 2018, the proposed "Water and Land Management Institute Odisha Employee's Service Rules, 2018" is yet to come into force as is yet to be approved by the Governing Council and the Government, followed by publication in the Gazette. Hence, this Court is of the view that in terms of Item No.19 of the Proceeding of 21st Governing Council Meeting of WALMI dated 20.07.1994, as extracted above, till coming into force of proposed Employees' Service Rules - 2018, the Orissa Service Code, T.A. Rules, Government Servant Conduct Rules and other Rules, Circulars, orders etc. of Government of Orissa, as issued and amended from time to time, shall be made applicable mutatis mutandis in WALMI, Orissa, including the age of superannuation and the case of the Petitioner and similarly placed others are squarely covered by the judgment of this Court in **Premalata Panda** (supra), which is based on the judgments of the Apex Court.

23. This Court is of further view that the judgments cited by the learned Senior Counsel for the Opposite Party Nos. 2 and 3 (WALMI) are not applicable to the facts and circumstances of the present case. Rather, the judgments of the Apex Court in **Harwindra Kumar** (supra), **Dayanand Chakrawarty** (supra), **Chairman, Uttar Pradesh Jal Nigam & another** (supra), so also judgment of this Court in **Premalata Panda** (supra) are squarely applicable to the case of the Petitioner and he is entitled to salary for the period from 01.05.2018 to 26.10.2018, as prayed for and the principle of "no work no pay" is not applicable to the case of the Petitioner.

24. Further, this Court is of the view that the communication made by the State Opposite Party No.1 vide letter dated 18.03.2019 (Annexure-8), being without any basis and cogent reason , contrary to the judgment of the Apex Court, so also this Court, is liable to be set aside. Accordingly, the same is set aside.

25. The W.P.(C) Nos.18737, 18738 and 27909, all of 2019, being identical to W.P.(C) No.27906 of 2019 with identical prayer, the impugned Order/letter dated 18.03.2019 in all the connected Writ Petitions are accordingly set aside.

26. In view of the above, the Opposite Parties, more particularly Opposite Party Nos. 2 and 3, are directed to pay the salary of all the Petitioners, as due and admissible, for the period as prayed for, within a period of four weeks from the date of communication of certified copy of this judgment.

27. Accordingly, all the Writ Petitions stand disposed of, with the above direction. No order as to costs.

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2023 (II) ILR – CUT - 1255

SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 5668 OF 2016

RABIRATAN SAHU & ORS. .....Petitioners

.V.

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

SERVICE LAW – Regularization – The Petitioners were engage in the vacant posts on contractual basis after obtaining due approval from Orissa State Agricultural Market Board with effect from 31.08.2007 – The authority rejected the representation for regularization – Effect of – Held, direction issued to the Opp. Parties to regularize the services of the petitioners and grant them all consequential service and financial benefits as due and admissible by making due calculation thereof within period of four months. (Para 21-29)

Case Laws Relied on and Referred to :-

1. (2010) 9 SCC 247: State of Karnataka & Ors. Vs. M.L. Kesari & Ors.
2. (2018) 8 SCC 238 : Narendra Kumar Tiwari & Ors. Vs. State of Jharkhand & Ors.
3. (2013) 145 SCC 65 : Nihal Singh & Ors. Vs. State of Punjab & Ors.
4. 2020 (I) ILR-CUT 68 : UCO Bank & Ors. Vs. Sk. Fayajjudin.
5. W.P.(C) 18298 of 2014 : Padmanava Pradhan & Ors. Vs. State of Odisha & Ors
6. 2017 (II) ILR-CUT : Sanatan Sahoo Vs. State of Odisha & Ors.
7. W.P.(C) No.24473 of 2012 : Anu Charan Patra Vs. Orissa State Agriculture and Marketing Board & Ors.

8. WPC(OAC) No.2818 of 2014 : Sunil Barik Vs. State of Odisha & Ors.
9. W.P.(C) No.20518 of 2010 : Ranjeet Kumar Das Vs. State of Orissa & Ors.
10. (2006) 4 SCC 1 : Secretary State of Karnataka & Ors. Vs. Umadevi & Ors.
11. (2010) 9 SCC 247 : State of Karnataka & other Vs. M.L. Kesari & Ors.
12. AIR 2001 SC 152 : Praveen Singh Vs. State of Punjab.
13. AIR 2000 SC 3689 : Om Kumar Vs. Union of India.
14. (2017) 3 SCC 410 : State of Jammu and Kashmir Vs. District Bar Association, Bandipora.

For Petitioners : Mr. S.D. Routray

For Opp. Party : Mr. G.N.Rout, A.S.C.
Mr. P.C. Panda

JUDGMENT Date of Hearing: 11.07.2023: Date of Judgment: 21.07.2023

SANJAY KUMAR MISHRA, J.

The Petitioners, who are working as Yardman/Watchman on contractual basis in the Regulated Market Committee, Bargarh, shortly, RMC Bargarh, have preferred the present Writ Petition for quashing of the Order dated 9th September, 2015 passed by the Collector-Cum-Chairman, Regulated Market Committee, Bargarh (Opposite Party No.5), as at Annexure-14 whereby, their representation for regularization of services against the vacant posts of Yardman/Watchman was rejected. Also a prayer has been made seeking for a direction to the Opposite Party Nos.2 to 5 to regularize their services and extend all such benefits, as is due and admissible to the posts of Yardman/Watchman.

2. The case of the Petitioners, in short, is that, the State Government under the Orissa Agricultural Produce Markets Act, 1956, shortly, Act, 1956, established Market Committee in every area in respect of agriculture produce. For superintendence over such Market Committee, by Notification in Official Gazette, a Board called the Orissa State Agricultural Market Board, shortly, OSAM Board, was established under Section 18-A of the Act, 1956. The OSAM Board vide Office Order No.4106 dated 03.08.2007, as at Annexure-1, intimated the Chairman/Secretary, RMC, Bargarh that the Board has been pleased to accord approval for creation of posts in different categories in favour of the RMC, Bargarh. Pursuant to the said Order, the RMC, Bargarh vide its Office Order No.754 dated 26.08.2007, as at Annexure-2, requested to accord necessary approval of OSAM Board, to fill up 45 numbers of vacant posts on contractual basis from amongst the existing NMRs. On 31.08.2007 proceeding of the Appointment and Promotion Sub-Committee of RMC, Bargarh was held in the Office of the Sub-Collector-Cum-Chairman, RMC, Bargarh, wherein it was decided to engage the present NMRs in the vacant posts on contractual basis after obtaining due approval from the OSAM Board. Thereafter, the OSAM Board, vide Order dated 20.09.2007, as at Annexure-5, intimated the RMC, Bargarh about the approval of the proceeding of the Sub-

Committee of RMC, Bargarh by the Hon'ble Minister, Co-operation-Cum-Chairperson, OSAM Board and advised to observe due formalities.

3. Pursuant to the Resolution of the Appointment and Promotion Sub-Committee of RMC, Bargarh and approval of OSAM Board, Bhubaneswar, the Sub-Collector-Cum-Chairman, RMC, Bargarh vide Order No.953 dated 09.10.2007, as at Annexure-6, appointed the Petitioners against the vacant posts on contractual basis with consolidated salary. Since then, the Petitioners are discharging their services on contractual basis. When no step was taken for regularization of the services of the petitioners, they made representation dated 05.08.2008 to the Secretary, RMC, Bargarh, as at Annexure-7. The Secretary, vide his letter dated 10.08.2008, submitted the said representation to the General Manager, OSAM Board. On receipt of the said representation, the General Manager, OSAM Board, vide his letter dated 13.08.2008, sought for certain clarification and justification from the Secretary, RMC, Bargarh, for regularization of services of the contractual workers. In response to the said letter, the Secretary, RMC, Bargarh, furnished necessary clarification assigning reasons for regularization of services of the Petitioners vide letter dated 22.09.2008, as at Annexure-10.

It is the further case of the Petitioners that after proper verification of clarification given by the Secretary, RMC, Bargarh, the General Manager, OSAM Board, approved the proposal of regularization of all 45 numbers of contractual workers including the Petitioners. Accordingly, the Petitioners' services were regularized vide Order dated 27.09.2008, as at Annexure-11. In spite of such regularization, the Petitioners were not treated as regular employees and denied regular scale of pay.

