THE INDIAN LAW REPORTS
(CUTTACK SERIES)

Containing Judgments of the High Court of Orissa.

Mode of Citation
2023 (III) I L R - CUT.

SEPTEMBER-2023

Pages : 01 to 318

Edited By

MADHUMITA PANDA, ADVOCATE

LAW REPORTER
HIGH COURT OF ORISSA, CUTTACK.

Published by : High Court of Orissa.
At/PO-Chandini Chowk, Cuttack-753002
Printed at - Odisha Government Press, Madhupatna, Cuttack-10

Annual Subscription : ₹ 300/-

ORISSA HIGH COURT, CUTTACK

CHIEF JUSTICE

The Hon'ble Shri Justice SUBHASIS TALAPATRA, *B.A, LL.B.*

PUISNE JUDGES

The Hon'ble Shri Justice Dr. B.R. SARANGI, *B.Com.(Hons.), LL.M., Ph.D.*

The Hon'ble Shri Justice ARINDAM SINHA, *LL.B.*

The Hon'ble Shri Justice DEBABRATA DASH, *B.Sc. (Hons.), LL.B.*

The Hon'ble Shri Justice BISWANATH RATH, *B.A, LL.B.*

The Hon'ble Shri Justice S.K. SAHOO, *B.Sc., M.A. (Eng.& Oriya), LL.B.*

The Hon'ble Shri Justice K.R. MOHAPATRA, *B.A, LL.B.*

The Hon'ble Shri Justice BIBHU PRASAD ROUTRAY, *B.A. (Hons.), LL.B.*

The Hon'ble Shri Justice Dr. SANJEEB KUMAR PANIGRAHI, *LL.M., Ph.D.*

The Hon'ble Miss Justice SAVITRI RATHO, *B.A. (Hons.), LL.B.*

The Hon'ble Shri Justice MRUGANKA SEKHAR SAHOO, *M.Sc., LL.B.*

The Hon'ble Shri Justice RADHA KRISHNA PATTANAIK, *B.Sc. (Hons.), LL.B.*

The Hon'ble Shri Justice SASHIKANTA MISHRA, *M.A., LL.B.*

The Hon'ble Shri Justice A. K. MOHAPATRA, *B.Com., LL.B.*

The Hon'ble Shri Justice V. NARASINGH, *B.Com.(Hons.), LL.M.*

The Hon'ble Shri Justice BIRAJA PRASANNA SATAPATHY, *M. Com., LL.B.*

The Hon'ble Shri Justice M. S. RAMAN, *B. Com. (Hons.), LL.B.*

The Hon'ble Shri Justice SANJAY KUMAR MISHRA, *B.Com., LL.B.*

The Hon'ble Shri Justice GOURISHANKAR SATAPATHY, *B.Sc., LL.B.*

The Hon'ble Shri Justice CHITTARANJAN DASH, *B.A., LL.B.*

The Hon'ble Shri Justice SIBO SANKAR MISHRA, *B.Sc. (Hons.), LL.B.*

The Hon'ble Shri Justice ANANDA CHANDRA BEHERA, *B.A, LL.B.*

ADVOCATE GENERAL

Shri ASHOK KUMAR PARIJA, *B.Com., LL.B.*

REGISTRARS

Shri P.K. PATRA , *Registrar General*
Shri A.K. PASCHIMAKABAT, *Registrar (Vigilance) & Registrar (Administration)I/C*
Shri SUMAN KUMAR MISHRA, *Registrar (Judicial)*

NOMINAL INDEX

ACTS /CODES

Acts & No.	
1985 -13	Administrative Tribunal Act, 1985
1908- 5	Code of Civil Procedure, 1908
1973- 02	Code of Criminal Procedure, 1973
1950	Constitution of India, 1950
2003-36	Electricity Act, 2003
1872 - 1	Evidence Act, 1872
1984- 66	Family Courts Act, 1984
1961- 43	Income Tax Act, 1961
1860-45	Indian Penal Code, 1860
1992 -35	Indo-Tibetan Border Police Force Act, 1992
2016-31	Insolvency and Bankruptcy Code, 2016
2006 - 27	Micro, Small And Medium Enterprises Development Act, 2006
1881 -26	Negotiable Instrument Act, 1881
1967 - 15	Passport Act, 1967
1988 - 49	Prevention of Corruption Act, 1988
1908- 16	Registration Act, 1908
1951- 11	Orissa Hindu Religious Endowment Act, 1951
2004	Odisha Electricity Regulatory Commission Distribution (Condition of Supply) Code, 2004

TOPICAL INDEX

SUBJECT INDEX

CRIMINAL PROCEDURE CODE, 1973 – Section 439 r/w section 45(1) of Prevention of Money Laundering Act, 2002 – Commission of offences punishable U/ss. 341/328/324/354-C/370/386/387/388/389/419/420/465/506/20-B of IPC and U/s. 66-E/67 of the IT Act 2000 and U/s. 3 of PML Act – The petitioner has not charge sheeted for predicate offence even after completion of investigation, whether the petitioner can released on bail? – Held, Yes – The petitioner has successfully demonstrated his case for compliance of section 45(1) of PML Act – The bail application stands allowed with certain terms and condition.

Khageswar Patra -V- Directorate of Enforcement, Government of India, Bhubaneswar.

2023 (III) ILR-Cut…… 299

CRIMINAL PROCEDURE CODE, 1973 – Section 469 – Period of Limitation – The Learned trial Court while passing the impugned order had neither noticed the accused person nor had condoned the delay by a speaking order – Effect of – Held, the impugned order taking cognizance of offences was therefore barred by limitation and as such whole subsequent proceeding was also bad in the eyes of law.

Raja @ Rajendra Prasad Swain @ Rajendra Pratap Swain -V- Union of India, R.P.F.

2023 (III) ILR-Cut…… 294

CRIMINAL PROCEDURE CODE, 1973 – Section 473 – Scope and ambit of power U/s. 473 of Cr.PC – Discussed with reference to case laws.

Raja @ Rajendra Prasad Swain @ Rajendra Pratap Swain -V- Union of India, R.P.F.

2023 (III) ILR-Cut…… 294

CRIMINAL TRIAL – Conviction for committing the offence punishable U/ss. 302/201/34 of the IPC – There is no evidence of motive – The deceased died due to asphyxia – There is no direct evidence as regards to the assault or applying padded material to pressurize on the neck causing asphyxia – The entire case is based on the circumstantial evidence – Whether in absence of any evidence regarding motive, the conviction is sustainable? – Held, No – Absence of motive in a case of circumstantial evidence weighs in favour of the accused and as such, the impugned judgment is liable to be interfered with.

FAMILY COURTS ACT, 1984 – Sections 10, 20 r/w Order VII Rule 14 of CPC – Petitioner filed an application U/o. VII Rule 14 to file certain document in support of his case to show that he has sufficient means to maintain the child – The Family Court rejected the application on hyper-technical ground – Whether the rejection order is sustainable? – Held, No – The Learned Family Court should adopt a pragmatic approach to see that the truth is revealed – The impugned order is set aside and petition filed for production of documents relating to assets and property is allowed subject to payment of cost.

Ajay Kumar Nanda @ Pintu -V- Ashok Kumar Padhee & Ors.
2023 (III) ILR-Cut…… 155

INCOME TAX ACT, 1961 – Section 148 – Whether the revenue assessing authority can reopen an assessment already made without disclosing any tangible material? – Held, No – There is conceptual difference between power to review and power to re-assess – For re-assessment, the revenue has to disclose tangible material.

Kalinga Institute of Industrial Technology (KIIT) -V- Asst. Commissioner of Income Tax Exemption Circle, Bhubaneswar & Ors.
2023 (III) ILR-Cut…… 80

INDIAN EVIDENCE ACT, 1872 – Section 32 – Dying declaration – Admissibility, credibility and evidentiary value of a dying declaration – Explained.

Sumanta Singh -V- State of Orissa.
2023 (III) ILR-Cut…… 83

INDIAN PENAL CODE, 1860 – Section 300 (3) – Whether only blow of an arrow shot, though fatal by itself, can automatically take the case out of the purview of the provisions of section 300 of IPC? – Held, No – In order to bring in clause 3 and section 300, prosecution must prove/fulfil necessary ingredients – Explained.

Era Madkami -V- State of Odisha.
2023 (III) ILR-Cut…… 104

THE INDIAN PENAL CODE, 1860 – Section 427 – The ingredients necessary to prove the charge U/s. 427 of IPC is not established – Evidence laid before the trial court no where establishes that

NATURAL JUSTICE – Petitioner was terminated from service on the basis of certain allegation of irregularities committed by him – He was not subjected to any disciplinary proceeding – Whether such termination order is sustainable? – Held, No – This is a clear case of violation of natural Justice.

Tapan Kumar Das -V- State of Odisha & Ors.
2023 (III) ILR-Cut…… 309

NATURAL JUSTICE – The Petitioner has never been served with a notice to show cause before the rescind of the contract agreement was passed – Whether it amounts to violation of principle of natural justice? – Held, Yes – Even in an administrative proceeding involving civil consequences doctrine of natural justice must be held to be applicable.

Sibu Kanungo -V- State of Odisha & Ors.
2023 (III) ILR-Cut…… 36

NEGOTIABLE INSTRUMENT ACT, 1881 – Sections 138(b) and (c) – Complainant not ascertaining that demand notice had been served on the accused – Whether the complaint is maintainable? – Held, No – Unless a notice is served in conformity with the proviso (b) and (c) appended to 135 of the Act, the complaint petition would not be maintainable under law.

Wipro Limited, Banpur, Cuttack -V- Prasanna Kumar Baral.
2023 (III) ILR-Cut…… 314

ODISHA HINDU RELIGIOUS ENDOWMENT ACT, 1951 – Maintainability of suit – The plaintiff instituted suit for declaration of right, title, interest and confirmation of possession and right to seva puja in respect of the deity – Whether in view of the special statute OHRE Act, for determination of the claims of the parties suit U/s. 41 is maintainable? – Held, No.

Narayani Thakurani & Ors.-V- The State of Orissa & Ors.
2023 (III) ILR-Cut…… 221

ODISHA ELECTRICITY REGULATORY COMMISSION DISTRIBUTION (CONDITION OF SUPPLY) CODE, 2004 – Regularization 97, 98 – Whether the escaped billing owing to mistake or omission in applying the appropriate multiplying factor would come within the meaning of "Omission" or "commission" under Regulation 98 of the Code 2004? – Held, Yes.

——o ——

2023 (III) ILR-CUT-01

FULL BENCH

S.TALAPATRA, C.J, K.R. MOHAPATRA, J & Dr. S.K.PANIGRAHI, J.

MATA NO. 53 OF 2009

PRANATI MISHRA …….Appellant

.V.

SRI CHANDRA SEKHAR TRIPATHY …….Respondent

MATRIMONIAL DISPUTE – Procedure for management of the deposit made in family courts or the matrimonial courts – Indicated.

(Para 2-3)

Case Law Relied on and Referred to :-

1. MATA No.53 of 2009 : Pranati Mishra Vs. Chandra Sekhar Tripathy.

For Appellant : Mr. A.K. Panda

For Respondent: Mr. S.C. Dash

ORDER Date of Order : 26.09.2023

BY THE BENCH

1. Heard Mr. A.K. Panda, learned counsel appearing for the Appellant and Mr. S.C. Dash, learned counsel appearing for the Respondent.

2. This reference has been made to the larger Bench to lay down a procedure for management of the deposit made in the Family Courts or the matrimonial courts. By the order dated 30th August 2023 passed in the present appeal being MATA No.53 of 2009 titled as ***Pranati Mishra v. Chandra Sekhar Tripathy***, a Division Bench of this Court has observed as follows:

> *"This Court records the submission of Mr. Dash,learned counsel for the Respondent-Husband that the Respondent-Husband is ready and willing to provide further a sum of Rs.3,50,000/- (Rupees Three Lakh Fifty Thousand) by the next date. Let the Respondent-Husband herein also deposit this amount by way of Demand Draft in the name of Wife-Appellant herein considering the Appeal is now confined to only permanent alimony aspect."*

3. In several other orders, we have noticed that divergent directions are being made in respect of the mode of deposit. We lay down the procedure of making the deposit and the management of deposit till the settlement or the final judicial order by which, entitlement and interest component of the deposit is mutually agreed or determined. Where there could not be any settlement between the parties, the Courts shall not accept any deposit in the name of either of the parties. In such event, the deposit shall be made in the name of the concerned Family Court or the matrimonial court. Even after the final order is passed in the proceeding, the parties may file an application of settlement.The Family Court or the matrimonial court can release the amount in favour of either of the parties. But, when there is no settlement or

agreement, the Family Court or the matrimonial court, as we repeat, shall not accept any deposit in the name of the parties. Deposits shall be made in the name of the court. The deposit be managed in a nationalized bank in the term deposit, which would bring or derive maximum interest and for such period as would be decided by the said court, with flexible locking up. After the dispute is finally settled or adjudicated by virtue of the order of the concerned court or the Family Court or the matrimonial court, the said amount shall be released with the accrued interest. For this purpose, the Family Court or the matrimonial court shall open a special account following the procedure as followed presently by the Motor Accident Claims Tribunal.

4. Before we part with the records, we would like to note that two conflicting orders by the same Division Bench are brought to our notice. One has been marked for circulation to the Family Courts and the matrimonial courts. Such irreconcilable directions might generate confusion. Hence, this reference has been made to the larger Bench for laying down the efficient and beneficial mode for management of deposits in the matrimonial or maintenance suit etc.

5. For circulation of the judgment, a practice direction has been adopted by the Standing Committee of Orissa High Court. The said practice direction stands as follows:

> ***"It is further resolved that in case it is found desirable by any Hon'ble Judge that the judgment is in any case is required to be circulated, instead of passing judicial order regarding circulation thereof, the matter may be brought to the notice of the Chief Justice on the administrative side for doing the needful."***

6. The extract of the said resolution was circulated. As the said resolution is not available in accessible records, we have extracted the said practice direction for observance. If the said practice direction is followed and adhered to, the circulation of the various judgments with divergent dimensions can be avoided.

7. In terms of the above, this reference stands answered and disposed of.

—— o ——

2023 (III) ILR-CUT-02

S. TALAPATRA, J & M.S. SAHOO, J.

W.P.(C) NO. 2338 OF 2015

THE EXECUTIVE ENGINEER (ELECTRICAL), CESU .....Petitioner

.V.

FAGUBHUSAN PARIDA & ANR. .....Opp.Parties

WP(C) NO.21792 OF 2015

THE EXECUTIVE ENGINEER (ELECTRICAL),CESU,CUTTACK ELECTRICAL DIVISION, CUTTACK & ANR. -V- M/S. PASUPATI FEEDS & ANR.

WP(C) NO. 23927 OF 2015
THE EXECUTIVE ENGINEER (ELECTRICAL), CESU, CITY DISTRIBUTION DIVISION NO.II CUTTACK. -V- OMBUDS MAN NO.1, BHUBANESWAR & ANR.

(A) THE ELECTRICITY ACT, 2003 r/w Regulation 97, 98 of OERC Distribution (Condition of supply) Code, 2004 – Whether by applying the multiplying factor the distribution licensee can modify the bill and demand payment from the consumer against the electricity consumption? – Held, Yes – Multiplication factor shall be done following the Regulation 97 of Code, 2004. (Para 55)

(B) ODISHA ELECTRICITY REGULATORY COMMISSION DISTRIBUTION (CONDITION OF SUPPLY) CODE, 2004 – Regulation 97, 98 – Whether the escaped billing owing to mistake or omission in applying the appropriate multiplying factor would come within the meaning of "Omission" or "commission" under Regulation 98 of the Code, 2004 – Held, Yes. (Para-56)

Case Laws Relied on and Referred to :-

1. (1997) 9 SCC 465 : Swastic Industries Vs. Maharashtra State Electricity Board.
2. AIR 1978 Bom. 369 : M/s. Bharat Barrel & Drum Manufacturing Co. Pvt. Ltd. Vs. Municipal Corporation of Greater Bombay & Anr.
3. AIR 2007 Orissa 37 : Ajay Kumar Agrawal Vs. O.S.F.C
4. 2005 (4) SCC 223 : Punjab State Electricity Board Ltd. Vs. Zora Singh & Ors.
5. (1975) 1 SCC 559 : Ramchandra Keshav Adke Vs. Govind Joti Chavare & Ors.
6. (2007) 7 SCC636 : Tamil Nadu State Electricity Board Vs. Central Electricity Regulatory Commission & Ors.
7. (1887) 18 QBD 428 : Foster Vs. Diphwys Casson.

For Petitioner : Mr. S.C. Dash
For Opp. Parties : Mr. Bikash Jena

JUDGEMENT Date of Judgment: 31.03.2023

S. TALAPATRA, J.

The foundation of the challenge in all these writ petitions is identical. The common question that wades through all the writ petitions is that whether by applying the multiplying factor (MF) the distribution licensee can modify the bill and demand payment from the consumer against the electricity consumption. Before we deal with the said question, we would like to briefly note the relevant facts in each of the writ petitions.

2. WP(C) No.2338 of 2015

The petitioner represents the Distribution Licensee (CESU). The Opposite Party No.1 is the consumer of electricity under HT Industrial (M) supply category for a contract demand of 27 K.W. of load under CESU. The power supply was effected from 01.07.2012 with installation of a Low Tension Current Transformer, (LTCT) meter bearing SL. No.CESU-0350, IR-01 & having Multiplying Factor of

(M.F.) 20. Details of the metering installation, load details, transformer details & meter details etc. were made known to the consumer when the consumer had signed the test certificate. It has been clearly mentioned that MF will be 20, but due to oversight & mistake, the bill continued with M.F-1 and the said metering was continued till the day of filing of the writ petition with the same Current Transformer (CT) & Potential Transformer (PT) ratio. After detection of the aforesaid omission in respect of the multiplying factor (MF), the modified bills were raised with M.F-20 w.e.f. May, 2014.

3. Since the consumer was under-billed for the period from 01.07.2012 to April, 2014, not being billed with the correct M.F, the differential on the basis of the actual units consumed were calculated with M.F.-20 in lieu of M.F.1 and thus, under-billed amount was worked out at Rs.5,09,415/-.The consumer was accordingly asked for payment of the said differential amount by the letter No.9027 dated 22.09.2014, Annexure-1 to the writ petition.

4. Being aggrieved by the said demand, the consumer had filed a Consumer Complaint Case No.108 of 2014 in the Grievance Redressal Forum (GRF) against the Distribution Licensee (CESU) invoking the power under Section 42(5) of the Electricity Act.

5. The consumer claimed in the complaint that the meter was malfunctioning and as such Regulations 97 & 98 of the OERC Distribution (Condition of Supply) Code, 2004 would apply. Further it has been contended that Regulation 98 of the OERC Distribution (Condition of Supply) Code, 2004 speaks about the non-availability of meter-reading due to fault in the metering equipments or due to absence of the multiplying factor of the meter, billing in such cases shall be done as per proceeding as laid down in Regulation-97. The GRF by waiving the objection of the petitioner has passed the order dated 10.11.2014, Annexure-4 to the writ petition, observing as follows:

> ***"We perused the available documents including the billing statement from July' 2012 and revised statement from July' 2012 to March'2014 towards M.F. change from 01 to 20. Regulation-98 of OERC Distribution Supply Code, clearly mentioned as "if the readings of meter working in association with Current Transformer (CT) and Potential Transformer (PT) and other auxiliary equipment if any, are found to be incorrect on account of wrong connection or disconnection of such CTs, PTs and other equipment or on account of omissions of commissions in regard to multiplying factor, erroneous adoption of CT ratio, PT ratio, the billing in such cases shall be done as laid down in Regulation-97.***
>
> ***As per Regulation-97 of OERC Distribution (Condition of Supply) Code, 2004 for the period the meter remained defective or was lost, the billing shall be done on the basis of average meter reading for the consecutive three billing periods succeeding the billing period in which the defect or loss was noticed. It shall be presumed that use of electricity through defective meter was continuing for a***

period of three months immediately preceding the date of inspection in case of Domestic and Agricultural consumers and for a period of six months immediately preceding the date of inspection for all other categories of consumers, unless the onus is rebutted by the person, occupier of possessor of such premises of place.

In the present case since the date of power supply i.e. from July'2012 the respondent prepared the energy bill with MF-1 upto April' 2014 despite in test report the MF is written as 20 in which both the complainant and respondent have signed. Erroneously the billing was continued with MF-1 by the respondent upto April-2014. In May' 2014 the bill was prepared with MF-20. As per Regulation, the billing should be done with MF-20 for past six month only."

Having observed thus, the GRF has directed for revision of bill for change of MF from 1 to 20 from July, 2012 i.e. the date of the initial power supply. The GRF was of the opinion that the revised bill with MF-20 shall be issued to the complainant from November, 2013 to April, 2014 i.e. only for 6 month as per the Regulation. But the word "Regulation" as used in the order dated 10.11.2014, Annexure-4 to the writ petition, the GRF meant Regulation-97 of the OERC Distribution (Condition of Supply) Code, 2004.

6. The petitioner has challenged the said order by contending that Regulations 98 and 97 of the OERC Distribution (Condition of Supply) Code, 2004 are not applicable in view of the nature of the dispute. Even the GRF has observed that the dispute is not on the defective meter reading but on account of omission and commission in regard to the multiplying factor. Hence, Regulation 97 of the OERC Distribution (Condition of Supply) Code, 2004 will apply. The petitioner has asserted in the writ petition that the order of the GRF suffers from serious illegality as the GRF has perversely interpreted Regulations 97 and 98 of the OERC Distribution (Condition of Supply) Code, 2004 in order to apply the same in the present dispute. Hence, the GRF's order is not sustainable. According to the petitioner, Regulation 98 of the OERC Distribution (Condition of Supply) Code, 2004 would only apply in the event of non-availability of the meter-reading due to fault in the metering equipments or due to absence of the multiplying factor of the meter. In such cases, Regulation-97 of the OERC Distribution (Condition of Supply) Code, 2004 would also apply. In short, the case of the petitioner is that the correct multiplying factor of the meter being not available, the meter cannot be deemed as defective for purpose of billing. So the applicability of Regulations 97 and 98 of the OERC Distribution (Condition of Supply) Code, 2004 are totally unwarranted. The observation of the GRF by the impugned order, Annexure-4 to the writ petition, that change of MF-1 to MF-20 will only apply for the immediate preceding 6 month from the date of the billing in the changed MF i.e. from November, 2013 to April, 2014. The remaining period cannot be accounted for purpose of billing.

7. The consumer (the Opposite Party No.1) has filed the counter affidavit in order to defend the GRF's order dated 10.11.2014 and raised the question relating to maintainability of the writ petition, stating *inter alia* that judicial review from the

order of GRF cannot be sustained in as much as GRF is the petitioner's *own establishment***.** It is the consumer who can only challenge the order passed by the GRF under Section 42 (6) of the Electricity Act, 2003. It has been further asserted by the consumer that there is not a single instance that during the period from 01.01.1999 to 27.05.2004 the Distribution Licensee had challenged the order passed by the designated authority by filing a writ petition. Since the GRF is constituted by the technical experts, no action for the judicial review at the instance of the Distribution Licensee is maintainable. It has been contended that by the letter dated 24.04.2014, suddenly CESU had claimed an amount of Rs.5,09,15.32/-, to be paid by the consumers. The said amount has been settled by way of revision of the bill on the basis of the changed MF 20. According to the consumer, the GRF has correctly held that Regulation 98 of the OERC Distribution (Condition of Supply) Code, 2004 is applicable and as such, Regulation 97 of the OERC Distribution (Condition of Supply) Code, 2004 shall apply and the demand shall be restricted only for 6 months preceding the date of demand and not for entire period during which such omission or commission continued.

8. In the case at hand, the petitioner has revised the bill for past 22 months, from July, 2012 to April, 2014 and the petitioner claimed a sum of Rs. 5,09,415.32/- as the differential amount due to erroneous billing by applying the multiplying factor 01, instead of 20. The petitioner has claimed that they are entitled to raise the differential bill for the entire period of 22 months, but by the impugned order, the same has been restricted only to preceding 6 months, in the manner as noted above. Therefore, the solitary question, which is pertinent, is that whether the revised bill can be raised for the entire period when the bills were erroneously made by applying a wrong multiplying factor or such bill shall be restricted to for a period of immediate preceding 6 month from the date of the revised billing. The petitioner by filing a rejoinder has seriously resisted the question of maintainability by stating that GRF is not an intra-departmental mechanism but it is a statutory body, as constituted under Section 42 (5) of the Electricity Act, 2003 and as such, the petitioner does not have any control or authority over the GRF. The petitioner is not in a position to influence the process in any manner. Hence, against the order of the GRF, the petitioner has right to invoke the jurisdiction of this court under Articles 226 and 227 of the Constitution of India.

9. To such claim of the petitioner, the consumer by filing an additional affidavit, has stated that it is the responsibility of the Distribution Licensee to record the meter data, maintain data bills and all information associated with the consumer's meter. The petitioner is under obligation to verify the correctness of the meter data. According to the consumer, it is a case of omission within the plain dictionary meaning and as such Regulation 98 of the said code would apply and hence, Regulation 97 will come into play so far the revised billing is concerned. It shall be restricted to preceding 6 months from the date of the revised billing. Hence, no illegality has been committed by the GRF while passing impugned order dated 10.11.2014.

10. WP(C) No.21792 of 2015

In this case also the petitioners have challenged the order dated 05.11.2015 passed in Consumer Representation (C.R.) Case No.47/2015 by the Ombudsman-I of the Electricity, Bhubaneswar. The Opposite Party No.1 (M/s Pasupati Feeds) is a consumer of CESU under large industrial category. The consumer had executed the agreement on 12.12.2012 for a contract-demand of 400 KVA. In terms of the said agreement, the power supply was effected after installation of an energy meter having multiplying factor of 200. On 29.10.2013, the said metering unit was replaced with a new 11KV/110 metering unit of 30/5 ampere containing the meter multiplying factor of 600, in place of 200 within the knowledge of the consumer (the Opposite Party No.1). Report to that effect was prepared and the same was acknowledged by the consumer. Though the multiplying factor was changed from 200 to 600 with effect from 29.10.2013, but due to oversight, the consumer was under-billed on account of clerical mistake. The consumer was billed under MF-200 by mistake. The consumer was not billed on actual MF-600. The said mistake came to the notice of the petitioners in the month of February 2015 when the demand notice No.AM-265, dated 12.03.2015 was issued to the consumer (the Opposite Party No.1) demanding Rs.16,74,512/- from the consumer. The differential bill was raised on MF-600 from October, 2013 till January, 2015. But from the month of February, 2015 the bill was correctly raised and the bill amount was paid by the consumer. The consumer has filed a Complaint Case No.337/2015 before the Grievance Redressal Forum (GRF) at Cuttack invoking the provisions of Section 42 (5) of the Electricity Act, 2003. But the said complaint was dismissed by the GRF by the order dated 29.06.2015, Annexure-4 to the writ petition. While dismissing the complaint, the GRF has *inter alia* observed as follows:

> *"From the above, it is clear that the Regulation-97 of OERC Distribution Code 2004 makes provision for billing in case of defective meter where it has been held that the use of electricity was continuing for a period of maximum six months immediately/proceeding from the date of inspection. But in instant case the meter of the complainant is not defective so far filed testing report dt.29.10.2013 Sl. No.6 Book No.160 is concerned. Only the Multiplying Factor has been changed from 200 to 600 which is on record of the O.P. since 29.10.2013 as well as the a copy of the testing report dt.29.10.2013 has also been handed over to the complainant on the stay of testing for his reference. The said MF of 600 has been escaped to be reflected in the energy charge bills of the complainant causing less claim of energy charge from dt.29.10.2013. field testing report dt.29.10.2013 has been signed by the consumer as token of acceptance of the report which construes that the fact regarding changed Multiplying Factor of 600 is in the knowledge of the complainant since dt.29.10.2013. Hence the provision made under Regulation-98/97 of OERC Distribution Code, 2004 should not be misinterpreted. As such the contention of the complainant to consider his matter as per Regulation-98/97 of OERC Distribution Code, 2004 is misconceived as the fact of MF 600 is on record of O.P. since dt.29.10.2013 with the knowledge of the complainant. In view of the above, the Forum feels that there is nothing illegality made by O.P. in raising additional demand of Rs.16,74,512/- in his letter no.265 dt.12.03.2015. Subsequently reduced to Rs.15,79,539/- by letter dt.02.05.2015. Hence the case is dismissed as there is no merit in the petition of the complainant."*

11. The consumer, being aggrieved by that order dated 29.06.2015, has filed a Consumer Representation Case No. OM (I)-47 of 2015 before the Ombudsman-I, Odisha Electricity Regulatory Commission, Bhubaneswar. By the order dated 05.11.2015, the Ombudsman had reversed the said finding of the GRF and held as follows:

> *"It is a fact that, the appellant has consumed the energy demanded by the licensee, but billed on less unit on account of "omission" due to failure on the part of the Respondent in taking prompt and vigilant action. Due to the defect and deficiencies on the part of Respondent such omission was detected after a period 16 months from the date of omission. This Forum feels that GRF have misconceived the very meaning of omission read under the provision of Regulation-98.*
>
> *There should not be any doubt that adoption of wrong Multiplying Factor (MF) is an "Omission" or "Commission" in regard to Multiplying Factor (MF) as mentioned in Regulation-98 and the same attracts billing under Regulation-97 i.e. for a maximum period of six months from the date of detection of such omission by the respondent.*
>
> *Therefore unless the Respondent is empowered by law and regulation, they are not empowered to recover the escaped unit beyond six months from the complaint.*
>
> *In view of the above finding and argument this Forum set aside the order of GRF arised in CC No.337 of 2015 dated 29.06.2015 and restrict the claim of the Respondent on account of omission of correct Multiplying Factor for maximum period of six months from the date of detection of such omission. The licensee is free to recover the balance amount from the erring officer, instead of burdening to the consumer/power sector through ARR."*

12. The said order of the Ombudsman has been challenged in this writ petition by the Distribution Licensee. The petitioners have categorically stated that the finding of the Ombudsman is based on erroneous interpretation of Regulation-98 of the OERC Distribution Code, 2004 and hence, adoption of the mechanism as provided by Regulation 97 of the OERC Distribution (Condition of Supply) Code, 2004 is unsustainable. It is necessary for doing justice that the order of the Ombudsman be interfered with, by directing the consumer to pay the revised differential bill without abridging the bill, restricting the same to the preceding 6 months, as stated. In this regard, the petitioners have referred to a decision of the apex court in ***Swastic Industries –Vrs.- Maharashtra State Electricity Board; (1997) 9 SCC 465*** to contend that in absence of any omission or commission in the meter or in the meter/metering unit/equipment etc., but not for raising the correct bill as per the actual and correct M.F. of the meter due to oversight, Regulation 97 qua Regulation 98 of the OERC Distribution (Condition of Supply Code), 2004 cannot be applied. The petitioners have contended that there is no application of Regulation 98 of the OERC Distribution (Condition of Supply) Code, 2004 in the case of so called clerical mistake. That apart, it has been contended by the petitioner that the Ombudsman's order as challenged in this writ petition, is based on perverse interpretation of Regulation 98 of the OERC Distribution (Condition of Supply) Code, 2004. The word *omission* or *commission* as appearing in Regulation 98 would

only mean omission or commission in regard to multiplying factor of the meter, metering unit or equipment etc., not committed by a human being. The consumer (the Opposite Party No.1) did not file any counter affidavit, but filed their written note of submission in order to resist the pleas raised in the writ petition. We will deal with the written note while recording the submission of the learned counsel appearing for the rival parties.

13. It is apparent from the above facts that the identical issue has raised in WP(C) No.2338 of 2015.

14. <u>WP(C) No.23927 of 2015</u>

The petitioner represents the Distribution Licensee, City Distribution Division No.II, Badambadi, CESU, Cuttack. By this writ petition, the petitioner has challenged the Judgment dated 05.12.2015 by the Ombudsman-I, Odisha Electricity Regulatory Commission, Bhubaneswar by which the finding of the GRF, returned by the Judgment dated 06.06.2015 delivered in C.C.Case No. 263 of 2015, Annexure-7 to the writ petition has been reversed. The consumer (the Opposite Party No.2) is a large industrial consumer with a contract demand of 125 KVA. A meter with multiplying factor 20 was installed in the premises of the said industry to record the consumption. At the instance of the consumer, a new SEMS Meter was installed in his premises with the multiplying factor 40. During verification by the authorized M.R.T. Personnel on 13.11.2013 it was found that consumer had enhanced his production capacity. The contract demand was enhanced from 88 KW to 117.8 KW by unauthorized means and without giving prior intimation to the Distribution Licensee. On further scrutiny, it appeared from the M.R.T. report (SL. No.172) dated 13.11.2013 that due to such excess load C.T. of the metering arrangement were overloaded and it needed to be replaced with higher capacity C.T. of 200/5Amp. The said meter was installed by the M.R.T. personnel in presence of the consumer on 07.02.2014. After installation of the meter, the concerned officer, M.R.T., along with the consumer signed the said meter installation report. Copies of the meter installation reports dated 13.11.2013 and 07.02.2014 are under Annexure-2 series to the writ petition. Subsequently, the consumer was supplied with a new meter along with C.T. with M.F.40. The modification of metering arrangement was carried out on 07.02.2014.

15. As per the meter installation report, the consumer was to be billed with the multiplying factor 40, but inadvertently, the consumer was billed as per the earlier multiplying factor 20. The said inadvertence came to the notice when the meter was further verified on 07.02.2015. In the said verification report, Annexure-3 to the writ petition, it was noted that the multiplying factor of the meter is MF 40. The verification report was duly signed by the consumer. Error in the bills in terms of the new meter MF, installed on 07.02.2014, came to the notice of the billing authority. Accordingly, during the month of February, 2015, a revised bill of the escaped amount was served on the consumer by the letter dated 10.02.2015. The consumer

received the differential bill to the extent of Rs.11,42,415/-, along with details, Annexure-4 to the writ petition. The consumer was being billed thereafter in every month with M.F. 40 and the consumer has been regularly paying such bill with M.F.40 without any reservation.

16. Being aggrieved by the differential bill, the consumer had filed the complaint before the GRF, CESU, Cuttack being Complaint Case No.263 of 2004. It has been contended that the petitioner cannot raise bill beyond the provisions of Regulation 98 of the OERC Distribution (Condition of Supply) Code, 2004. If the reading of a meter functioning in association of C.T. and P.T. and other auxiliary equipments, is found to be incorrect on account of omission or commission in regard to M.F., billing shall be done following the procedure as laid down in Regulation-97 of the OERC Distribution (Condition of Supply) Code, 2004. Therefore, it had been contended before the GRF that the Distribution Licensee shall be directed to revise the bill, limiting the period in terms of Regulation 97 of the OERC Distribution (Condition of Supply) Code, 2004. It has been also mentioned that the consumer had requested the Supply Engineer to revise the additional bill according to the provision of Regulation 97 of the OERC Distribution (Condition of Supply) Code, 2004 but that was not acceded to. Hence, there had been no other alternative but to approach the GRF. The consumer is saddled with liability of payment of a sum of Rs.11,42,415/-. The Complaint Case of the consumer had been dismissed by the GRF by their Judgment dated 06.06.2015, Annexure-7 to the writ petition, by observing as follows:

> "*It is clear that the Regulation-97 of OERC Distribution Code 2004 makes provision for billing in case of defective meter where it has been held that the use of electricity was continuing for a period of six months immediately/preceding from the date of inspection. But in instant case the meter of the complainant is not defective so far MRT Testing Report No.II dt.07.02.2014 & Sl. No.40 dt. 07.02.2015 are concerned only the Multiplying Factor has been changed from 20 to 40 which is on record of the O.P. since date 07.02.2014 and subsequently report to be 40 also on dt. 07.02.2015 by MRT, Cuttack. The said MF of 40 has been escaped to be reflected in the energy charge bills of the complaint causing less claim of energy charge. Both the MRT Report dt. 07.02.2014 & dt. 07.02.2015 have been signed by the consumer as token of acceptance of the report which construes that the Multiplying Factor of 40 is in the knowledge of the complainant. Hence the provision under Regulation-98 & 97 of the OERC Distribution (Condition of Supply) Code, 2004 should not be misinterpreted. As such the contention of the complainant to consider his matter as per Regulation- 98/97 of OERC Distribution Code 2004 is misconceived as the fact of MF 40 is reported and on record since dt.07.02.2014 with the knowledge of the complainant. In view of the above the Forum Feels that there is nothing illegality made by O.P. in raising the additional demand of Rs.11,42,415/- on account of differential amount towards (MF) of 40 which is recoverable from the complainant. Hence, the case is dismissed as there is no merit in the petition of the complainant.*"

17. Being aggrieved by the said Judgment dated 06.06.2015 Annexure-7 to the writ petition, the consumer filed the Consumer Representation Case No. OM (I)-42

of 2015. The said case was disposed of, by the Judgment dated 05.12.2015, Annexure-1 to the writ petition. It has been observed by the Ombudsman-I while reversing the finding of the GRF as follows:

> *"Omission: 1. A failure to do something; esp. a neglect of duty.*
> *2. The act of leaving something out.*
> *3. The State of having left out or of not having been done.*
> *4. Something that is left out, left undone or otherwise neglected.*
>
> *This Forum is of the opinion that, the Respondent is not entitle to claim the lost unit for more than six months, intention and introduction of the Regulation-97 and 98 in the OERC Distribution Code, 2004 read with earlier instruction of Hon'ble OERC on dated 03.03.2023 clearly evident and supporting the stand of the Petitioner to enforce Regulation-97 to the present case. The instruction of Hon'ble OERC in their letter dated 03.03.2003 mainly reads as below:*
>
> *"Such instructions/guidelines were issued by the OERC as it came to the notice of the OERC that some of the consumers are being served with large arrear bills for a period exceeding six months for having defective meters in their premises. So, the Commission directed that in case of defective meter, "the licensee is entitled to raise an arrear bill for a maximum period of six months or the period for which it remained defective (whichever is less) as per Section 26(6) of the Indian Electricity Act, 1910. Arrear billing due to adoption of wrong multiplying factor (MF) would also be dealt under the above mentioned section. **The** consumer should not be penalized beyond this period since it is duty and obligation of licensee to keep the meter in good condition and ensure routine testing/checks."*
>
> *Also if we minutely read Regulation-98 "if the reading of meter if any, are found to be incorrect on account of (wrong connection or disconnection of such CTs, PTs and other equipment) or on account of omission or commission in regard to multiplying factor, erroneous adoption of CT ratio, PT Ratio, the billing in such cases shall be done as laid down in Regulation-97."* **[Emphasis Added]**

18. Having observed thus, the Ombudsman-I has set aside the order of the GRF delivered in CC No.263 of 2015 and restricted the claim of the petitioners on account of omission of correct multiplying factor for a maximum period of 6 preceding months from the date of detection of such omission. The licensee has been given liberty to recover the balance amount from the concerned officer, instead of burdening the consumer. The said Judgment dated 06.12.2015, Annexure-1 to the writ petition, has been challenged by this writ petition.

19. According to the petitioners, Regulation 97 qua Regulation 98 cannot have any application in the perspective-fact as noted above. It has been contended by the petitioners that the Regulation-98 of the OERC Distribution (Condition of Supply) Code, 2004 provides unequivocally that if the meter working in association with CT and PT and other auxiliary equipments is found malfunctioning on account of wrong connection or disconnection of CT and PT and other equipments, only then Regulation 97 and Regulation 98 can be applied. But the case in hand does not fall within the said category. Hence, the impugned Judgment dated 05.12.2015,

Annexure-1 to the writ petition, needs to be set aside. As nobody has appeared for the Opposite Party No.2, despite due notice from this court, no counter affidavit has been filed. But having the resemblance of the issue, the issue raised in the writ petition will be decided on merit with the other analogous writ petitions.

20. In this case also, the identical question has been raised whether erroneous billing will debar the Distribution Licensee to recover the whole escaped amount from the consumer or that amount shall be restricted to the amount as provided under Regulation 97 of the OERC Distribution (Condition of Supply) Code, 2004.

21. It is apparent that the common question that emerges for determination is whether the escaped billing owing to mistake or omission in applying the appropriate multiplying factor would come within the meaning of "Omission" or "Commission" under Regulation 98 of the OERC Distribution (Condition of Supply) Code, 2004. Mr. S.C. Dash, learned counsel appearing for the petitioner, in all these three writ petitions, has quite succinctly submitted that the regular bill had been raised by not applying the multiplying factor of the meter. As such, those bills cannot be stated to have raised for omission/commission/errors/defect/fault in the meter or its auxiliary parts. Hence, Regulations-97 and 98 of the OERC Distribution (Condition of Supply) Code, 2004 will not apply for escaped billing.

22. The way Regulations 98 and 97 have been interpreted by the GRF is unacceptable and hence, it is liable to be interfered with. Revised bills have been raised for recovering of the charge for the "escaped period". The consumer is bound to pay the said differential amount. In ***Swastic Industries*** *(supra)****: (1997) 9 SCC 465*****,** in which case, the supplementary bill demanding payment was raised and the consumer had objected to that bill. In the face of threat of disconnection of the electricity supply for non-payment of the supplementary demand, the complainant had approached the State Consumers Dispute Redressal Commission which observed that the claim was barred by limitation. The Maharashtra Electricity Board filed an appeal to the National Consumer Redressal Commission.

23. Bombay High Court in ***M/s. Bharat Barrel & Drum Manufacturing Co. Pvt. Ltd. Vs. Municipal Corporation of Greater Bombay & Anr.: AIR 1978 Bom. 369*** held that there is no limitation for making the demand by way of supplementary bill. Section 24 of the Indian Electricity Act, 1910 gives power to the Board to issue such demand and to discontinue the supply to a consumer who neglects to pay the charges.

24. Thereafter, in the said perspective-fact, the apex court has observed as follows:

> *"It would, thus, be clear that the right to recover the charges is one part of it and right to discontinue supply of electrical energy to the consumer who neglects to pay charges is another part of its. The right to file a suit is a matter of option given to the licensee, the Electricity Board. Therefore, the mere fact that there is a right given to the Board to*

> *file the suit and the limitation has been prescribed to file the suit, it does not take away the right conferred on the Board under Section 24 to make demand for payment of the charges and on neglecting to pay the same. They have the power to discontinue the supply or cut-off the supply, as the case may be, when the consumer neglects to pay the charges. The intendment appears to be that the obligations are actual. The board would supply electrical energy and the consumer is under corresponding duty to pay the sum due toward the electricity consumed. Thus the Electricity Board, having exercised that power, since admittedly the petitioner had neglected to pay the bill for additional sum, was right in disconnecting the supply without recourse to filling of the suit to recover the same. The National Commission, therefore, was right in following the judgment of the Bombay High Court and allowing the appeal setting aside the order of the State Commission. Moreover, there is no deficiency of service in making supplementary demand for escaped billing."*

25. Mr. Das, learned counsel appearing for the petitioners has placed his reliance on two decisions in support of his contention.