4. The Petitioners, finding no other alternative remedy, moved this Court by way of preferring W.P.(C) No.7905 of 2010. This Court, by its Order dated 06.07.2010, disposed of the said Writ Petition by directing the Petitioners to file fresh representation before Opposite Party No.5. Accordingly, the Petitioners made representation before the A.D.M-Cum-Chairman, Regulated Market Committee, Bargarh. The Opposite Party No.5 rejected the said representation in a mechanical manner. The Secretary of the Regulated Market Committee, vide Memo No.2049 dated 21.09.2010, communicated the same to the Petitioners.

5. Being aggrieved by the said Order dated 21.09.2010 passed by the Chairman, Regulated Market Committee, Bargarh the Petitioners again approached this Court in W.P(C) No.15279 of 2010. The said Writ Petition was also disposed of on 27.07.2015, directing the Petitioners to file a fresh representation highlighting all their grievances before the authorities. Pursuant to the said direction, the Petitioners again made a representation to the Opposite Party No.5 on 01.08.2015, as at Annexure-13. However, the Collector-Cum-Chairman, Regulated Market Committee, Bargarh, vide Order dated 9th September, 2015, as at Annexure-14,

rejected the representation of the Petitioners solely on the ground that irregularly recruited engagees cannot be regularized in blatant violation of settled recruitment norms and transgression of provisions of ORV Act.

6. Being aggrieved by the said order dated 9th September, 2015, passed by the Opposite Party No.5, as at Annexure-14, the Petitioners have approached this Court with the prayers as detailed above.

7. Tough this is a matter of the year 2016, no Counter Affidavit has been filed any of the Opposite Parties, including State, till date. Further, when the matter was taken up for final disposal, learned Counsel for the Opposite Party Nos.3 & 4 wanted to rely on the Counter Affidavit filed by the Board in WP(C) No.15279 of 2011, which has been annexed to the Writ Petition as Annexure-12. On consent of the learned Counsel for the parties, the matter was taken up for final disposal.

8. Heard Mr. S.D. Routray, learned Counsel for the Petitioners, Mr. G.N. Rout, learned Additional Standing Counsel and Mr. P.C. Panda, learned Counsel for Opposite Party Nos.3 & 4.

9. Mr. Routray, learned Counsel for the Petitioners submitted that while passing the impugned order, the Opposite Party No.5 has observed that there was an internal communication between the Secretary, RMC, Bargarh with General Manager, OSAM Board vide letter dated 22.09.2008 clarifying the position with respect to preparation of the merit list for observance of ORV Act. After clarifications were received, OSAM Board approved the proposal for regularization of service of the Petitioners vide Order dated 27.09.2008. But in paragraph-9 of the impugned order, the Collector has given an erroneous findings that there is no evidence on record to testify that the contractual employees i.e. the Petitioners, have been engaged in a transparent manner following the procedure of recruitment and adhering to the provisions of the ORV Act. He further submitted that while passing the impugned order, Opposite Party No.5 lost sight of the Counter Affidavit filed by the Secretary, RMC, Bargarh and the Chairman of the Regulated Market Committee in W.P.(C) No.15279 of 2011 (Annexure-12), wherein it has been admitted before this Court that the appointment of the Petitioners were as per the prevailing norms and prior approval of the OSAM Board with proper implementation of ORV Rules. Therefore, the findings of the present Opposite Party No.5 in the impugned Order with regard to non-observance of ORV Rules is not only illegal and arbitrary but also contrary to their own Counter Affidavit filed in W.P.(C) No.15279 of 2011 before this Court

10. Further, Mr. Routray submitted that the Collector referring to various Judgments of the apex Court had come to a conclusion that due to non-observance of the statutory provisions, regularization of services of the petitioners cannot be adhered to. But the Collector, while passing the impugned Order, has failed to appreciate the law laid down by the apex Court in its Constitution Bench judgment

in **Secretary, State of Karnataka and others Vs. Umadevi & others,** wherein it has been categorically held that when an incumbent ,who has been continuing against the sanctioned vacant post for more than ten years without intervention of any Court or Tribunal, not appointed illegally but irregularly, can be considered for regularization of his service.

11. It was submitted that the Collector, while passing the impugned order dated 9th September, 2015, observed that the representation of the Petitioners after due consideration is dismissed as devoid of merit as no irregularly recruited engagees can be regularized in blatant violation of settled recruitment norms and transgression of provisions of ORV Act. But at the same time , the Collector has failed to appreciate the law laid down by the apex Court in **State of Karnataka & other Vs. M.L. Kesari & others,** reported in (2010) 9 SCC 247, wherein the proposition of irregular and illegal appointment, as laid down by the apex Court in the case of **Uma Devi** (supra), has been clarified by observing that, if an incumbent has been appointed against the sanctioned post on contractual basis through a regular recruitment process but not illegal recruitment process, his case can be considered for regularization of service, if he has completed more than ten years of service without intervention of any Court or Tribunal.

The Collector also failed to appreciate the provisions provided under the Act, 1956, more particularly, Section-9 of the said Act and Rule 33 of the Orissa Agricultural Produce Markets Rules, 1958, which envisages that the Board is the OSAM Board and it is the competent authority to take a decision for regularization of service of Class-IV employees and there is no need of prior order or post facto approval of any other competent Authority. In this context, it has further been submitted that the Collector has once again failed to appreciate the Judgment of this Court in the case of **Umesh Dalai Vs. State of Orissa and others** passed in O.J.C. No.15810 of 2001 dated 24.04.2008, wherein the R.M.C. was directed by this Court to absorb those Petitioners on regular basis.

12. Learned Counsel for the Petitioners further submitted that the action of the Collector in not adhering to the decision of the OSAM Board dated 27.09.2008, by virtue of which the proposal for regularization of the Petitioners has been approved by the OSAM Board, is not only illegal and arbitrary but also contrary to the provisions of Orissa Agricultural Markets Produce Act and Rules framed thereunder inasmuch as the same is also discriminatory in nature and is in violation of Articles 14 & 16 of the Constitution of India.

13. To substantiate his argument, learned Counsel for the Petitioners placed reliance on the Judgments of the apex Court in **Narendra Kumar Tiwari & others Vs. State of Jharkhand & others**, reported in (2018) 8 SCC 238, in **Nihal Singh & others Vs. State of Punjab & others**, reported in (2013) 145 SCC 65, Judgment of the coordinate Bench of this Court in **UCO Bank & others Vs. Sk. Fayajjudin**,

reported in 2020 (I) ILR-CUT 68, Judgment dated 03.07.2020 passed in W.P.(C) No.18298 of 2014 (**Padmanava Pradhan & others Vs. State of Odisha & others)**, in **Sanatan Sahoo Vs. State of Odisha & others**, reported in 2017 (II) ILR-CUT 1059, Judgment dated 22.01.2019 passed in W.P.(C) No.24473 of 2012 (**Anu Charan Patra Vs. Orissa State Agriculture and Marketing Board and others)**, Judgment dated 22.06.2021 passed in WPC(OAC) No.2818 of 2014 (**Sunil Barik Vs. State of Odisha and others)**, Judgment of Division Bench of this Court dated 06.04.2018 passed in W.P.(C) No.20518 of 2010 (**Ranjeet Kumar Das Vs. State of Orissa and others)** and the Judgment of the Bombay High Court in **Sachin Ambadas Dawale & others Vs. State of Maharashtra & another,** passed in Writ Petition No.2046 of 2010 on 19.10.2013.