26. In ***M/S Prem Cottex vs Uttar Haryana Bijli Vitran Nigam Ltd & Ors. (Judgment dated 05.10.2021,*** *delivered in* ***Civil Appeal No.7235 of 2009),*** the apex court has observed as follows:

> "*The period of limitation of two years would commence from the date on which the electricity charges became first due under Section 56(2)". This Court also held that Section 56(2) does not preclude the licensee from raising an additional or supplementary demand after the expiry of the period of limitation in the case of a mistake or bona fide error. To come to such a conclusion, this Court also referred to Section 17(1) (c) of the Limitation Act, 1963 and the decision of the apex court in* ***Mahabir Kishore & Ors. vs. State of Madhya Pradesh: 1989 4 SCC 1****.*
>
> **[Emphasis Added]**

27. In ***Prem Cottex*** *(supra),* the dispute emerged from the memorandum dated 11.09.2009 which is a short assessment notice. It has been claimed that though the multiplying factor (MF) was 10, it was wrongly recorded in the bills for the period from 3.08.2006 to August, 2009 as 5 and as a consequence of that mistake, there was short billing to the tune of Rs.1,35,06,585/-. By the said short assessment notice, the said amount was sought to be recovered. The said notice and the demand were challenged. In ***Prem Cottex (supra)*** the apex court has observed further as follows:

> *"Sub-section (2) uses the words "no sum due from any consumer under this Section". Therefore, the bar under Sub-section (2) is relatable to the sum due under Section 56. This naturally takes us to Sub-section (1) which deals specifically with the negligence on the part of a person to pay any charge for electricity or any sum other than a charge for electricity. What is covered by section 56, under sub-section (1), is the negligence on the part of a person to pay for electricity and not anything else nor any negligence on the part of the licensee.*
>
> *The matter can be examined from another angle as well. Sub-section (1) of Section 56 as discussed above, deals with the disconnection of electric supply if any person "neglects to pay any charge for electricity". The question of neglect to pay would arise only after a demand is raised by the licensee. If the demand is not raised, there is no occasion for a*

consumer to neglect to pay any charge for electricity. Sub-section (2) of Section 56 has a non−obstante clause with respect to what is contained in any other law, regarding the right to recover including the right to disconnect. Therefore, if the licensee has not raised any bill, there can be no negligence on the part of the consumer to pay the bill and consequently the period of limitation prescribed under Sub-section (2) will not start running. So long as limitation has not started running, the bar for recovery and disconnection will not come into effect. Hence the decision in Rahamatullah Khan and Section 56(2) will not go to the rescue of the appellant." **[Emphasis Added]**

28. Mr. Dash, learned counsel appearing for the petitioner has submitted that the escaped billing was for realising the cost of electricity as supplied to the Opposite Party No.1 and as such, the Distribution Licensee is entitled to recover the said cost. In ***Jingle Bell Amusement Park P. Ltd. vs, North Delhi Power Ltd. (Judgment dated 19.04.2011*** delivered in ***WP(C) No.8647 of 2007)*** the multiplying factor of the concerned meter was 12, but inadvertently the bills were raised with the multiplying factor 1 only. The counsel for the respondent in this regard during the course of hearing had handed over a copy of the Meter Installation Protocol Sheet bearing the signatures of the petitioner and showing the multiplying factor of the meter to be 12. The counsel for the petitioner had controverted the same. It is also not in dispute that the petitioner had in February, 2003 applied for additional load of 60 KW, but had drawn the total load of 140 KW. The additional load was energized in March, 2004. It is the case of the petitioner that while sanctioning the enhanced load to the respondent-consumer, it came to light that the respondent-consumer was being billed with multiplying factor 1 instead of 12 and hence, the multiplying factor 12 had been applied with effect from August, 2003 and the impugned demand was raised for the escaped period i.e. 30th November, 2002 to July, 2003.

29. It has been in the identical facts by the Bombay High Court that in case, the consumer is under-billed on account of clerical mistake, such as where in the bill, the multiplication factor had changed, but due to oversight the department issued bills with 500 as the multiplication factor instead of 1000, the bar of limitation cannot be raised by the consumer. It was held that the revised bill amount would become due when the revised bill is raised and Section 56(2) of the Electricity Act would not come in the way of recovery of the amount under the revised bills.

30. In our considered view, in this case, no objection has been raised on the ground of limitation. Moreover, it is seen that in view of the settled position of law as declared by the apex court, the demand had been raised within the period of limitation of 2 years following Section 56(2) of the Electricity Act.While summarizing his contention, Mr. Das, learned counsel has contended that there is no omission/commission/error/defect/fault in the meter or in its auxiliary parts and hence, Regulation 98 of the OERC Distribution (Condition of Supply) Code, 2004 will not apply.

31. Mr. B. Jena, learned counsel appearing for the Opposite Party No.1 in WP(C) No.2338 of 2015 and WP(C) No.21792 of 2015 has contended that failure to

raise the bill on applying the appropriate multiplying factor falls within the category of omission and hence, Regulation 98 of the OERC Distribution (Condition of Supply) Code, 2004 will apply without any amount of doubt. For purpose of reference, Regulation 98 of the OERC Distribution (Condition of Supply) Code, 2004 is reproduced below:

> "*if the readings of meter working in association with Current Transformer (CT) and Potential Transformer (PT) and other auxiliary equipment, if any, are found to be incorrect on account of wrong connection or disconnection of such CTs, PTs and other equipment or on account of omissions or commissions in regard to multiplying factor, erroneous adoption of CT ratio, PT ratio, the billing in such cases shall be done as laid down in Regulation 97."*

32. For purpose of further reference, Regulation 97 of the OERC Distribution (Condition of Supply) Code, 2004 is also reproduced hereunder:

> *"For the period the meter remained defective or was lost, the billing shall be done on the basis of average meter reading for the consecutive three billing periods succeeding the billing period in which the defect or loss was noticed. It shall be presumed that use of electricity through defective meter was continuing for a period of three months immediately preceding the date of inspection in case of Domestic and Agricultural consumers and for a period of six months immediately preceding the date of inspection for all other categories of consumers, unless the onus is rebutted by the person, occupier or possessor of such premises or place."*

33. Mr. Jena, learned counsel has contended that the meaning of omission and commission according to ***Black's Law Dictionary-9th Edition.2009 [Page-1197]*** is as follows:

> "***Omission-*** *1. A failure to do something; esp., a neglect of duty,*
>
> *2. The act of leaving something out,*
>
> *3. The state of having been left out or of not having been done,*
>
> *4. Something that is left out, left undone or otherwise neglected.*

34. Mr. Jena, learned counsel has further submitted that Regulations 97 and 98 of the OERC Distribution (Condition of Supply) Code, 2004 have been placed in the Chapter-X of the OERC Distribution (Conditions of Supply) Code, 2004 under the heading *RECOVERY OF ELECTRICITY CHARGES AND INTERVAL OF BILLING*. Provisions of the said Chapter-X cast a duty on the licensee to raise and serve the bill towards the charges payable by a consumer for supply and consumption of electricity. Thus, the consumer remains under obligation for payment of the bills so raised.

35. According to Mr. Jena, learned counsel, from a bare reading of the said Regulations 97 and 98 of the OERC Distribution (Condition of Supply) Code, 2004, it would transpire that in case of defective meter, the procedure that is to be followed for billing has been provided under Regulation 97. Billing in the case like the present one is covered under Regulation 98. A joint reading of both the Regulations

makes it further clear that the billing procedure as prescribed under Regulation 97 is to be followed by the licensee in a case of defective meter. Regulation 97 is not restrictive to defective meters only. It can also be followed for the cases which fall under Regulation 98. Provisions under Regulation 98 are plain and no further interpretation is required to understand that purport.

36. Having referred to the instructions/guidelines under No.Engg-80/2000/452 dated 03/03/2003 vide Annexure-A/1 of the additional affidavit filed by the Opp. Party No.1, Mr. Jena, learned counsel has submitted that from the said circular it is clear that the cases like the present ones are covered by Regulation 98 read with Regulation 97 of the OERC Distribution (Condition of Supply) Code, 2004. Mr. Jena, learned counsel has further submitted that in the O.S.E.B. (General Conditions of Supply) Regulations, 1981 a provision was incorporated under Regulation - 32 (g) authorizing the Engineer to revise or rectify any mistake on detection at any time and present a fresh bill to the consumer. But by the subsequent legislation i.e. O.S.E.B. (General Conditions of Supply) Regulations, 1995, the said power had been taken away from the engineers. But after introduction of the Electricity Act, 2003 the legal regime has taken a determinative turn. In case of an issue on which the statute is silent, it would amount to prohibition. To buttress the said statement, a decision of the apex court in ***Ajay Kumar Agrawal Vrs. O.S.F.C: AIR 2007 Orissa 37*** has been relied on. For purpose of reference, the relevant passage is extracted hereunder:

> *"27. Therefore, the submission of the learned counsel of WESCO that the transaction is absolutely commercial is not entirely correct. If may be noted that the Opp. Party No. 1 is asking tor supply of electricity for commercial purposes. But electricity, being a public property, its supply is controlled by the statute. Therefore elements of public law govern the situation at the stage of supply. Under such circumstances, WESCO as a distribution licensee is clothed with the status of a State under Art. 12 of the Constitution of India since it is to discharge preliminarily governmental function, namely, supply of power to industries. In such a situation, the WESCO cannot act like a "public giver". It cannot act at its caprice, whims or fancy nor can it, taking advantage of its monopoly status, exact an amount which it cannot do under the provision of law. If the court, ignoring the provision of the said Act, permits WESCO to realize the amount which is contemplated under Clause 9 of its purported agreement dated 28-11-2001 then the court would be permitting WESCO, a State under Art. 12, to flout the provisions of the said Act and to enrich itself by virtue of its superior bargaining position through a method, not contemplated under law and therefore prohibited by law. Here, the silence of the statute would amount to a prohibition, otherwise it amounts to an exaction of a sum from a consumer who is under no legal obligation to pay the same. That would amount to deprivation of one's property without authority of law."*
>
> **[Emphasis Added]**

37. In our considered view, the said decision has no relevance in the present context in as much as there no dispute that the consumers had admitted the mistake incidences and that they had paid less electricity charge. As such, there is no question of unjust enrichment by the Distribution Licensee.

38. A reference has been made to ***Punjab State Electricity Board Ltd. Vs. Zora Singh & Others****: 2005 (4) SCC 223*. In ***Zora Singh*** *(supra)* the various other aspects were examined, but not the subject which we are presently dealing with. Mr. Jena, learned counsel has placed his reliance on a decision of the apex court in ***Ramchandra Keshav Adke Vrs. Govind Joti Chavare & Ors: (1975) 1 SCC 559*** to contend that the power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden.

39. For a limited purpose, this decision has its impact on the present controversy. If we find that the escaped bills should be restricted to the preceding 6 months from the date of giving the notice or placing the demand, then of course the petitioners cannot demand the payment for the remaining period.

40. Further, a decision of the apex court in ***Tamil Nadu State Electricity Board Vs. Central Electricity Regulatory Commission and Ors.: (2007) 7 SCC636*** has been referred to. In that decision, the apex court has recorded their opinion following the rule of literal interpretation. When the language is plain and explicit, admits a legislative intent that cannot be assumed to expand the meaning of the expression employed by the legislature. As long as, there is no ambiguity in the statutory language, resort to any interpretative process to unfold the legislative intent is impermissible. If the intendment is not clear from the words used in the statute and it can be found nowhere else, the need for interpretation may arise. When the words used in the statute are ambivalent and do not manifest any intention, the said circumstances may call for interpretation.

41. According to Mr. Jena, learned counsel, ***Swastic Industries*** *(supra)* does not have any relevance, as the question that has been answered therein is completely different from the question we are concerned with. In ***Swastic Industries*** *(supra),* the central issue was whether the bar of limitation will apply against the claim of the Maharashtra State Electricity Board. The apex court has categorically observed that the law of limitation will not apply, as the mistake has been discovered subsequently and from the day of discovering the mistake, the limitation would be relevant.

42. Mr. Jena, learned counsel has submitted that it is the primary duty of the Distribution Licensee to maintain the data and to raise the correct bill. If they had raised the bill with incorrect multiplying factor, the Distribution Licensee has to take their responsibility. They can claim the amount to that extent as has been provided by the law, but not beyond that. Any demand not authorized under law would amount to unjust and undue enrichment.

43. Having appreciated the submissions as advanced by the counsel for the parties, except the Opposite Party No.2 in whose behalf there is no representation, we would observe that the word omission as used in Regulation 98 of the OERC Distribution (Condition of Supply) Code, 2004 would embrace the cases of the escaped bill based on which the petitioners have placed their demand as aforenoted.

44. It has been provided under Regulation 93 (7) of the O.E.R.C. (Condition of Supply) Code, 1994 as follows:

> *"(vii)* ***Payment of Energy Charges****: Consumers are expected to make payment for the energy used by them every month/by-monthly. The licensee/supplier must ensure that a bill is delivered to the consumer by hand or by post every month/by monthly."*
>
> **[Emphasis Added]**

45. Hence, whatever the obligation relating to payment of the energy bill is concerned, the consumer's liability of payment, arises when he receives the bill from the licensee. There is no allegation against the consumers that they had not paid the regular bills as raised by the distribution licensee. As the bill was raised erroneously by not applying the correct multiplying factor, there had been less payment. When the escaped bills were raised and payment was demanded from the consumers, they raised their objections and it led finally to the filing of the complaint in the GRF. This is not a case of the defective meter. The billing of the defective meter falls under Regulation 97 and as such, the case of the consumers in these writ petitions do not come within the purview of Regulation 97 of the OERC Distribution (Condition of Supply) Code, 2004 directly.

46. That was not the case as projected by Mr. Jena, learned counsel appearing for the consumer-Opposite Parties. According to him, the cases of the consumers are squarely covered by Regulation 98 of the OERC Distribution (Condition of Supply) Code, 2004.

47. It has been contended by the consumers that by the circular dated 03.03.2003, the issue of arrear billing due to adoption of wrong multiplying or multiplication factor has been dealt with. The said circular dated 03.03.2003 is available at Annexure-A1 to the additional affidavit filed by the Opposite Party No.1 on 30.09.2015 in WP(C) No.2338 of 2015. The said circular dated 03.03.2003, issued by the Odisha Electricty Regulatory Commission (OERC) was communicted to the Chief Executive Officers/Managing Directors of the Distribution Licensees.

48. Having considered its relevance we would like to reproduce the entire text of the circular hereunder:

> *ORISSA ELCTRICITY REGULATORY COMMISSION*
> *BIDYUT NIYAMAK BHAVAN UNIT-VIII*
> *BHUBANESWAR-751012.*
> *PH-414117/413097[PBX]*
> *FAX.419781/413306*
> *e-mail:oriere@dtevsnl.net.in*
>
> *No Engg-80/2000*
> *Date-03/03/2003*
>
> *To*
>
> *The Chief Executive Officer*

CESCO, 2nd Floor, IDCO Tower Bhubaneswar-7

The Managing Director
NESCO, Januganj, Balasore

The Managing Director
WESCO, Burla, Samabalpur

The Managing Director
SOUTHCO, Courtpeta, Berhampur.