14. The facts, as detailed above, are undisputed. Though in the impugned rejection order dated 9th September, 2015, as at Annexure-14, a stand has been taken by the Collector-Cum-Chairman, Regulated Market Committee, Bargarh that there is no evidence on record to testify that the contractual employees i.e. the Petitioners, have been engaged in a transparent manner following the procedure of recruitment and adhering to the provisions of the ORV Act, contrary to the said stand taken in the rejection order, a Counter Affidavit was filed by the Opposite Party Nos.3 & 4 in the earlier Writ Petition i.e. W.P.(C) No.15279 of 2011 (Annexure-12). Paragraphs 5 to 11 of the said Counter Affidavit, being germane for proper adjudication of the present lis, are extracted below:

> *"5.* ***That considering the proposal; of regularization of the Petitioners' appointment and the clarification given by the deponent's office about the justification for such regularization General Manager of the Board was pleased to regularize their appointment vide his letter dated 27.09.2008 (Annexure-11) indicating that after regularization of the staff the expenditure should be within prescribed limit fixed by the relevant time.***
>
> *6. That however, since no final decision could be taken relating to regularization of their services, the petitioners approached this Hon'ble Court agitating their grievance by way of filing a writ petition vide W.P.(C) No.7904 of 2010 which was disposed of on 6.7.2010.*
>
> *7. That in obedience to the direction given by this Hon'ble Court in order dated 6.7.2010. The Chairman of R.M.C. while considering the case of the petitioners for regularization of their appointment gave emphasis on restriction imposed by the Commissioner-cum-Secretary to Government, Co-operation Department vide his letter bearing No.609/Co.op dated 3.3.2009, since the same was in operation then. In the said guidelines the limit for expenditure for the staffs salary was prescribed and in terms of conditions laid down in paragraph-3 of the said letter Bargarh R.M.C. is to be classified as an 'A' Class R.M.C. and as per the limitations stipulated in letter bearing No.609/Coop dated 3.3.2009, 10% of the revenue income could be spend towards salary of staffs. So after evaluating the revenue income and establishment expenditure of Bargarh R.M.C. for the financial year it was assessed that an additional expenditure of 17% was likely to be incurred on account of such regularization which was beyond the prescribed limit and since the establishment expenditure of the R.M.C. was much more*

than the prescribed limit, the opposite party no.5 did not have the occasion to consider the case of these petitioner favourably and accordingly had rejected their claim vide his order dated 21.9.2010. Now again being aggrieved by the said order, the petitioners have preferred the present writ petition. Photostat copy of letter No.609/coop dated 3.3.2009 is annexed herewith as Annexure-A/4.

8. That the deponent humbly submits after filing of this writ petition the competent authority of the State Government (High Power Committee being presided by Hon'ble Minister of Cooperation as its Chairman) have been pleased to make a revision of norms regarding establishment expenditure (salary/wages) of employees of Regulated Market Committee and while doing such exercise the earlier guideline under Annexure-A/4 was modified and the prescribed limits of expenditure on account of salary & wages of staff for an 'A' Class R.M.C. was enhanced from 10% to 30 %. Soon after this decision was taken by the High Power Committee, the Board informed all R.M.Cs of the State about the same vide its letter No.2156 dated 26.8.2011, the copy of which is annexed herewith as Annexure-B/4.

9. ***That in view of such modification in the restriction with regard to establishment cost of the R.M.C., the deponent humbly submits that the claim of the petitioners can be entertained and therefore their demand for regularization of their appointment which has already been approved by the Board can be fulfilled. The copy of the total revenue income & expenditure (Income & expenditure statement) for the marketing year 2012-13 clearly shows that the demands of the petitioners if allowed the expenditures to be incurred for their salary component shall be well within the prescribed limitations enumerated*** *in annexure-B/4. The copy of Revenue income and expenditure (Income & expenditure statement) for the marketing year 2012-13 annexed herewith as Annexure-C/4.*

10. ***That, in the committee meeting of R.M.C., Bargarh held on 23.03.2012 & 03.10.2012, Resolutions have been passed vide Resolution No.13 and Resolution No.12 respectively and it has also been decided in the said meetings to regularize the services of the contractual employees of the R.M.C., Bargarh. Resolutions copy of the meeting held on 23.3.2012 & 3.10.2012 is annexed herewith as Annexure-D/4****.*

11. ***That the deponent humbly submits that the appointments of the petitioners were done as per the prevailing norms and prior approval of the Board was duly obtained & in course of their engagement necessary compliance was made to observe proper implementation of O.R.V. Rules. Besides other employment Rules and procedures were properly followed. The deponent humbly submits as it transpires from the records available in the office of the deponent that the recruitment procedure followed for engagement of the petitioner was regular one and was made as per law and in view of relaxation made under Annexure-B/4, these petitioners claim requires to be considered in proper perspective by this Hon'ble Court and the deponent humbly submits in case their appointment is regularized, adequate funds can be made available by proper budgetary allocations for disbursement of salary components in favour of the petitioners, which will be well within the prescribed limit fixed by the Board****."*** (Emphasis supplied)

15. It is pertinent to mention here that the Secretary, R.M.C., Bargarh, vide letter dated 26th August, 2007 wrote to the General Manager, Odisha State Agricultural Marketing Board, Bhubaneswar, to fill up 44 numbers of base post lying vacant on contractual basis from amongst existing N.M.Rs followed by

communication dated 31st August, 2007 seeking for necessary approval for de-reservation of the concerned post on the ground that there are insufficient numbers of efficient N.M.Rs in the concerned post as per 80 point roster point and to take a decision to the said effect to de-reserve and fill up the said post for efficient management of day to day affairs of the R.M.C. Bargarh. Pursuant to the said communication, the Appointment and Promotion Sub-Committee of Regulated Market Committee, Bargarh, resolved to engage the N.M.Rs in the vacant posts on contractual basis after obtaining due approval from the O.S.A.M. Board for a period of one year initially, which can be renewed subsequently depending upon the requirement of the R.M.C. Further, a query being made by the General Manager, Odisha State Agricultural Marketing Board, Bhubaneswar vide letter dated 13th August, 2008, each query was answered by the Secretary, R.M.C., Bargarh vide communication dated 22nd September, 2008 as at Annexure-10, the contents of which are extracted below:

"OFFICE OF THE REGULATED MARKET COMMITTEE, BARGARH
No.84 Dated 22.9.2008

To

The General Manager,
Orissa State Agricultural Marketing Board,
Bhubaneswar

Sub: Clarification with justification for regularization of services of contractual workers.

Ref:- 1) This office letter No.726 dtd.11.8.2008
2) Your letter No.3242 dtd. 13.8.2008

Sir,

With reference to the letters on the subject cited above I am to submit herewith the compliance for further action at your end as desired.

1. ***The 45 nos. of contractual workers are working against the sanctioned posts****.*

2. ***The appointment sub-committee held on 31.8.2007 have resolved for engagement of 45 nos. of contractual employee which have been already approved by the O.S.A.M Board vide its letter No.4572 dtd.20.9.2007****.*

The copy of the proceeding of the sub-committee dtd. 31.8.2007 is enclosed here with for your kind reference.

3. ***O.R.V. Act. has been followed and the roster register is maintained accordingly as per the guidance of concerned by the District Welfare Officer, Bargarh District. Who was one of the members of the appointment sub-committee****.*

4. ***The present contractual employees were appointed as such on examination of their performances and merit by the appointment sub-committee held on 31.8.2007. Further the performances and merit of those employees are satisfactory at present****.*

5. After regularization of the services of the contractual employees the total establishment expenditure shall be approximately Rs.90,69,036.00 against the expected

annual income of Rs.2,47,41,471.00 (i.e. excluding 1% market fee for infrastructure etc.) This calculation to 36.65%, which is within the norms fixed by the O.S.A.M., Board.

6. Up to July, 2008 the total revenue income of this R.M.C. is Rs.3,20,24,850.00 and the expenditure is 1,07,58,432.25. A copy of the income & expenditure statement is enclosed herewith for fovour of kind reference.

In view of the above facts necessary order may please be passed and approval accorded accordingly.

Yours faithfully
Sd/-
SECRETARY
R.M.C., Bargarh

Enclosed:

1. *Copy of proceeding of Appointment Sub-Committee On dtd. 31.8.2007*
2. *Copy of letter No.4572 dtd. 20.9.07 Of O.S.A.M. Board*
3. *Copy of revenue income & Expenditure statement up to July, 08"*

(Emphasis supplied)

16. Being so clarified, the General Manager, Odisha State Agricultural Marketing Board, Bhubaneswar, vide letter dated 27th September, 2008, communicated to the Secretary, R.M.C., Bargarh regarding approval of the said proposal for regularization of 45 numbers of contractual workers, which is extracted below:

"OFFICE OF THE ORISSA STATE AGRICULTURAL MARKETING BAORD: BHUBANESWAR

No.3738 Date: 27.9.08

TO
The Secretary,
R.M.C., Bargarh

Sub: Regularization of the contractual workers.

Ref:- Your letter No.726 Date.10.08.2008 & letter No-841 Dt.22.09.08. This is office letter No.-3242 Dt.13.08.08.

Sir,

With reference to the letter on the subject cited above, I am directed to inform you that, ***the Hon'ble Chairperson, OSAM Board have been pleased to approve the proposal for regularization the 45 nos of contractual workers****. After rergularisation of these staff, the expenditure should be within the prescribed limit fixed by O.S.A.M. Board.*

The R.M.C. is advised to observe due formalities in this respect.

Yours faithfully,
Sd/-
General Manager"

(Emphasis supplied)

17. Despite such approval of the proposal for regularization of services of the Petitioners, the impugned order dated 9th September, 2015, as at Annexure-14, has been passed by the Collector-Cum-Chairman, Regulated Market Committee, Bargarh on the plea that there is no evidence on record to testify that the contractual employees i.e. the present Petitioners, have been engaged in a transparent manner following the procedure of recruitment and adhering to the provisions of the ORV Act.

18. At this juncture, it is apt to deal with various provisions under the Orissa Agricultural Produce Market Act, 1956. Section 2 (ii-a) of the Act, 1956 defines "Board", which means the Orissa State Agricultural Marketing Board established under Section 18-A of the Act. Section 2(viii) provides "Market Committee", which means a Committee established under Section 5. Chapter-II deals with constitution of markets and Market Committee. Section 5 provides establishment of Market Committee whereas Section 6 envisages about constitution of Market Committee. Chapter-III deals with incorporation of Market Committee, its power and duties. Section 8 deals with appointment of sub-committee or joint committee and Section 9 deals with employment of staff. Chapter-IV-A deals with constitution and powers of the Board. Section 18-A deals with establishment of the Board and Section 18-B deals with powers and functions of the Board. Section 27 deals with power to make rule. In exercise of power conferred under Section 27 of the Orissa Agricultural Produce Market Act, 1956 (for short "the Act, 1956"), the State Government framed Rules called "The Orissa Agricultural Produce Markets Rules, 1958", which shall apply to any market area or areas notified as such under Section 4 of the Act, 1956. Part-III of Rules, 1958 deals with Market Committee, its Chairman, Officers and servants and disputes Sub-Committee. Rule-33 deals with servants of the Market Committee. Rule-33, which has been substituted by O.G.E. No.794 dated 03.08.1996, reads thus:-

> *"33. Servants of the Market Committee :- (1) The Market Committee may appoint such officers and servants as may be necessary for the proper management of the market :*
>
> *Provided that the superior Officers of the Committee shall be appointed only with the previous approval of the Board.*
>
> *(2)Superior Officers shall be the Secretary, Clerks and such officers and servants of the Market Committee as the Board may determine from time to time.*
>
> *(3)The terms and conditions of service of superior officers shall be such as may be approved by the Board and those of others shall be such as the Market Committee may decide from time to time.*
>
> *(4)The Market Committee shall be the Disciplinary Authority in respect of all officers and servants of the Committee :*

Provided that the removal or dismissal of superior officers as a measure of punishment shall be subject to the approval of the Board."

19. In view of the aforementioned provisions contained in the Rule-33, power has been vested with the Market Committee which may appoint such Officers and servants, as may be necessary for proper management of the market, provided that the superior officers of the Committee shall be appointed only with the previous approval of the Board. As per sub-rule (2) of Rule-33, superior officers shall be the Secretary, Clerks and such Officers and servants of the Market Committee, as the Board may determine from time to time. As per sub-rule (3) of Rule-33, the terms and conditions of service of superior Officers shall be such as may be approved by the Board and those of others shall be such as the Market Committee may decide from time to time. So it clarifies the position that the terms and conditions of service of Superior Officers are required to be approved by the Board and so far as other employees are concerned, it is the Market Committee, which has to take a decision and fix the terms and conditions of service. The Yardman post, not being a superior officer post, the Market Committee is competent to determine the terms and conditions of service of such employee.

20. From the pleadings made in the Writ Petition, so also contents of the documents appended to the Writ Petition, as extracted above, it is amply clear that the Petitioners, who were earlier working as N.M.Rs, were appointed as contractual workers against sanctioned posts. The Appointment Sub-Committee held on 31st August, 2007 resolved for engagement of those 45 numbers of contractual employees, which had already been approved by the OSAM Board vide its letter dated 20th September, 2007. That apart, ORV Act was followed and the Roster Register was maintained accordingly as per the guidance of concerned District Welfare Officer, Bargarh District, who was one of the members of the Appointment Sub-Committee. That apart, the Petitioners, who are engaged as contractual employees, were appointed as such on examination of their performances and merit by the Appointment Sub-Committee held on 31st August, 2007. It was found by the Appointment Sub-Committee that their performances are satisfactory. That apart, with regard to financial implication, it was intimated to the General Manager, OSAM Board, vide communication dated 22nd September, 2008 that after regularization of the services of these Petitioners, the total establishment expenditure shall be within the norms fixed by the OSAM Board. Pursuant to such communication, the OSAM Board had been pleased to accord approval of the said proposal of regularization of services of the Petitioners, who are at present working as contractual workers since 2007 and prior to such engagement, all were working as N.M.Rs in R.M.C.,Bargarh.

21. In **Narendra Kumar Tiwari** (Supra), vide paragraphs-8, 10 & 11, the apex Court held as follows:

"*8. The purpose and intent of the decision in Umadevi (3) was therefore two-fold, namely, to prevent irregular or illegal appointments in the future and secondly, to*

confer a benefit on those who had been irregularly appointed in the past. ***The fact that the State of Jharkhand continued with the irregular appointments for almost a decade after the decision in Umadevi (3) is a clear indication that it believes that it was all right to continue with irregular appointments, and whenever required, terminate the services of the irregularly appointed employees on the ground that they were irregularly appointed. This is nothing but a form of exploitation of the employees by not giving them the benefits of regularization and by placing the sword of Damocles over their head. This is precisely what Umadevi (3) and Kesari sought to avoid****.*

10. The High Court as well as the State of Jharkhand ought to have considered the entire issue in a contextual perspective and not only from the point of view of the interest of the State, financial or otherwise – the interest of the employees is also required to be kept in mind. What has eventually been achieved by the State of Jharkhand is to short circuit the process of regular appointments and instead make appointments on an irregular basis. This is hardly good governance.

11. Under the circumstances, ***we are of the view that the Regularisation Rules must be given a pragmatic interpretation and the appellants, if they have completed 10 years of service on the date of promulgation of the Regularisation Rules, ought to be given the benefit of the service rendered by them. If they have completed 10 years of service they should be regularized unless there is some valid objection to their regularization like misconduct etc."*** (Emphasis supplied)

22. In **Nihal Singh** (Supra), vide paragraphs-22, 23 and 35 to 38, the apex Court has observed as follows:

"22. *It was further declared in Umadevi (3) case that the jurisdiction of the Constitutional Courts under Article 226 or Article 32 cannot be exercised to compel the State or to enable the State to perpetuate an illegality. This court held that compelling the State to absorb persons who were employed by the State as casual workers or daily-wage workers for a long period on the ground that such a practice would be an arbitrary practice and violative of Article 14 and would itself offend another aspect of Article 14 i.e. the State chose initially to appoint such persons without any rational procedure recognized by law thereby depriving vast number of other eligible candidates who were similarly situated to compete for such employment.*

23. Even going by the principles laid down in Umadevi's case, we are of the opinion that the State of Punjab cannot be heard to say that the appellants are not entitled to be absorbed into the services of the State on permanent basis as their appointments were purely temporary and not against any sanctioned posts created by the State.