Sir,

It has come to the notice of the Commission that some of the consumers are being served with large arrear bills for a period exceeding six months for having defective meters in their premises.

In case a meter is defective for which it does not register the actual consumption and is detected at later stage by the licensee is entitled to raise an arrear bill for a maximum period of six months or the period for which it remained defective (whichever is less) as per Section 26(6) of the I.E. Act, 1910.

Arrear billing due to adoption of wrong multiplication factor (MF) would also be dealt under the above mentioned section. The consumer should not be penalized beyond this period since it is duty and obligation of licensee to keep the meter in good condition and ensure routine testing checks.

However, meters for not registering actual consumption, due to fraudulent actions of consumer like illegal extraction through tampering or bypassing of meter or its accessories like PT & CT would not attract the provision of Section 26(6) of I E Act and has to be dealt through relevant regulation of the Commission.

All the supply Engineers may be informed accordingly under intimation to this office.

Yours Faithfully
Secretary.

It is apparent from the said circular that arrear due to adoption of wrong multiplication factor (MF) would also be dealt under the above mentioned section i.e. Section 26(6) of the Electricity Act.

49. It cannot be said that the said circular is unambiguous, in as much as the said circular has been issued in reference to Sub-section 6 of Section 26 of the Indian Electricity Act, 1910. Section 26 deals generally with the meters. Section 26 (6) of the Electricity Act 1910 provides that where any difference or dispute arises as to whether any meter referred to in sub-section (1) is or is not correct, the matter shall be decided, upon the application of the either party, by an Electrical Inspector; and where the meter is in the opinion of the Inspector ceased to be correct, such Inspector shall estimate the amount of the energy supplied to the consumer or the electrical quantity contained in the supply. During such time, not exceeding six months, as the meter shall not, in the opinion of such Inspector, have been correct; but save as aforesaid, the register of the meter shall, in the absence of fraud, be

conclusive proof of such amount or quantity. As stated, either a licensee or a consumer applies to the Electrical Inspector under the said sub-section, giving the other party not less than seven days' notice of his intention so to do.

50. The said circular cannot, therefore, be of any avail for the present controversy. Moreover, the law has been overhauled. It is not in dispute that bills were raised by applying wrong multiplication/multiplying factor (MF). Even the consumers have been paying the current bills raised on applying the correct multiplication factor (MF) without raising any objection.Their objection before the Grievance Redressal Forum (GRF) was that the entire arrear cannot be realized from them and only the arrears of 6 months preceding the date of the inspection report based on which the demand has been raised against them can be realized and not beyond that. The claim of the consumers is based on Regulation 98 of the OERC Distribution (Condition of Supply) Code, 2004, as reproduced.

51. Regulation 98 of the OERC Distribution (Condition of Supply) Code, 2004 provides that if the reading of meter working in association with the Current Transformer (CT) and Potential Transformer (PT) and other auxiliary equipments is found to be incorrect on account of wrong connection or disconnection of such CTs, PTs and other equipment or on account of *omissions* or *commissions* in regard to multiplying factor and erroneous adoption of CT and PT ratio, the additional billing shall be done in accordance with procedure as laid down in Regulation 97.

52. According to Mr. Dash, learned counsel, if the reading of the meter working in association with Current Transformer (CT) and Potential Transformer (PT) and other auxiliary equipments, if any, is found to be incorrect on account of wrong connection or disconnection of such CTs, PTs and other equipments, the above mode of additional billing can be adopted. Such interpretation, as provided by Mr. Dash, leaned counsel for the petitioners, can be accepted. The rule of *Ejusdem Generis* vis-à-vis the defective meters cannot be applied for legislative definiteness. It is well known principle that the rule of *Ejusdem Generis* applies when the statute contends an enumeration of specific words, the subject of enumeration constitutes a class or category and that class or category is not exhausted by enumeration. The general items follow the enumeration when there is no indication of a different legislative intent.

53. In ***Foster Vs. Diphwys Casson: (1887) 18 QBD 428*** it has been observed that the case involved a statute which stated that explosives taken into a mine must be in a "case or canister". There, the defendant used a cloth bag. The courts had to consider whether a cloth bag was within the definition as provided. Under *noscitur a sociis*, it was held that the bag could not have been within the statutory definition, because the parliament's intention in using 'case or container' was to *something* of the same strength as a canister.

54. In this case, the clause on account of *omission* or *commission* in regard to multiplying/multiplication factor has been used disjunctively in Regulation 98 of the

OERC Distribution (Condition of Supply) Code, 2004. Therefore, the words "or on account of omission or commissions in regard to multiplying factor cannot be associated with the incorrect reading of the meter.

55. Hence, we would like to hold that this is a case of incorrect reading of the meter on account of *omission* or *commission* in regard to multiplying factor. Billing, in the event of omission in regard to multiplying or multiplication factor, shall be done following the Regulation 97 of the OERC Distribution (Condition of Supply) Code, 2004 which provides *inter alia* that the period of additional billing would be 6 months immediately preceding the date of inspection or notice.

56. Regulation 98 deals clearly with three situations *viz. (1)* if the reading of the meter working in association with the current CT and PT and other auxiliary equipments which is found to be incorrect on account of wrong connection or disconnection of CT and PT and other equipments; *(2)* if the reading of the meter is found to be incorrect on account of omission or commission in applying the multiplying factor and *(3)* the reading of the meter are found to be incorrect for erroneous adoption of CT or PT ratio.

57. In all those situations the billing shall be done following the procedure as laid down in Regulation 97.

58. Having observed thus, we find no merit in these writ petitions and accordingly, all these writ petitions are dismissed.

59. In the circumstances of these cases, there shall be no order as to costs.

—— o ——

2023 (III) ILR-CUT-21

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

CRLA NO. 83 OF 2013

KRUSHNA CHANDRA BARAL @ BARAD & ORS. ……Appellants

.V.

STATE OF ORISSA ……Respondent

CRIMINAL TRIAL – Conviction for committing the offence punishable U/s. 302/201/34 of the IPC – There is no evidence of motive –The deceased died due to asphyxia – There is no direct evidence as regards to the assault or applying padded material to pressurize on the neck causing asphyxia – The entire case is based on the circumstantial evidence – Whether in absence of any evidence regarding motive, the conviction is sustainable? – Held, No – Absence of motive in a case of

circumstantial evidence weighs in favour of the accused and as such, the impugned judgment is liable to be interfered with. (Para 79-83)

Case Laws Relied on and Referred to :-

1. AIR 1977 SC 1307 : Pratap Mishra Vs. State of Orissa.
2. AIR 1999 SC 2416 : Md. Zahid Vs. State of Tamil Nadu.
3. A.I.R. 1983 SC 66 : Mayor Pranabhai Shah Vs. State of Gujarat.
4. (2020) 10 SCC 166 : Anwar Ali Vs. State of Himachal Pradesh.
5. (2008) 16 SCC 73 : State of U.P. Vs. Kishanpal.
6. (2009) 9 SCC 152 : Pannayar Vs. State of Tamil Nadu.
7. (2021) 5 SCC 626 : Shivaji Chintappa Patil Vs. State of Maharashtra.
8. (1984) 4 SCC 116 : Sharad Bidhichand Sarda Vs. State of Maharashtra.

For Appellants : Mr. Biplab P.B. Bahali
Mr. S.K. Patnaik

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

JUDGMENT Date of Judgment : 28.07.2023

S. TALAPATRA, J.

This is an appeal by the convicts (hereinafter referred to as the appellants) challenging the judgment and order of conviction and sentence dated 06.02.2013 delivered in S.T. Case No.12/142 of 2012/2010 by the Adhoc Addl. Sessions Judge, Fast Track Court, Khurda.

2. At the outset, it would be apposite to note that out of the four appellants, the appellants No.1, 2 & 4 are on bail by virtue of the order dated 30.07.2013 delivered in Misc. Case No.196 of 2013 arising from this appeal.

3. The repeated attempts of the appellant No.3 for obtaining bail or interim bail did not succeed and hence, he is in the jail and serving out the sentence, subject to the outcome of this appeal.

4. By the said judgment, the trial judge has convicted the appellants for committing the offence punishable under Sections-302/201/34 of the IPC. But they were acquitted from the charges as framed under Section-498-A/304-B/406/34 of the IPC and under Section-4 of the Dowry Prohibition Act.

5. One accused namely Susama Martha was acquitted from all the charges. At the time of returning the said finding of conviction, the trial judge has observed that there is no evidentiary material to support the charges under Sections-498-A/304-B/406/34 of IPC and Section-4 of the D.P. Act.

6. Pursuant to the said conviction, the appellants have been sentenced to suffer Rigorous Imprisonment for life and to pay a fine of Rs.500/- (Rupees five hundred) with default, imprisonment for committing the offence punishable under Section-302 of the IPC and Rigorous Imprisonment for one year under Section-201 of the IPC. It has been declared that the sentences are to run concurrently.

7. Briefly stated the prosecution case is that one Sasmita Mangaraj, sister of Sunil Kumar Mangaraj (P.W.1) and Susil Kumar Mangaraj, (P.W.2) was married to Susant Baral, the appellant No.3. Their marriage was solemnized on 06.07.2008. The appellant No.1, Krishna Chandra Baral and the appellant No.4, Sobha Baral are the parents of the appellant No.3 whereas the appellant No.2, Santosh Baral is the brother of the appellant No.3. The accused, Susama Martha is the minor sister of the appellant No.3.Within four months of their marriage, serious difference cropped up between the deceased (Sasmita Mangaraj) and her husband, the parents-in-law, married sister-in-law and brother-in-law.

8. The appellant No.3, the husband of the deceased started torturing the deceased for realizing unlawful demand of dowry. On 19.05.2009, the appellant No.3 informed Sunil Kumar Mangaraj (P.W.1) that Sasmita had been admitted in the District Headquarters Hospital, Khurda due to her illness. Getting that information, P.W.1 and his relatives reached the said hospital. To their dismay, they found Sasmita was lying dead and froth was coming out from her mouth. P.W.1 suspected that the accused persons (the appellants and Susama Martha) murdered the deceased by administering poison, as the demand of the accused persons could not be fulfilled. P.W.1 submitted a report (Ext.1) to the IIC, Khurda Police Station at 7.30 P.M. on 19.05.2009. Based on the said report, Khurda P.S. Case No.152 of 2009 was registered and taken up for investigation.

9. Gobinda Chandra Behera (P.W.6) after examining some witnesses held inquest on the dead body of the deceased in presence of the witnesses namely Ellora Samal (P.W.5), the Executive Magistrate and Prakash Chandra Mangaraj (P.W.3). After the inquest report (Ext.5) was drawn, the dead body of Sasmita (referred to as the deceased) was transported to the D.H.H., Khurda for post-mortem examination. Dr. Sanjukta Mohanty (P.W.4), the Assistant Surgeon at D.H.H., Khurda carried out the post mortem examination on 20.05.2009. P.W.4 basing on the chemical examination report (Ext.12) and having noticed the ante-mortem injury on the dead body of the deceased gave her final opinion that the death of the deceased was due to asphyxia caused by heavy pressure inflicted over anterior surface of neck which had caused damage to underlying muscle and vessels of the neck with swelling but without any mark, as it has been estimated that heavy pressure was exerted on the deceased by padded material. The said opinion is reflected in the final opinion report of P.W.4 (Ext.7).

10. After completion of the investigation and having found a prima facie case, the Investigating Officer submitted the charge-sheet under Sections-498-A/304-B/302/406/201/34 of the IPC and under Section-4 of the Dowry Prohibition Act against the five accused persons.

11. The charge-sheet was submitted in the court of the S.D.J.M., Khurda, who had taken the cognizance of the offences shortly after filing of the charge-sheet and committed the case records to the court of the Addl. Sessions Judge, Khurda.

12. In due course, the charge was framed under Sections-498-A/304-B/302/406/201/34 of the IPC and under Section-4 of the D.P. Act. But the appellants and the acquitted accused persons abjured the charge by denying its content and claimed to be tried in accordance with law.

13. In order to substantiate the charge as many as six witnesses were examined by the prosecution including the informant (P.W.1) and the post-mortem doctor (P.W.4).

14. The prosecution had introduced seven documentary evidence including the inquest report (Ext.5), post-mortem examination report (Ext.6), the final opinion report of P.W.4 (Ext.7) and the chemical examination report (Ext.12).

15. In order to rebut the prosecution evidence, the accused persons (the appellants and the acquitted accused) adduced five witnesses including two doctors namely Prof. Dr. Krishna Kumar Mohanty (D.W.4) and Dr. Satyaban Nayak (D.W.5).

16. The defence has introduced six documentary evidence (Ext.A to Ext.H) including various prescriptions (Exts.A, B, C, D & G). Even the Outdoor Registers of the D.H.H., Khurda (Exts.F & H) were admitted in the evidence.

17. After the prosecution evidence was recorded, the appellants and the acquitted accused persons were separately examined under Section- 313(1)(b) of the Cr.P.C. in order to have their response to the incriminating materials which surfaced in the evidence recorded during the trial. All the accused persons including the appellants reiterated their innocence and stated that the evidence has been falsified to implicate the appellants and the acquitted accused persons in the case.

18. On assumption that the death of Sasmita Mangaraj was un-natural, it was considered to be a homicide committed by the appellants and the acquitted accused persons. Afterwards, to rebut the prosecution evidence, the evidence as afore-stated was led by the appellants and the acquitted accused persons.

19. Having appreciated the evidence and the oral arguments advanced for the accused persons in particular and for the State, the trial judge returned the finding of conviction in the manner as noted above.

20. It is apparent that there is no direct evidence against the appellants. There is no ocular evidence against the appellant No.3 that he caused the murder of Sasmita (the deceased) by pushing pillow or padded materials on her mouth.

21. The finding as returned by the trial judge is in response to the following questions, as framed by him:

> *(i) Whether the accused persons subjected the deceased with cruelty by wilful conduct and also harassed her with a view to coerce her and her parents to meet their unlawful demand of more dowry in furtherance of their common intention ?*

(ii) Whether the deceased met her death within seven years of her marriage and it is shown that soon before her death, she was subjected to cruelty or harassment by the accused persons in connection with demand of additional dowry in furtherance of their common intention ?

(iii) Whether the accused persons being entrusted with certain property, to wit the dowry articles like cash of Rs.2,00,000/-, gold ornaments weighing 20 bharis, Godrej, T.V., Freeze, Washing Machine and other household articles, etc. and committed criminal breach of trust by misappropriating the same, in furtherance of their common intention ?

(iv) Whether the accused persons in furtherance of their common intention, committed murder of the deceased by inflicting heavy pressure on the neck of the deceased by padded materials which had caused damage to the underlying muscles or vessels of the neck ?