35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor reference to which the executive government is required to take rational decision based on relevant consideration. ***In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State****.*

36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt

exclusively within the domain of the Legislature. ***However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden****. If absorbing the appellants into the services of the State and providing benefits at par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is – the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks.* ***We are of the opinion that neither the Government of Punjab nor these public sector banks can continue such a practice consistent with their obligation to function in accordance with the Constitution. Umadevi's judgment cannot become a licence for exploitation by the State and its instrumentalities****.*

37. For all the above mentioned reasons, we are of the opinion that the appellants are entitled to be absorbed in the services of the State. The appeals are accordingly allowed. The judgments under appeal are set aside.

38. We direct the State of Punjab to regularize the services of the appellants by creating necessary posts within a period of three months from today. Upon such regularization, the appellants would be entitled to all the benefits of services attached to the post which are similar in nature already in the cadre of the police services of the State. We are of the opinion that the appellants are entitled to the costs throughout. In the circumstances, we quantify the costs to Rs.10,000/- to be paid to each of the appellants."

(Emphasis supplied)

23. The coordinate Bench in **Padmanava Pradhan** (Supra), relying on paragraph-7 of the Judgment of the apex Court in **Narendra Kumar Tiwari** (Supra), held as follows:

"10. In the backdrop of the aforesaid factual exposition and after having bestowed my anxious consideration to the rivalised submissions, the cases of the petitioners deserve consideration for regularization in view of the following facts reasons and judicial pronouncement.

i) Admittedly, all the petitioners in pursuance of the advertisement and after undergoing the process of selection were appointed as Executive Assistant on contractual basis since 2012. In the meantime they have completed more than eight years of contractual services against the post of Executive Assistant which has been subsequently re-designated as Junior Assistant on the recommendation of the Syndicate Sub-committee in the year 2013*.*

ii) Government of Odisha vide Notification dated 16th January,2014 has published a Contractual Rule 2013 wherein on completion of six years of contractual services, one will be eligible for regularization in service. Since the petitioners have completed the requisite period of services, their services ought to have been regularized by the University in the light of the Notification of the G.A. Department, Government of Odisha.

iii) Much has been argued on behalf of the State that initial appointment of the petitioners was against a non-sanctioned post. Therefore, regularization of the petitioners against the non sanctioned post is not legally permissible, but the letter of the

Government of Odisha, in the Department of Higher Education dated 08.07.2008 which pertains to the Review committee meeting regarding filling up of the teaching and non-teaching posts in Sambalpur University indicates that the said Review committee meeting was being attended by the members of the Higher Education department, Finance Department and by a conscious decision, the post of Junior Assistant was re-designated as Executive Assistant. Accordingly, the advertisement was published and the petitioners appeared the selection process and they were appointed against the 14 post of Executive Assistant in lieu of Junior Assistant. Subsequently in the year 2013 by virtue of the decision of the Syndicate subcommittee the post of Executive Assistant has been re-designated as Junior Assistant and the petitioners have been continuing against the post of Junior Assistant since 2013 taking into consideration the uninterrupted services rendered by the petitioners against the redesignated post of Junior Assistant and on perusal of the Notification of the State Government regarding regularisation of contractual appointees, it is quite luculent that the petitioners have rendered more than the requisite period of service against the sanctioned and vacant post of Junior Assistant to stake their claim for regularization of services.

iv) So far as regularization of services, the Hon'ble Apex Court in a catena of decisions have succinctly and illuminatively dealt with the concept of regularization. In the case of Narendra Kumar Tiwari and others-vrs.-State of Jharkhand and others : (2018) 8 SCC 238, in paragraph-7, it was held that

"The purpose and intent of the decision in Umadevi (3) was therefore twofold, namely, to prevent irregular or illegal appointments in the future and secondly, to confer a benefit on those who had been irregularly appointed in e past. The fact that the State of Jharkhand continued with the irregular appointments for almost a decade after the decision in Umadevi (3) is a clear indication that it believes that it was all right to continue with irregular appointments and whenever required, terminate the services of the irregularly appointed employees on the ground that they were irregularly appointed. This is nothing but a form of exploitation of the employees by not giving them the benefits of regularisation and by placing the sword of Damocles over their head. This is precisely what Umadevi and Kesari sought to avoid."

24. The coordinate Bench in **Sanatan Sahoo** (Supra), relying on paragraph-53 of the Judgment of the apex Court in **Secretary State of Karnataka & others Vs. Umadevi & others,** reported in(2006) 4 SCC 1, so also the Judgment in **State of Karnataka & other Vs. M.L. Kesari & others,** reported in (2010) 9 SCC 247, held as follows:

"7. Law is well settled in the case of ***Secretary State of Karnataka and others v. Umadevi and others****, reported in (2006) 4 SCC 1, wherein at paragraph 53 it has been held as thus:-*

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in ***S.V. NARAYANAPPA*** *(supra),* ***R.N. NANJUNDAPPA*** *(supra), and* ***B.N. NAGARAJAN*** *(supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and*

their instrumentalities should take steps to regularize as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

However in the case of ***State of Karnataka & others v. M.L. Keshari & others****, reported in (2010) 9 SCC 247, the principle decided by the Apex Court in the case of Umadevi (supra) has been further clarified and followed.*

8. This Court in the case of ***Prakash Kumar Mohanty v. State of Odisha and others*** *(W.P.(C) No.22159 of 2012 decided on 28.02.2017) referring to the decisions in the case of Umadevi (supra) and M.L. Kesari (supra) directed the competent authority to take a decision on the grievance of the petitioner in the light of the observations made in paragraph-53 of the Umadevi case within eight weeks from the date of receipt of copy of the order.*

9. Admittedly in the present case, the petitioner having the requisite qualification was engaged as Data Entry Operator since September, 1995 and he has been continuing as such till date without the intervention of the Courts. He approached the Tribunal in the year 2013 for his regularization before the notification issued by the State Government regarding Odisha Group 'C' and Group 'D' posts (contractual appointment) Rules, 2003. The recruitment rule came into force only in the year 2008 and the rule regarding contractual appointment as contended by the State Government was followed latter on. ***Thus the engagement of the petitioner at best can be termed as irregular engagement and not illegal engagement. That apart, it is also admitted that sanctioned posts are available since 2009 and the petitioner had also completed more than ten years by then. In view of the discussions made hereinabove paragraphs and in the peculiar facts and circumstances of this case, this Court is of the opinion that the Tribunal has lost sight of facts in right perspective in the light of the aforesaid decisions of the apex Court. Thus, this Court set aside the impugned order dated 14.05.2015 passed in O.A. No.3421 of 2013 and remits the matter back to the authorities to regularize the service of the petitioner by applying the aforementioned ratio and to extend consequential service benefits to the petitioner accordingly, within a period of eight week****s."***

(Emphasis supplied)

25. In **Anu Charan Patra** (supra), the Coordinate Bench has held as follows:

"8. In view of the aforementioned provisions contained in the Rule-33, power has been vested with the market committee which may appoint such officers and servants, as may be necessary for proper management of the market, provided that the superior officers of the committee shall be appointed only with the previous approval of the Board. As per sub-rule (2) of Rule-33, superior officers shall be the Secretary, Clerks and such officers and servants of the market committee, as the Board may determine from time to time. As per sub-rule (3) of Rule-33, the terms and conditions of service of superior officers shall be such as may be approved by the Board and those of others shall be such as the market committee may decide from time to time. So it clarifies the position that the terms

and conditions of service of superior officers are required to be approved by the Board and ***so far as other employees are concerned, it is the market committee which has to take a decision and fix the terms and conditions of service. The Yardman, being not a superior officer post, the market committee is competent to determine the terms and conditions of service of such employee****."* (Emphasis supplied)

Vide the said Judgment, relying on the Judgment of the apex Court in **Praveen Singh vs. State of Punjab,** reported in AIR 2001 SC 152 and in **Om Kumar vs. Union of India**, reported in AIR 2000 SC 3689 in paragraph-14 it was observed as follows.

"*14. In view of the law laid down by the apex Court as discussed above, there is no iota of doubt that when the recommendation has been made by the appointment sub-committee with regard to regularization of services of the petitioner and the same was approved by the Board, the same should have given effect to by opposite parties no.2 and 3. Instead of doing so, for some reason or other, the opposite parties no.2 and 3 have tried not to implement the same resulting in depriving the petitioner of his valuable right to continue against a regular post for which he has been selected by following due procedure by the appointment subcommittee and approved by the Board."*

26. In **Sunil Bark** (supra), the Coordinate Bench has held as follows:

"13. In ***State of Jammu and Kashmir v. District Bar Association, Bandipora****, (2017) 3 SCC 410, wherein a distinction has been made with regard to "irregular" and "illegal" engagement, referring to the exception carved out in* ***Umadevi(3)*** *mentioned supra, in paragraph-12 of the said judgment it has been stated as follows:*

"12. The third aspect of Umadevi (3) which bears notice is the distinction between an "irregular" and "illegal" appointment. While answering the question of whether an appointment is irregular or illegal, the Court would have to enquire as to whether the appointment process adopted was tainted by the vice of non-adherence to an essential prerequisite or is liable to be faulted on account of the lack of a fair process of recruitment. There may be varied circumstances in which an ad hoc or temporary appointment may be made. The power of the employer to make a temporary appointment, if the exigencies of the situation so demand, cannot be disputed. The exercise of power however stands vitiated if it is found that the exercise undertaken (a) was not in the exigencies of administration; or (b) where the procedure adopted was volatile of Articles 14 and 16 of the Constitution; and/or (c) where the recruitment process was overridden by the vice of nepotism, bias or mala fides."

14. ***Applying the above principles to the present case, since the petitioner has been discharging the duties against a sanctioned vacancy in the post of Barber with the knowledge of the employer on daily wage basis for a quite long time, after being duly selected by following due process of selection in the post of Home Guard, and his engagement is due to the emergent situation, the engagement may be "irregular" one, but his service is to be regularized with all consequential benefits in accordance with law****. This Court directs accordingly. The entire exercise shall be completed within a period of four months from the date of communication/production of authenticated/certified copy of this judgment by the petitioner."* (Emphasis supplied)

27. The Division Bench of this Court in **Ranjeet Kumar Das** (Supra), relying on the Judgments of the apex Court In **Uma Devi** (supra), in **M.L. Kesari** (supra), in

Nihal Singh (supra) and in **State of Jammu and Kashmir Vs. District Bar Association, Bandipora,** reported in (2017) 3 SCC 410 held that if the petitioner has been engaged against an existing vacancy, by following due process of selection, and continued for a quite long period and his engagement is due to the emergent situation, the appointment being "irregular" one, his services are to be regularized in accordance with law.

28. In view of the discussions made, so also settled position of law as detailed above, including the Judgments passed by the coordinate Bench in **Anu Charan Patra** (supra), where the Petitioner was also working as Yardman (N.M.R) under the Nimapara Regulated Marketing Committee, Nimapara, this Court is of the view that the services of the Petitioners should have been regularized against the vacant posts of "Yardman" as per the recommendation made by the Appointment Sub-Committee, which was duly approved by the Board, as communicated by the General Manager, Orissa State Agricultural Marketing Board vide letter dated 27th September, 2008. This Court is of further view that the impugned order of rejection dated 9th September, 2015 under Annexure-14, vide which the representation of the Petitioners for regularization of their services was rejected, being contrary to the admitted facts as detailed above, so also documentary proof on record, is illegal, unjustified and product of non-application of mind and is liable to be set aside. Accordingly, the said rejection order dated 9th September, 2015, as at Annexure-14, is hereby set aside.

29. In the aforesaid facts and circumstances, this Court directs the Opposite Parties, more particularly, Opposite Party Nos.4 & 5 to regularize the services of the Petitioners with effect from 27th September, 2008 i.e. the date on which the General Manager, Orissa State Agricultural Marketing Board, Bhubaneswar communicated the Secretary R.M.C., Bargarh (Annexure-11) to regularize the services of the Petitioners, and to grant them all consequential service and financial benefits, as due and admissible, by making due calculation thereof within a period of four months from the date of communication of the certified copy of this Judgment.

30. With the aforesaid direction the Writ Petition stands allowed and disposed of. However, there shall be no order as to cost.

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2023 (II) ILR – CUT - 1271

CHITTARANJAN DASH, J

CRA NO.107 OF 1997

JANARDAN SAHU & ORS. ……..Appellants

.V.

STATE OF ODISHA ……Respondent

INDIAN PENAL CODE, 1860 – Section 498-A – Necessary ingredients to bring home the offences under section 498-A – Indicated. (Para 14)

For Appellants : Mr. D. Panda
For Respondent : Mr. Debasis Biswal, ASC

JUDGMENT Date of Judgment : 28.07.2023

CHITTARANJAN DASH, J.

1. This Appeal is directed against the judgment and order dated 9th May, 1997 passed by the learned Sessions Judge, Sambalpur in S.T. Case No.128 of 1996 wherein the learned court holding the prosecution to have failed to prove the charges against the Appellants in the offences U/s. 304-B/201/34 IPC read with Section 4 of the D.P. Act, found to have proved the offence U/s. 498-A beyond reasonable doubt and held the Appellants guilty therein, convicted them and sentenced the Appellants to undergo RI for two years with a direction to serve the sentence after the pre conviction detention is set off under Section 428 Cr.P.C.

2. The prosecution case as reveals from the case record and evidence are that the Appellants Janardan Sahu tied the nuptial knot with Kajali (hereinafter called the deceased) on 10th May 1992 as per the Hindu Rites and Customs. It is alleged that at the time of marriage articles were given to the bride as per the rituals and after the marriage the couple consummated the marriage in the matrimonial home in village Pandri under Sasan P.S. in the district of Sambalpur. It is also alleged that after the marriage the bride and the bridegroom paid visit to the parental house of the bride on many occasions. During her visit the bride used to complain to her parents about the demand of a scooter by the in laws and for its non-fulfillment she was subjected to ill treatment. About three years after the marriage one day sometime in the month of July, 1995 it is informed to the parents of the bride about her ill health. Having heard such information the father and brother of the deceased went to the hospital but they did not find her and returned to the matrimonial home where they found their daughter lying dead. It is also alleged that the dead body instead of being cremated was buried. Subsequently, on the next day the father of the deceased lodged a report with the Police in Sasan Police Station. As the report revealed cognizable offence, the Police treated the same as FIR and registered it vide Sasan P.S. Case No.46 of 1995 and the investigation commenced.

3. In course of investigation, the police exhumed the dead body in presence of the Executive Magistrate and witnesses which was buried, inquest was held over the dead body and the same was sent for post mortem. The I.O examined the witnesses, seized the dowry articles, left the dowry articles on the zimma of the parental side of the bride, seized other incriminating articles, obtained the post mortem report, arrested the accused persons and forwarded them to the court., obtained the chemical examination report of the viscera sent to ascertain the nature of poison consumed by the deceased and after completion of the investigation submitted the Final Form.

4. The case of the Appellants before the learned court below was one of complete denial and false implication.

5. Upon denial of the prosecution case the learned court framed the charges and proceeded with the trial.

6. To bring home the charges, the prosecution examined 13 witnesses in all and proved the documents taken to the evidence on record vide Exts. 1 to 15 besides the material objects proved vide MOs. (i), (ii) and (iii). The Appellants in support of the defence examined two witnesses as DWs 1 and 2.

7. The learned court below having assessed the evidence found the prosecution to have failed to bring home the charges for the offence under Sections 304-B/201 IPC read with Section 4 of the D.P. Act. However, found the prosecution to have successfully proved the sole charge under Section 498-A IPC and having convicted the Appellants sentenced them as narrated above.

8. It is submitted by the learned counsel for the Appellants that the learned court below exceeded in appreciating the evidence both in fact and law and derived a conclusion that the evidence led by the prosecution before it as cogent which is neither prolific nor formidable to hold the prosecution to have proved the charge under Section 498-A and as such the same is not sustainable in the eye of law. It is also argued that the witnesses have miserably failed to account for the demand of dowry and consequent torture allegedly to have meted out to the bride consistently and coherently and the sporadic statement of the witnesses more particularly the parents and the brother of the deceased leaves no room to deduce that the bride though had the occasion to visit the parental house in frequency nothing transpired from the statement that the demand was consistently been made allegedly to be one for the Scooter and the same was from the side the bridegroom or the in-laws. According to the learned counsel for the Appellants the statement of the father, mother and brother are inadequate to draw even an inference that there was a demand of dowry on the face of the evidence of the defence witness more particularly DW 1 who is none but the co-brother in law of the father of the deceased who was the Mediator in the marriage who specifically stated on oath that there was no demand of dowry at the time of marriage and he had visited the matrimonial house of the deceased and at no point of time he had ever come across any complaint either from the side of the deceased or the in laws with regard to the demand of the Scooter.