(v) Whether the accused persons after murdering the deceased, brought her to the D.H.H., Khurda and created some evidence to show that the deceased died due to asthma while undergoing treatment in D.H.H., Khurda, with intention to screen themselves from legal punishment for murder, in furtherance of their common intention ?

(vi) Whether the accused persons demanded a cash of Rs.2,00,000/-, 20 bharis of gold ornaments, Godrej, Freeze etc. before the marriage and additional cash of Rs.50,000/- after the marriage of the deceased with Susanta ?

22. We have already referred the crux of the finding of the trial judge wherefrom it is discernible that the questions No.1, 2, 3 & 6 were answered in the negative by the trial judge. However, the questions No.4 & 5 were decided against the appellants, but not against other accused persons, who had been acquitted under Section-235(1) of the Cr.P.C. for lack of evidence.

23. By means of this appeal, the appellants have challenged the finding of conviction for being based on surmise, assumption and unsolicited presumption.

24. Mr. Biplab P.B. Bahali, learned counsel appearing for the appellants has submitted that the trial judge has unceremoniously discarded the evidence of D.W.4, Prof. Dr. Kishore Chandra Mohanty and D.W.5, Dr. Satyaban Nayak, who deposed in the trial quite categorically that the deceased was suffering from asthma and she was being treated by them for that illness. Even the evidence of D.W.1, Nilamani Baral, a cousin of the appellant No.3 who transported the deceased in his Auto-Rickshaw to the D.H.H., Khurda on 19.05.2009 as the deceased was seen seriously unwell for her heart disease. D.W.1 has testified that the deceased had been suffering from heart disease. According to Mr. Bahali, learned counsel for the appellants, the evidence of D.W.2, Manoj Kumar Satrusalya and D.W.3, Purna Chandra Baral, the co-villagers have not been considered in the perspective of this case. D.W.3 has deposed that the deceased was leading a happy married life in her matrimonial home till she breathed her last.

25. Mr. Bahali, learned counsel has further contended that the entire prosecution case is based on the opinion of P.W.4. According to him, P.W.4 was not a competent

witness to state that heavy pressure was put on the neck of the deceased by padded materials.

26. It has been further contended that this part is entirely based on assumption without any foundation of evidence. Even the post-mortem doctor had no occasion to consider that aspect that the deceased was suffering from asthma or not.

27. Having referred to para-7 of the impugned judgment, Mr. Bahali, learned counsel has submitted that the elements as catalogued therein cannot lead to a definite inference that there had been heavy pressure on the neck which caused *asphyxia*.

28. P.W.4 in the cross-examination has admitted that asphyxia can be possible by any disease. It can also be caused by broncho-spasm as well as by chocking of trachea by food materials and swelling can also be possible by coming in contact with the railings of the auto-rickshaw when a person is transported by an auto-rickshaw.

29. Mr. Bahali, learned counsel has thereafter, submitted that the trial judge has not considered the said opinion and did record his own opinion which is not supported by any expert-opinion.

30. According to the trial judge, absence of over-expanded lungs rules out natural death due to asthma. In support of his contention, Mr. Bahali, learned counsel has relied on the decisions which were referred to, by the trial judge. In **Pratap Mishra vs. State of Orissa**: **AIR 1977 SC 1307**, the apex court held that the doctor's evidence is more reliable than that of the extracts from the medical books. The doctor's attention had to be drawn to the particular passage of the books before the defence goes on to rely upon them. In absence of any opinion from the expert on the comments of the text book, the Court cannot draw any inference based on the comments on text book.

31. In **Md. Zahid vs. State of Tamil Nadu**: **AIR 1999 SC 2416**, the doctor conducting post mortem examination had stated that the cause of death was *asphyxia* and cerebral *anoxia,* cumulative with other injuries. Those statements were cross-checked by the defence on the basis of the authoritative text books and suggested that the doctor had wrongly inferred the cause of death. The doctor's attention was drawn to those texts, as the doctor could not reasonably explain the conclusion drawn on the cause of death; the Court held that sufficient weightage should be given to the evidence who conducted the post-mortem examination, as compared to the statements found in the text books. But giving weightage does not ipso-facto mean that each and every statement made by the medical witness should be accepted on its face value, if it is found to be fraught with contradiction.

32. Another decision has been relied on in order to buttress the contention of the appellants. In **Mayor Pranabhai Shah vs. State of Gujarat**: **A.I.R. 1983 SC 66**, it

has been observed by the apex court that a doctor is like any other witness and his evidence is to be read just like any other witness. He is not a witness of truth. Where a doctor has deposed in the Court, his evidence has got to be appreciated like the evidence of any other witness and there is no irrebuttable presumption that a doctor is always a witness of truth.

33. Mr. Bahali, learned counsel has submitted that the appreciation of the doctor's testimony was totally erroneous, as the doctor's opinion as expressed during the cross-examination has been discarded on wrong premises and without following the procedure as enunciated by the apex court. At no point of time, the doctor was confronted with the text book which was relied on by the trial judge.

34. In this context, we are persuaded to take note the observation of the trial judge, where he has observed as follows:

> *"The defence did not do so. Thirdly, presence of laceration on muscles and blood vessels in neck, compression of cartilage of neck, post-mortem lividity on back, thigh, hand and back side, rigor mortis on leg, and abrasion on breast is suggestive as well as indicative of the fact that heavy pressure was inflicted on the anterior surface of the neck with padded materials which had caused suffocation/smothering resulting the death of the deceased."*

35. In this context, it has been indicated that the witnesses from the family of the deceased denied the fact that the deceased was suffering from asthma at any point of time. These observations are really surprising in as much as two doctors came as the defence witnesses and clearly stated that they had been treating the deceased for asthma. Even the defence witnesses such as, D.Ws. 1, 2 & 3 were not properly appreciated, as they were related to the appellant No.3.

36. The trial judge has given reason why he has discarded the evidence of D.Ws. 4 & 5, the doctors who treated the deceased on some occasions. It has been observed by the trial judge as follows:

> *"D.W.5 has admitted when confronted that Ext.G relates to the patient Sasmita Pradhan but could not explain how Baral was replaced to the place of Pradhan. Over and above, D.W.5 has admitted that he had prescribed in all the prescriptions for treatment of the pregnant lady and also prescribed medicine for asthma in Ext.D. His statement for prescribing Deriphyling of single strength is preposterous when he could not say its different strength in as much as when he was not sure of the chest pain was related to asthma. Therefore, it is as clear as noon day that insertion of Deriphyling for treatment for asthma is a manipulation of D.W.5 and hence, his testimony to that extent is not accepted."*

It has been further observed by the trial judge as follows:

> *"D.W.4 at para-5 of his deposition has admitted Ext.B and Ext.C are in two different pad stamps. He has further stated that despite acuteness of asthma of the deceased as on the date of his examination, he has not admitted her in his nursing home rather suggested to consult a Cardiologist. He is running a private nursing home. As per the guidelines of the Government, under the Orissa Clinical Establishments (Control and Regulation) Act 1991 & Rules 1994, documents are required to be maintained about*

incoming and outgoing of the patients. No such Registers are filed. The facts and circumstances speak a volume about the credibility of Exts.B & C which D.W.4 issued without any pathological test report as suggested by him. Therefore, Exts. B & C are obtained to suit the line of the defence and as we know money like water washes away everything."

37. Mr. Bahali, learned counsel in order to further nourish his submission has relied on a recent decision of this Court in **Jayram Sahoo vs. State of Odisha** (**Judgment dated 31.03.2022 delivered in CRA No.20 of 2000**) where this Court has observed that ... *"since the prosecution has failed to prove the motive of the crime in a case based on circumstantial evidence, it will have a serious impact in the chain of the circumstances, as the prosecution is under obligation to prove the circumstance as relied upon in a conclusive manner without leaving any space for any other hypothesis except the hypothesis of guilt. In that case, this Court had interfered with the judgment for not proving the motive behind the crime."*

38. Reliance has been placed on a decision of the apex court in **Anwar Ali vs. State of Himachal Pradesh**: **(2020) 10 SCC 166**. It has been held in **Anwar Ali** *(supra) inter alia* as follows:

"The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because, even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of the eye-witnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction."

39. The apex court in **Nandu Singh vs. State of Madhya Pradesh** (**Judgment dated 25.02.2022 delivered in Criminal Appeal No.285 of 2022**) has observed that in a case based on circumstantial evidence, motive assumes great significance. It is not as if the motive alone becomes the crucial link in the case to be established by the prosecution and in its absence, the case of prosecution must be discarded. But, at the same time, complete absence of motive assumes a different complexion and such absence definitely weighs in favour of the accused.

40. In **State of U.P. vs. Kishanpal**: **(2008) 16 SCC 73**, the apex court had occasion to observe as follows:

"The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eyewitnesses is available, because, even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of the eye-witnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of the eyewitnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction."

41. The same law has been restated in **Pannayar vs. State of Tamil Nadu**: **(2009) 9 SCC 152** where the apex court has held that the absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused.

42. In another decision, in **Shivaji Chintappa Patil vs. State of Maharashtra**: **(2021) 5 SCC 626**, the apex court having referred to **Anwar Ali** *(supra)* observed as under:

> *"Though in a case of direct evidence, motive would not be relevant, in a case of circumstantial evidence, motive plays an important link to complete the chain of circumstances."*

43. Mr. J. Katikia, learned Addl. Government Advocate appearing for the State has submitted that the impugned judgment is a well-reasoned judgment. The trial judge has appreciated the evidence and has drawn the inference on appreciation of every piece of the evidence that the appellants have committed the murder of Sasmita (the deceased). But he has fairly admitted that as the appellants have been acquitted from the charges under Sections-498-A/304-B/406 of the IPC and Section-4 of the D.P. Act, the statements relating to harassment for realising unlawful demand cannot have any relevance, but for the purpose of showing any material in support of the remaining charges, those may be still relevant. He has fairly admitted that the State has not challenged the order of acquittal and hence, the order of acquittal has reached its finality.

44. According to Mr. Katikia, learned Addl. Government Advocate, in the cross-examination, P.W.1 has categorically stated that he saw that white froth was coming out from the mouth and nose of the deceased.

45. P.W.2 has corroborated that he had also seen that froth was coming out from the mouth and nostril of the deceased and the said feature have been recorded in the inquest report.

46. P.W.3, Prakash Chandra Mangaraj, has stated in the cross-examination that he was not examined by the Police in the case and he was not aware of the cause of death of the deceased (See para-11 of the cross-examination) P.W.3 did not speak a single word in respect of frothing. However, Mr. Katikia, learned Addl. Government Advocate has placed heavy reliance on the testimony of P.W.4, Prof. Dr. Sanjukta Mohanty, who had conducted the post mortem examination on the dead body of the deceased in the D.H.H., Khurda.

47. Mr. Katikia, learned Addl. Government Advocate has referred to the following part of the deposition of D.W.4:

> *"Slim built, froth from nose and mouth, eye closed, mouth closed, conjugtiva congested, Cyanosis of lips and nails dilated and fixed pupil face neck congested, swelling of neck with subcutaneous blood clot, tear of sternomastoid, laceration of muscle and blood vessels in neck, compression of cartilage of neck, post-mortem lividity on back and thigh, hand and*

back side, rigormotis present in leg, absent in arms, abrasion on left breast, pale frothy lungs, heart partially filled with blood, lever, kidney normal, splin is congested, gravid uterus with 20 to 24 foetus, inside uterus, stomach contained 500 ml. food, with chemical smell, brain is congested without any injury or fracture.

Initially, the opinion on cause of death was kept pending waiting for the chemical analysis report from the State Forensic Laboratory, Rasulgarh, Bhubaneswar."

48. After the chemical examination report was received from the Investigating Officer on 12.09.2009, P.W.4 gave the final opinion. She has stated quite categorically that in her opinion, the death was due to *asphyxia* caused by heavy pressure inflicted over anterior surface of the neck. The pressure inflicted was as such, that it has caused damage to underlying muscle/vessels of the neck which area was found with swelling without any mark of injury as padded materials were used exert pressure.

49. At this juncture, though it has not been referred by Mr. Katikia, learned Addl. Government Advocate appearing for the State, we may read the alternative opinion that has been given by P.W.4 in her cross-examination. She has testified as follows:

"Asphyxia can be possible by any disease, throttling of neck or pressure on the neck. Asphyxia can also be possible by bronchospasm, in as much as possible by chocking of Trachea by food material. I had not marked any ecchymosis of the limbs vessels during Post Mortem examination. Swelling can be possible by coming in contact with railings of the auto rickshaw while carrying a person on auto rickshaw. I have not mentioned the size of swelling as not existing at the time of my examination on the swelling injury. We have not dissected the trachea."

50. Mr. Katikia, learned Addl. Government Advocate has stated that the said opinion is based on the knowledge only.

51. P.W.5, Debdas Giri was present at the time of the inquest and he had signed the inquest report (Ext.5).

52. P.W.6, Gobindra Chandra Behera was working as S.I. of Police at Khurda Town Police Station and he was entrusted with the investigation of the case. He has narrated briefly how he had conducted the inquest in presence of the witnesses and sent the dead body for the post-mortem examination to the D.H.H., Khurda. He had sealed some materials which were in the wearing of the deceased by preparing the seizure list. The other part of the deposition is not very material. We should re-appreciate the cross-examination of the Investigating Officer. He has clearly admitted that he did not ascertain whether the victim was transported to the hospital alive or not. He has also not examined the doctors who were on duty at the relevant point of time, when the deceased was brought to the hospital. He has admitted that on 30.08.2009, he had seized one photocopy of a prescription being produced by Krupasindhu Martha, the husband of Susama Martha (the co-accused). The said prescription relates to the deceased, Sasmita Baral.

53. P.W.6, the Investigating Officer has admitted that he has not ascertained how the deceased was transported to the hospital and what kind of vehicle was used. P.W.6 has asserted that all the family members including the informant had stated that the appellant and the acquitted accused persons administered poison to the deceased and thereby caused the death. But the chemical examination report received by him did not reveal that the death of the deceased was due to poison. The investigating officer has denied that during the investigation, he was aware that the deceased was suffering from asthma.

54. Mr. Katikia, learned Addl. Government Advocate has candidly admitted that since the death of the deceased took place within seven years of her marriage and there was allegation of harassment for dowry or unlawful demand soon before her death, the prosecution did not take any care to prove the motive independently and as such, none of the witnesses had specifically stated about the motive. Mr. Katikia, learned counsel has submitted that the opinion of P.W.4 has clearly established that by creating heavy pressure on the neck, internal injuries were caused and the death took place as consequence thereof.