9. Learned Additional Standing Counsel on the other hand besides a note of submission, submits that the evidence of P.Ws.10, 11 and 12 are consistent to the effect that there was demand of dowry and continuous ill treatment being meted out to the deceased which the deceased could not reconcile and having found all other ways foreclosed took the drastic step of doing away with her life by consuming poison. It is also submitted that the evidence of PWs.10, 11 and 12 are sufficient to

bring home the charges in the offence under Section 498-A and held the learned trial court to have rightly found the Appellants committed the offence and canvassed no interference to the judgment impugned.

10. Needless to say that grave is the offence greater should be the proof. Having regard to the evidence led before the court below, on a meticulous examination, this Court found the evidence led through the witnesses while does not inspire confidence with regard to the statement of the witnesses viz. P.W.1 to 6, the evidence in respect to the kith and kin such as PWs.10, 11 and 12 are not consistent to each other so also to their earlier statement recorded under Section 161 Cr.P.C. by the Police in course of investigation.

11. Before adverting to the merit of the case it is necessary to delve into the back ground facts of the incident as borne out from the evidence. Considering the death occurred to the deceased within seven years of the marriage allegedly for the ill-treatment and torture meted out to her in connection with demand of dowry soon before the death termed as "dowry death", the Appellants faced charges in the offence U/s. 498-A/304-B/34 Indian Penal Code. Since there was allegations that in order to screen the evidence attempt was made to disappear the evidence by burring the dead body in absence of the members of the Parental side of the deceased, the Appellants also faced charge in the offence U/s.201 Indian Penal code and the offence U/s. 4 D.P. Act.

12. The learned court below disbelieved the evidence led by the Prosecution to bring home the charges in the offence U/s. 304-B/201/34 IPC read with section 4 D.P. Act though held the death of the deceased to have occurred in the matrimonial house within seven years of the marriage and the same being not natural. However, the learned court below held the Prosecution to have proved the charge U/s. 498-A IPC.

13. The evidence disclosed the death to have occurred due to consumption of poison and the CE report reveals the poison to have contained organo phosphorous substance.

14. In order to bring home the charge for the offence under Section 498-A IPC it is necessary to prove the following ingredients :

> (1) The woman must be married;
>
> (2) She must be subjected to cruelty or harassment; and
>
> For proving offence under section 498A, the complainant must make allegation of harassment to the extent so as to coerce her to meet any unlawful demand of dowry, or any willful conduct on the part of the accused of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health. In the instant case, no such allegation was made or otherwise could be found out so as to arrive at opinion that appellants prima facie committed such an offence.

> For the purpose of section 498A, harassment simpliciter is not "cruelty" and it is only when harassment is committed for the purpose of coercing a woman or any other person related to her to meet an unlawful demand for property, etc. that it amounts to "cruelty" punishable under section 498A.
>
> (3) Such cruelty or harassment must have been shown either by husband of the woman or by the relative of her husband.
>
> The basic ingredients of section 498A are cruelty and harassment, further in explanation (b) which relates to harassment there is absence of physical injury but it includes coercive harassment for demand of dowry, it deals with patent or latent acts of the husband or his family members.
>
> The consequences of cruelty which are likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical of the woman are required to be established in order to bring home the application of section 498A."

15. Taking a cue from the evidence led by the prosecution before the court below, on its examination in thread bare it appears that the deceased soon after her marriage had paid visit to the parental house on different occasions and made complaint of ill treatment by her in laws under the pretext of a demand of Scooter. The statement of the witnesses more particularly P.Ws. 10, 11 and 12 seems to be general in nature inasmuch as none of these witnesses have clearly spelt out the manner in which the deceased was subjected to ill treatment and harassment.

16. There is absolutely no whisper as to when such ill treatment was meted out and how was the deceased facing the same. The veracity of the testimony of these witnesses could have been taken seriously had there been evidence to the effect that the deceased till her death continued to complain as to the ill treatment meted out to her for the demand of dowry of Scooter. Whereas, in the entire gamut of prosecution evidence including that of the parents and close relative such as P.Ws.10, 11 and 12 nothing appears that the deceased besides her complaint at the initial days to have continued or complained subsequently at any point of time so as to deduce that such demand or any other overt act of the Appellants could be of such nature thereby she felt all her ways foreclosed and forced to commit suicide. In absence of such consistent evidence it is unreasonable rather improbable to believe the evidence to be sufficient to bring home the charge. It further vouch safe from the findings of the learned court below itself when it took the view in its findings at paragraph-9 that "at least there is some material to show that the accused Janardan, Mayadhar, Jibardhan and Surubali tortured the deceased if not for dowry but because of her incapacity to bear a child" which is absolutely not the case of the prosecution.

17. Very surprisingly, the evidence of none of the witnesses including P.Ws.10, 11 and 12 gives inkling as to any torture being inflicted on the deceased for her having failed to bear a child after the marriage. Consequently, none of the ingredients necessary to constitute the offence U/s. 498-A stands proved by the prosecution.

18. In view of the discussions as above, it can safely be held the prosecution to have failed to prove the charge U/s.498-A IPC. Therefore, the conclusion derived by the learned court below holding the Appellants guilty in the offence U/s. 498-A IPC based on surmises and presumption is not sustainable in the eye of law and deserves to be set aside. The Appellants stands accordingly acquitted from the said charge. They be discharged from the bail bond. The appeal is allowed.

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2023 (II) ILR – CUT - 1276

CHITTARANJAN DASH, J.

CRLREV NO. 290 OF 2012

NIRAKAR BHOI & ORS. .....Petitioners

.V.

STATE OF ODISHA & ANR. .....Opp. Parties

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 307,308 – Power and duty of the court while acting upon the prayer of the accused for grant of pardon – Explained with reference to case laws. (Para 10-13)

Case Laws Relied on and Referred to :-

1. (2013) 13 SCC : Yakub Abdul Menon Vs. State of Maharashtra
2. (1995) Supp.(1) SCC 80 : Suresh Chandra Bihari Vs. State of Bihar.
3. 91(2001) CLT 639(Ori) : Giria Vs. State of Orissa.

For Petitioners : Mr. H.S. Mishra, Sr. Adv.

For Opp. Parties : Mr. M.K. Mohanty, A.S.C.
Mr. A.K. Acharya

JUDGMENT Date of Judgment : 28.07.2023

CHITTARANJAN DASH, J.

1. Challenge in this Revision has been to the legality, propriety and correctness of the order dated 30.04.2012 passed by the learned Additional Sessions Judge-cum-Special Judge (Vigilance), Bolangir in S.T. Case No.89/10 of 2010-12, wherein the learned court allowed the prayer of the accused Balaram Pradhan moved under Section 307, Cr.P.C. and pardoned him to be examined as a witness for the prosecution in line with the stipulation under Section 308, Cr.P.C. Pursuant to such pardon, the accused filed a memo accepting the conditions.

2. The background facts of the case are that, one Sudam Sahu, son of Bhojaraj Sahu of village Budhipadar under Loisingha P.S. in the district of Bolangir lodged a written report informing that on 29.05.2009 at about 10.30 A.M. the owner of the Rugudikhal Sahoo Dhaba stopped him and told that his (informant's) brother Anand

Sahu @ Jhara has been severely assaulted to death. The informant thereafter arrived at the Loisingha Hospital and again at Bolangir Government Hospital and found the dead body of his elder brother Anand Sahu @ Jhara kept in the premises of the Government Hospital, Bolangir. He found injuries appearing on his head, face, legs and there was bleeding. He also found the right hand of his deceased brother to have broken. According to the informant, seeing the dead body, it appeared that somebody attacked him severely by means of sharp cutting weapon and committed his murder. It is also alleged in the F.I.R. that in the District Headquarter Hospital at Bolangir he came to know that his brother Anand Sahu was attacked near Loisingha station and was left abandoned after a brutal assault in a serious condition.