55. We have carefully examined the post-mortem examination report to find out the nature of the ante-mortem injuries. What has been described in the post mortem examination regarding injury or about the state of the deceased has been vouched by P.W.4 in the trial. At the instance of Mr. Katikia, learned Addl. Government Advocate appearing for the State, we have re-appreciated that part of the deposition as made by P.W.4.

56. We find that the victim was carrying feutus of 20-24 weeks only. External injuries as noted by P.W.4 are as follows:

(i) Laceration of blood vessels on neck and

(ii) Compression of cartilage of neck.

57. It has also been noted that the red patch or abrasion on the left breast was found during the post-mortem examination. But no visible injury was there. Even there was no mark of ligature.

58. We have cautiously scrutinized the testimonies of the witnesses and the documentary evidence. The trial judge has categorically observed that there is no evidence relating to unlawful demand or harassment for dowry. Consequently, the appellants and the accused who have been acquitted from the charge and the other accused persons have been acquitted from the charges under Sections-498-A/406/304-B & Section- 4 of the D.P. Act.

59. No motive could be found from the evidence relating to the unlawful demand, harassment or torture for realization of the dowry etc. Those evidence have been totally disbelieved by the trial judge. As stated, the State has filed no appeal questioning the finding of acquittal. As such, we are persuaded to come to an

inference that there is no evidence of motive. There is no direct evidence as regards the assault or applying padded material to pressurize on the neck causing *asphyxia*.

60. Hence, it has been rightly contended by Mr. Bahali, learned counsel that except the opinion of P.W.4, there is no material which even remotely indicates to the involvement of the appellants including the appellant No.3 in the alleged offence. What is pertinent here to mention that there is no specific finding about the role of the appellants.

61. On the contrary, it is available on the evidence that the appellant No.3 and D.W.1 brought the victim to the hospital for treatment. D.W.1 has categorically stated that by his auto rickshaw, the appellants had shifted the victim (Sasmita Baral) to the D.H.H., Khurda for her treatment. He did not vacillate during the cross-examination. Moreover, the Investigating Officer did not direct his investigation to ascertain by which vehicle, the victim was brought to the hospital by the appellants.

62. D.W.2 has also stated about the seizure of the medical prescription. D.W.3, Sri Purna Chandra Baral, a co-villager has stated that he was examined by the Police. But he was not produced in the trial by the prosecution. He had stated to the Police, according to his version, that the deceased was enjoying happy matrimonial life from the date of marriage until her death.

63. D.W.4, Prof. Dr. Krishna Kumar Mohanty has clearly stated that on 08.07.2008, he had examined Sasmita Baral for broncial *asthma*. She had dyspnoea with palpitation. She had cough, nausea, anorexia and pedal- oedeman. He prepared the prescription for Sasmita Baral. The patient [the deceased] was advised to come for check up after one week. She was also advised for pathological investigation. It may be noted that she had palpitation which P.W.4 diagnosed as reflection of eschemic heart disease. He has suggested by the prosecution that the *asphyxia* can be caused by asthma. He has also denied the suggestion that he had never treated Sasmita (the deceased) on 08.07.2008 or 10.07.2008.

64. D.W.5, Dr. Satyaban Nayak has corroborated that the victim was suffering from asthma. Dr. Satyaban Nayak, (D.W.5) has categorically stated that he had examined Sasmita for her pregnancy. He has further stated that *"as she was previously taking medicine for asthma, I suggested her to continue with the medicine."* Ext.G was his prescription.

65. Having appreciated the evidence on record, three pertinent questions emerge for our consideration. Those are:

(I) Whether the opinion of P.W.4 is a substantive evidence to convict the appellants ?

(II) Whether in absence of any evidence regarding motive, the conviction in the case is sustainable ?

(III) Whether the trial judge has committed error by substituting the alternative opinion of P.W.4 by his own opinion on the basis of the text book ?

66. While visiting the statement of P.W.4, we have found that the opinion that she has expressed is based on certain elements such as, laceration of muscles, blood deposits in the vessels in the neck and compression of cartilage of the neck. But there was no inquiry whether those injuries were ante-mortem or post-mortem. Even if those injuries were ante-mortem on the basis of those elements, can inference be drawn for asphyxia ? P.W.4 herself was confused and that is the reason why she has given a different opinion in the cross-examination. In the cross-examination, she has stated that asphyxia can also be possible by broncospasm. She has testified that swelling can be possible for coming in contact with the railings of the auto-rickshaw while a person is carried in an auto-rickshaw. She has candidly stated that she has not mentioned the size of swelling *"as not existing at the time of my examination of the swelling injury"*.

67. Therefore, the nature of swelling comes under doubt and moreover, she has not dissected the trachea. In absence of dissection of trachea, how the inference can be drawn regarding asphyxia by creating pressure on the neck by heavy padded materials, as suggested.

68. In the examination-in-chief, she has stated that the pressure inflicted was as such that it had caused damage to underlying muscle/ vessel on the neck with swelling without any mark of injury. This opinion stands contrary to the opinion that has been expressed in para-5 of the cross-examination, as reproduced by us, that at the time of examination, swelling did not exist.

69. The trial judge has not straightway accepted the opinion of P.W.4. Rather, he has discarded the alternative opinion by observing that in the case of asphyxial death due to asthma lungs will appear over-expanded. By pressing on the chest, resuscitation can be done by sending air.

70. According to the trial judge, in the case in hand, both the lungs were not over-expanded. This finding according to us is without any basis. The trial judge has in this context, noted as follows:

> *"Secondly, in common medico-legal practice, the unnatural death resulting from lack of oxygen of common occurrence, which are traditionally classified as asphyxial deaths are (I) hanging; (II) strangulation; (III) suffocation; (IV) drowning and (V) traumatic asphyxia i.e. due to compression of chest. Suffocation is the purest form of asphyxial death. On the other hand, the important causes for sudden natural death related to the respiratory system are (i) pulmonary thromboemboli, (ii) Asthma, (iii) Pneumonea, (iv) epiglottitis, (v) Pneumothorax, (vi) haemophysis and (vii) aspiration.*

71. The trial judge has acceded that the defence case was categorical that the death of the deceased was due to prolonged suffering from asthma. The observation as made by the trial judge is on the basis of Lyon's Medical Jurisprudence and Toxicology, 11th Edition, 2012, Chapter LII, Page-817 & Chapter- LIX, Page-955.

72. The trial judge did not take any confirmation from P.W.4 regarding the comments as available in the said text book by exercise of his power under Section-

165 of the Evidence Act. Nor had there been disclosure to the accused persons that he will be taking assistance from the text book. The manner in which has been made by the trial judge reliance on the text book is totally unacceptable.

73. Hence, we are to appreciate the evidence of P.W.4 without track with the observations of the trial judge. According to us, the post- mortem doctor did not consider whether the appellant was at all suffering from any disease which can cause asphyxia. There was no inquiry to ascertain whether the deceased suffered asphyxia from asthma.

74. On the other hand, what we find that D.Ws.4 & 5 have come forward to state in the trial that the victim was suffering from asthma since long and she was under their treatment. As such, the element of asthma contributing to asphyxia cannot be totally ruled out and we hold that the defence has probalised that aspect and hence, the appellants are entitled to benefit of doubt.

75. The trial judge has cast certain aspersions on D.Ws. 4 & 5 without any basis or foundation. His observations are totally uncalled for. The court can always discard any evidence. Without having evaluated materials on records appropriately, no aspersion on the integrity of the witnesses should be made. On the contrary, the suggestions made to D.Ws. 4 & 5 were squarely denied by them.

76. In **Ghulam Hassan Beigh vs. Mohammad Maqbool Magrey & others** (**Judgment dated 26.07.2022 delivered in S.L.P. (Criminal) No.4599 of 2021**), the apex court has observed as follows:

> *"It is the trial court as well as the High Court got persuaded by the fact that the cause of death of the deceased as assigned in the post mortem report being the "cardio respiratory failure", the same cannot be said to be having any nexus with the alleged assault that was laid on the deceased. Such approach of the trial court is not correct and cannot be countenanced in law.* ***The post mortem report, by itself, does not constitute substantive evidence. Whether the "cardio respiratory failure" had any nexus with the incident in question would have to be determined on the basis of the oral evidence of the eye witnesses as well as the medical officer concerned i.e. the expert witness who may be examined by the prosecution as one of its witnesses.*** *Whether the cause of death has any nexus with the alleged assault on the deceased by the accused persons could have been determined only after recording of oral evidence of the eye witnesses and the expert witness along with the other substantive evidence on record. The post mortem report of the doctor in his previous statement based on his examination of the dead body. It is not substantive evidence. The doctor's statement in Court is alone the substantive evidence. The post mortem report can be used only to corroborate his statement under Section 157, or to refresh his memory under Section 159, or to contradict his statement in the witness box under Section 145 of the Evidence Act, 1872. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the*

> *terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court."* [Emphasis added]

77. Another observation as returned by the trial judge and as referred by us, is also unsustainable in law. The trial judge has observed that it was upto the defence to question P.W.4 as to the veracity of her opinion. This statement has been made without reading the entire evidence of P.W.4.

78. In the cross-examination, carried out by the appellants, P.W.4 had given her alternative opinion. Thus, the alternative opinion clearly supports the case of the defence. As such, we hold that on the basis of the post-mortem examination report, and the testimony of P.W.4 in the trial, the trial judge ought not have returned the judgment of conviction.

79. There is no direct evidence in the case in hand. As nobody has seen any incidence of assault, the entire case is based on the circumstantial evidence. But except P.W.4's testimony, there is no other evidence forming the chain towards a hypothesis of guilt against the appellants. There is no indication also how the projected assault was committed by the appellants. The evidence as laid by the prosecution is concerned mostly with the cruelty for unlawful demand, criminal breach of trust, harassment on demand of dowry etc. Those have been discarded by the trial judge very categorically. Thus, there is no evidence whatsoever against the appellants indicating their involvement in the crime. In the cases of this nature, motive plays an important role.

80. In **Pannayar** *(supra)*, the apex court has categorically held that absence of motive in a case of circumstantial evidence weighs in favour of the accused and as such, on that ground also, the impugned judgment is liable to be interfered with.

81. The trial judge has definitely committed an error by accepting the selective comments of the text book for arriving at an inference about the cause of death, that to, without taking the opinion of P.W.4. P.W.4 has stated about the two possibilities as regards asphyxia which has been regarded as the cause of death.

82. It is well settled principle of law that, if two views are possible, the benefit shall always go in favour of the accused. It will be apposite to refer a passage from **Sharad Bidhichand Sarda vs. State of Maharashtra**: **(1984) 4 SCC 116**. It has been held in **Sharad Bidhichand Sarda** *(supra)* as follows:

> *"We then pass on to another important point which seems to have been completely missed by the High Court. It is well settled that where on the evidence two possibilities are available or open, one which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt.*

Another golden thread which runs through the web of the administration of justice in criminal cases, is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence."

83. Therefore, the benefit of ambivalence of P.W.4 will go in favour of the appellants. The cumulative result of those observations as made by us above is that the appellants are entitled to get the benefit of doubt which we extend without hesitation. As consequence thereof, the impugned judgment and order of conviction and sentence dated 06.02.2013, as challenged in this appeal, is set-aside.

84. As the appellants No.1, 2 & 4 are on bail, we discharge their sureties from their respective obligations. But so far as the appellant No.3-Susanta Baral @ Barad is concerned, he shall be released forthwith, if not warranted in any other case.

85. In the result, the appeal stands allowed.

86. The Registry is directed to send a copy of this judgment to the Adhoc Addl. Sessions Judge, Fast Track Court, Khurda or the Addl. Sessions Judge, Khurda forthwith.

—— o ——

2023 (III) ILR-CUT-36

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

W.P(C) NO. 1754 OF 2023

SIBU KANUNGO .....Petitioner

.V.

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

NATURAL JUSTICE – The Petitioner has never been served with a notice to show cause before the rescind of the contract agreement was passed – Whether it amounts to violation of principle of natural justice? – Held, Yes – Even in an administrative proceeding involving civil consequences doctrine of natural justice must be held to be applicable. (Para 20-35)

Case Laws Relied on and Referred to :-

1. (2006) 2 SCC 777 : Vidyawati Gupta Vs. Bhakti Hari Nayak.
2. (2009) 1 SCC 354 : K. Laxmanan Vs. Thekkayil Padmini.
3. (2007) 6 SCC 401 : M. Venkataramana Hebbar (Dead) by LRS Vs. M. Rajagopal Hebbar & Ors.

4. (2017) 8 SCC 592 : Jaspal Kaur Cheema & Anr Vs. Industrial Trade Links & Ors.
5. 1976 2 All ER 865 (HL) : Fairmount Investments Ltd. Vs. Secy. of State for Environment.
6. (1963) 2 SLL RT 66 at 102 : Ridge Vs. Baldwin.
7. (1958) All ER 579 : Byrne Vs. Kinematograph Renters Society Ltd.
8. (1949) 1 All ER 109 : Russel Vs. Duke of Norfolk.
9. (1993) 4 SCC 10 : AIR 1993 SC 2115 : Rattan Lal Sharma Vs. Managing Committee.
10. (1943) AC 627 : General Medical Council Vs. Spackman.
11. AIR 1970 SC 150 : (1969) 2 SCC 262 : A.K. Kraipak & Ors.Vs.Union of India.
12. AIR 1981 SC 818 : Swadeshi Cotton Mills Vs. Union of India.
13. (1998) 8 SCC 194 : Basudeo Tiwary Vs. Sido Kanhu University & Ors.
14. AIR 1965 SC 1767:(1965) 3 SCR 218 : Bhagwan Vs. Ramchand.
15. AIR 1975 SC 1331:(1975)1 SCC 421 : Sukdev Singh Vs. Bhagatram.

For Petitioner : Mr. Milan Kanungo, Sr. Adv.
M/s. S.R. Mohanty & D. Acharya.

For Opp. Parties : Mr. P.P. Mohanty, Addl. Govt. Adv.

JUDGMENT Date of Hearing: 25.07.2023: Date of Judgment: 28.07.2023

Dr. B.R. SARANGI, J.

The petitioner, who is a contractor, has filed this writ petition challenging the order dated 12.01.2023 under Annexure-7, by which the Executive Engineer, Nayagrah (R&B) Division, Nayagarh, in pursuance of the approval of rescission of contract vide letter no.2198 dated 15.11.2022 of the Chief Construction Engineer, Khurdha (P&B) Circle, Khurdha, has rescinded the contract agreement no.223P1/2018-19 for the work "Improvement to Sadar Police Station to Khetribarpur Khandugaon RD road from 0/0 km to 2/430 km for the year 2017-18" as per Clause-2(i) of P1 agreement with levy of penalty @ 20% of the value of leftover work to be realized from the petitioner-contractor.