3. On the basis of the report lodged, the law was set in motion and investigation commenced. In course of the investigation, police visited the spot, seized the incriminating articles, held the inquest over the dead body, sent the dead body for Post-Mortem Examination, examined the witnesses, arrested the accused Balaram Pradhan, Prashant Kumar Rath @ Suru Babu @ Hapi, recorded the statement of the accused Balaram Pradhan under Section 164, Cr.P.C. and other witnesses under Section 161, Cr.P.C. and upon completion of the investigation, having found prima facie evidence against the accused persons including accused Balaram Pradhan, submitted charge-sheet under Sections 147/148/302/120/149, I.P.C. The case having been committed to the court of sessions was transferred to the court of the learned Addl. Sessions Judge-cum-Special Judge (Vigilance), Bolangir, who framed the charge against the accused persons on 14.03.2012.

4. While the matter stood thus, soon after framing of the charge, before commencement of recording evidence on 20.04.2012 one of the accused persons namely Balaram Pradhan filed a petition under Section 307, Cr.P.C. directly before the learned trial court with the prayer to act upon it and to tender pardon to him within the sweep of Section 307, Cr.P.C. A copy of the petition so filed on behalf of the accused Balaram Pradhan was served on the Associate Public Prosecutor whereas no copy was served on the co-accused persons despite objections raised from the side of the co-accused persons that they are entitled to file objection. Learned court having taken cognizance of the petition filed under Section 307, Cr.P.C., sought for a statement from the prosecution side before consideration of the said petition fixing the case to the very next date. On the next date, i.e. 21.04.2012 the learned Associate PP filed a petition for time to file objection, which the learned court declined and affording no further opportunity proceeded without reference to the co-accused persons or the prosecution.

5. In its further proceeding the learned court got the statement of the accused Balaram Pradhan recorded, wherein the accused stated to have given a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to other persons concerned whether the principal or the abettor in the commission thereof. In its order learned court observed that the Associate PP did

not have any objection to the statement of the accused so recorded. On 23.04.2012 before the learned court acted upon the prayer of the accused Balaram Pradhan in his petition filed under Section 307, Cr.P.C., it was pointed out by the Associate PP that there is slight variation in the statement of the accused recorded under Section 164, Cr.P.C. and the statement recorded in consonance with the provision under Section 306(1), Cr.P.C. However, the learned court vide its order dated 30.04.2012 passed a speaking order and allowed the petition filed by accused Balaram Pradhan under Section 307, Cr.P.C., as required under the statute and pardoned him to be a witness for the prosecution following the consequence of the provision of Section 308, Cr.P.C. which is impugned herein.

6. In order to appreciate the argument advanced by the learned counsel for the Petitioner, it is apt to refer to the provisions under Sections 306 and 307, Cr.P.C.

Section 306, Cr.P.C. provides :-

"306. *Tender of pardon to accomplice.* – (1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the First Class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure or the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission of thereof."

Section 307, Cr.P.C. provides :-

"307. *Power to direct tender of pardon.* – At any time after commitment of a case but before judgment is passed, the court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person."

7. A meticulous examination of both the provisions indicates that Section 306, Cr.P.C. is applicable in a case where the order of commitment has not been passed, whereas Section 307, Cr.P.C. is applicable after the commitment of the case is done but before the judgment is pronounced. As mandated in the provision, after commitment of the case, pardon is to be granted by the trial court subject to the condition specified in Sub-Section (1) of Section 306, Cr.P.C., i.e. after making a full and true disclosure of the whole of the circumstances within his knowledge related to the offence and to every other person concerned whether he/she is principal or abettor in the commission thereof.

8. It is submitted by the learned counsel for the Petitioner that the court below erred in law and passed the impugned order illegally with material irregularity, which is perverse for non-application of judicial mind, tainted with arbitrariness and contrary to the settled principles of law. He further argued that the learned trial court

committed gross illegality by not referring the petition filed under Section 307, Cr.P.C. to the prosecution, instead it entered into the ring as a veritable director of prosecution in as much as the trial court exercised the power to pardon on behalf of the prosecution agency whereas, such power is to be exercised only when the prosecution joins in the request. It is further argued that, the order impugned is illegal for the reason that the prayer for time to file objection by the prosecution was rejected by the court when it is incumbent for the court before granting of pardon to an accused to call for a statement of the prosecution which the learned court did not adhere to and as such the learned court has transgressed its jurisdiction. According to learned counsel, the learned court below even did not allow the petitioner to get the certified copy of the statement and thereby the order impugned suffers a gross illegality and prays to set aside the same.

9. The learned counsel for the State Mr. Mohanty submitted that the order impugned is in consonance with fact and law and requires no interference. Subscribing the versions of the learned Addl. Standing Counsel, Mr. A.K. Acharya, learned counsel appearing on behalf of the Opposite Party No.2, i.e. accused Balaram Pradhan, contended the impugned order as legal and justified and akin to the relevant provision. He further submitted that the impugned order receives assurance from various pronouncements and canvassed for no interference thereupon relying upon the decisions reported in ***(2013) 13 SCC*** in the matter of ***Yakub Abdul Menon Vs. State of Maharashtra and Suresh Chandra Bihari Vs. State of Bihar*** reported in ***(1995) Supp.(1) SCC 80***.

10. As held in the matter of ***State of Andhra Pradesh Vs. Cheemalapati Ganeswara Rao and Another,*** the power under Section 307 Cr.P.C is exercised with an object to allow pardon to be tendered in a grave offence allegedly to have committed by several persons so that with the aid of evidence of the person so pardoned the offence could be brought home to the rest.

11. The moot question requires answer herein is whether the impugned order passed by the learned court would sustain in the eye of law in terms of section 307 Cr.P.C.? As stated, the provision U/s 307 Cr.P.C. empowers the trial court to act upon the prayer of the accused for grant of pardon. The only condition for granting pardon is "with a view to obtaining the evidence of any person who is supposed to have been directly or indirectly concerned in, or privy to, an offence". This makes it clear that the person seeking pardon need not be a culprit himself as held by several High Courts including this Court in the matter of ***Giria Vs. State of Orissa, 91(2001) CLT 639(Ori***).

12. The provision also does not make it mandatory to record the statement of the accused seeking pardon to get his statement recorded U/s. 164 Cr.P.C nor does the statement so recorded belies the object. There is also no illegality in recoding the statement of the accused before the grant of pardon inasmuch as the aim of the court granting pardon to an accused is only to obtain evidence as a witness. The fact that

there is already a recoded confession under Section 164 Cr.P.C cannot be a factor weighing against the tender of pardon.

13. The submission that ordinarily it is for the prosecution to ask that a particular accused out of several may be tendered pardon does not preclude the accused from directly applying to the court. Further, the very object of the provision does not in any manner make the proceeding illegal merely for the reason that the court requesting the prosecution to give statement files no statement. This is because once the accused volunteers to become a witness within the ambit of the provision leaves no discretion to the prosecution, save and except a caution to be maintained by the court exercising the power to pardon. In the instant case, the order impugned clearly indicates that the Prosecution did not object to the recording of statement of the accused before grant of Pardon. The discrepancy pointed out in the statement of the accused in his statement recorded U/s. 164 Cr.P.C. and the statement recorded before grant of pardon does not affect the object of the proceeding. Further, the exculpatory or inculpatory statement of the accused is matters of appreciation of the court during trial and nothing to do with the discretion applied by the court in granting the pardon. As rightly held by the learned court in the impugned order, the grant of pardon to the seeker is primarily a proceeding between the courts and the Petitioner and the co-accused have nothing to object. The absence of statement from the prosecution too in the circumstance does not make the order impugned ***per se*** illegal that requires interference. This Court, therefore, finds no substance in the Revision. Accordingly, the Criminal Revision fails. The order of the learned Addl. Sessions Judge-cum-Special Judge (Vigilance), Balangir passed on 21.04.2012 in Sessions Case No.89/10 of 2010-12 is confirmed. Having regard to the age of the case, it is however directed that the court concerned shall take up the trial in promptitude.

14. The CRLREV is dismissed.

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