2. The factual matrix of the case, in brief, is that the Chief Construction Engineer, Khurdha (R&B) Circle, Khurdha-opposite party no-3 invited tender for the work "Improvement to Sadar Police Station to Khetribarpur Khandugaon RD Road of Ward No-6 from 0/0 to 2/430 km vide Bid Identification No.SE/Khurdha (R&B) Circle-02/2018-19". Pursuant to such tender call notice, the petitioner participated in the bid and came out successful. Consequently, on 17.09.2018, an agreement was executed between the petitioner and opposite party no. 4, vide P1 Agreement No- 223-P1/2018-19.

2.1 After execution of the agreement, the petitioner moved his men and machineries to start and complete the work as per the agreement, but, however, due to encroachments and forcible occupation of land by various persons, it was difficult on his part to conclude the work. Even though the petitioner made several requests, vide letters dated 03.12.2018, 12.02.2019 and 24.03.2019, but no action was taken

by the opposite parties. Ultimately, opposite party no.4 informed the petitioner that they cannot evict the encroachments as General Election 2019 was around the corner and displacement of people would create hue and cry for the ruling government. Even though an obligation was cast on the opposite parties to give the land free of encroachment to undertake the work, they did not discharge their duties and responsibilities by providing encroachment free land to undertake the work. The opposite parties, on 25.01.2021, inspected the entire site and decided to double the width of the road, i.e., instead of single lane it was decided to make the road double lane and accordingly a revised estimate was prepared and finalised on 24.11.2021. After finalisation of the revised estimate, opposite party no.4, vide letter no. 6629 dated 24.11.2021, submitted the revised estimate with deviation statement for the approval of the higher authority, i.e., opposite party no.3 and after duly scrutinizing the proposal, opposite party no.3, vide letter no. 417 dated 04.03.2022, approved the deviation and accordingly, returned the documents to opposite party no.4 for starting the double laning of the road. For revising the work and to give a go ahead to the petitioner, since the opposite parties took considerable time, the petitioner mobilised few of his resources to complete the work under other agreements in order to achieve his bid capacity. However, when the approval was accorded by opposite party no. 3, the petitioner immediately resumed the work basing on which, the running account was released in favour of the petitioner in the month of April, 2022 for the work done in the month of March, 2022.

2.2 The petitioner humbly continued the work till the onset of monsoon, but due to unprecedented rains, it was very difficult to execute the work as per the revised estimate, as it was only earthwork and was carried out on the foothill of the mountain which was hampered by heavy water flow. After the rain subsided, when the petitioner moved his men and machineries for resumption of work at the site, he was verbally stopped by the Assistant Engineer from doing any work at the site. As a result of thereof, the petitioner made a grievance before opposite party no. 4 on 20.11.2022. While his grievance was pending, the petitioner received a letter dated 12.01.2023, whereby opposite party no. 4 has rescinded the agreement for the work "Improvement to Sadar Police Station to Khetribarpur Khandugaon RD road of ward no.6 from 0/0 km to 2/430 km vide Bid Identification No.SE/Khurdha (R&B) Cirlce-02/2018-19" with a levy of penalty of 20% of the value of the leftover work. Hence, this writ petition.

3. Mr. Milan Kanungo, learned Senior Advocate appearing along with Mr. S.R. Mohanty, learned counsel for the petitioner vehemently contended that the impugned letter dated 12.01.2023 vide Annexure-7, which has been issued in rescinding the contract, is arbitrary, unreasonable and contrary to the provisions of law and violates the principles of natural justice as the petitioner has never been served with a notice to show cause and he has not been given opportunity of hearing before the order impugned was passed. He further contended that as per the agreement, which was executed on 17.09.2018, the work could not be executed, as

the authorities proposed to revise the work. As such, the revised estimate was prepared and finalised on 04.03.2022 and, thereafter, the petitioner was allowed to start the work, as the scope of work was completely changed. He further contended that in one hand the opposite parties delayed the finalization and approval of revised work/estimate by three years and on the other hand in an arbitrary and most unfair manner rescinded the work granted in favour of the petitioner by attributing the delay to him in execution of the same. He, therefore, contended that the actions of the opposite parties are *per se* unfair, illegal, arbitrary, discriminatory, abridges the legitimate expectation and also infringes the statutory and fundamental rights of the petitioner as guaranteed under Articles 14, 19 and 21 of the Constitution of India and, therefore, seeks for interference of this Court.

4. Mr. P.P. Mohanty, learned Addl. Government Advocate appearing for the State-opposite parties, though admitted the factual matrix as stated above, contended that the petitioner failed to complete the work as per his commitment. Accordingly, the contract rescission proposal was initiated as per Clause-2(i) of the agreement and got approved by the competent authority. Therefore, after rescission of contract, on 20.03.2023, a fresh tender was issued by the Chief Construction Engineer, Khurda (R&B) Circle-opposite party no.3. Since the petitioner challenged the rescission of contract by filing the present writ petition, on 10.04.2023, the said fresh tender was cancelled by opposite party no.3. It is further contended that as the petitioner failed to start the work, for which Contract Management Meeting was held on 07.12.2018. In the said meeting, the petitioner had committed to start the work by 13.12.2018, but he did not comply with the same. As a consequence thereof, a show cause notice was issued vide letter dated 02.02.2019. In spite of that, the petitioner did not start the work as per his commitment. Therefore, he was issued with show cause notices, vide letters no. 4916 dated 18.12.2019, no. 3113 dated 28.04.2020, no. 4185 dated 21.07.2020, no. 3617 dated 04.05.2021 and no. 4101 dated 07.07.2021. In spite of repeated show cause notices, the petitioner did not take any step to expedite the work to complete in all respect. He further contended that inspection was caused by the Chief Engineer (DPI & Roads) Odisha, Bhubneswar on 25.01.2021. The petitioner was instructed to improve the road with provision of double lane instead of single lane with scope of work within agreement amount. The Contract Management Meeting was held on 08.10.2021 in presence of the petitioner, being the agency, and other Engineer-in-Charge, where the petitioner committed to start the work by 16.10.2021 and to submit the revised work programme by 11.10.2021 prior to start of the work. Consequently, the revised estimate and deviation was approved by the Chief Construction Engineer, R&B Circle, vide letter No.417 dated 04.03.2022. Since the petitioner did not execute the original quantity of work provided in the original estimate, the action was taken against him. It is further contended that the petitioner has been paid the running account bill time to time, as per execution of quantity provided in the original agreement and also the bill was paid to the petitioner for the work executed during March 2022. The petitioner did

not execute the agreement quantity and was far behind the quantity provided in the estimate or revised quantity. He has executed the work for a total amount of Rs. 68,37,781.42 excluding GST (approximately 21% of agreement amount) up to March 2022. Thereafter, no work has been executed by the petitioner till rescission of contract. Therefore, the action taken by the authorities is well justified. Consequentially, dismissal of the writ petition is sought for.

5. This Court heard Mr. Milan Kanungo, learned Senior Advocate appearing along with Mr. S.R. Mohanty, learned counsel for the petitioner and Mr. P.P. Mohanty, learned Addl. Government Advocate appearing for the State-opposite parties in hybrid mode and perused the records. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

6. Before delving into the contentions raised by learned counsel for the parties, for a just and proper adjudication of the case, Clause-2(i) of the Conditions of Contract is quoted herein below:-

> *"(i) To rescind the contract (of which rescission notice in writing to the contractor under the hands of the Executive Engineer shall be conclusive evidence), 20% of the value of left-over work will be realised from the contractors penalty. (Works Deptt No. 10639, Pt. 27.05.2005)*
>
> *In the event of above course being adopted by the Executive Engineer the contractor shall have no claim to compensation for any loss sustained by him by reason of his having purchased or procured any materials, or entered into any engagements, or made any advances on account of or with a view to, the execution of the work or the performance of the contract. And in case the contract shall be rescinded under the provisions aforesaid, the contractor shall not be entitled to recover or be paid any sum of any work thereto for actually performed under this contract, unless and until the Executive Engineer shall have certified in writing the performance of such work and the value payable in respect thereof and he shall only be entitled to be paid the value so certified."*

On perusal of the aforementioned clause, it is made clear that to rescind the contract (of which rescission notice in writing to the contractor under the hands of the Executive Engineer shall be conclusive evidence) 20% of the value of left-over work will be realised from the contractor as penalty. Therefore, for rescinding the contract, an obligation was cast on the *Executive Engineer to give a* rescission notice in writing. Thereby, a condition has been stipulated for giving prior notice to the contractor.

7. On careful examination of the documents available on record, there is no dispute that pursuant to the tender notice invited by the opposite parties, the petitioner participated and on being selected was allotted with the work. But, subsequently, the work in question was revised and instead of single laning road it was decided for double laning and, as such, the road was encroached by the

unauthorised occupants, which the opposite parties were under obligation to provide free of encroachments. When this fact was brought to the notice of the opposite parties, instead of taking a call on the issue, responsibility was shifted on the petitioner to evict such unauthorised occupants and undertake the work including revised work. Needless to say that the revised work was permitted to be done by the petitioner only vide letter dated 04.03.2022 by approving the deviation. Hence, the petitioner was to start the work, but due to heavy rain, it was not possible on his part to go with the work immediately. Unfortunately, an inquiry was conducted behind his back and on the basis of such inquiry, the order dated 12.01.2023 was passed by rescinding the contract. Much emphasis was laid by learned Addl. Government Advocate that petitioner was issued with four show cause notices of different dates as pleaded in paragraph-9 of the counter affidavit. But fact remains, those notices had been issued much prior to revision of work and, therefore, the same have no bearing to the present context, since the petitioner was allowed to do the revised work only in March, 2022 vide letter dated 04.03.2022. It has also been admitted that the petitioner has executed the work for a total amount of Rs.68,37,781.42 excluding GST (approximately 21% of agreement amount) up to March, 2022. Beyond March 2022, no work has been executed by the petitioner till the order of rescission of contract was issued in January, 2023. Though reliance was placed on Contract Management Meeting held on 08.10.2021, where the petitioner committed to start the work by 16.10.2021, but after that the petitioner had executed the work amounting to Rs.26,65,146.00 excluding GST of the agreement amount during March, 2022. Therefore, when the petitioner is progressing with the work, on the plea of failure to achieve the target, a bald statement has been made to the effect to show that notices were issued to the petitioner giving opportunity to state his difficulty. But factually no such show cause notice was served on the petitioner and the contract rescission proposal was initiated as per Clause-2 (i) of the Conditions of the Contract, which got approved by the Chief Construction Engineer, by imposing levy of penalty of 20% on the petitioner. So far as contention raised and as pleaded in paragraph-9 of the counter affidavit, that several show cause notices were issued, those show cause notices had been issued prior to 04.03.2022, when on a revised estimate the petitioner was to execute the work from single laning to double laning road. When the work was in progress, the step for rescission of contract was taken without complying with the principle of natural justice.

8. The petitioner has specifically pleaded in paragraphs-12 and 15 of the writ petition to the following effect:-

> *"12. That it is most respectfully submitted that the impugned letter under Annexure-7 has been issued in clear violation of the principles of natural justice as the Petitioner has never been served with a show cause notice and the Petitioner has not been heard before passing of the impugned order. This ground alone makes the order liable to be quashed and set aside by this Hon'ble Court.*

15. That the actions of the Opp. Parties are in clear violation of the principles of natural justice and oozes malafide. This shows the arbitrary nature with which the Petitioner has been dealt with and acted upon. Hence, the impugned order as under Anncxure-7 is liable to be quashed and set aside."

9. In the reply to the same, the State-opposite parties, in their counter affidavit, have stated in paragraphs-14 and 16 to the following effect:-

"14. That the averments made in paragraph No.12 of writ petition are disputed and denied. It is humbly submitted that in spite of several letters issued to the petitioner, he never heed to keep the progress of the work. After conduct of several contract management meeting and several Show Cause Notices issued to the petitioner, finally the contract was rescinded under clause 2 (i) of the agreement with imposition of penalty @ 20% of value of left over work. Thereby the rescission of the contract under clause 2 (i) of the agreement does not violate the principle of natural justice.

All other allegations/ averments made in this paragraph are hereby disputed and denied.

16.That the averments made in paragraphs No. 15, 16, 17 and 18 of the writ application shall be dealt with at the time of hearing."

10. From the above pleadings available on record, it is made clear that in reply to the contention raised by the petitioner, that there was non-compliance of the principles of natural justice, it has only been stated by the State-opposite parties that the action was taken under Clause-2(i) of the agreement, which cannot be construed to be compliance of the principles of natural justice. In absence of an effective reply to the pleading made on behalf of the petitioner, it is deemed that the same has been admitted by the opposite parties. It is trite that a fact admitted need not be proved. An admission of fact in the written statement/counter need not be proved, reason being an admission is concession or voluntary acknowledgement made by a party or someone identified with him in legal interest of the existence of certain fact which are in issue or relevant to an issue in the case. The predominant characteristic of this type of evidence consists in its binding characters.

11. Admissions are broadly classified into two categories; (a) Judicial admissions; and (b) Extra-judicial admissions. Judicial admissions are formal admissions made by a party during the proceedings of the case. Extra-judicial admissions are informal admissions not appearing on the record of the case. The former are fully binding on the party that makes them. They constitute a waiver of proof.

12. Section 58 of the Evidence Act confines to judicial admission such as admission by pleadings. It normally relates to agreed statements of facts made between both parties to save time and expenses at a trial.

13. The basic principle under Order 6 Rule 5 of CPC is that every allegation of fact in the plaint must be taken as admitted unless denied or stated to be not admitted in the pleading of the defendant. Hence, where there is no pleading of the defendant,

there can be no denial or non-admission on his part and he is bound by all the allegations in the plaint.

14. Section 3 (vi) of the Debts Recovery Tribunal Regulations of Practice, 1997 also clarifies that pleading shall include original applications, reply statements, rejoinders and additional statements supplementing the original applications and reply statement as may be permitted by the tribunal.

15. In ***Vidyawati Gupta v. Bhakti Hari Nayak***, (2006) 2 SCC 777, the apex Court held that the word 'pleadings' under Order VI Rule 1 and Order VII of the Code means 'plaint' or written statement.

16. In K***. Laxmanan v. Thekkayil Padmini***, (2009) 1 SCC 354, the apex Court held that 'pleadings' consist only of a plaint and a written statement. A replication if filed by plaintiff and allowed by the Court would be a part of 'pleadings'.

'Pleadings' include particulars and a 'pleading' must state only facts and not law.

17. In ***M. Venkataramana Hebbar (Dead) by LRS v. M. Rajagopal Hebbar & others***, (2007) 6 SCC 401, the apex Court held the averments made in the plaint not been denied in the written statement, the said averment is deemed to be admitted. Therefore, in terms of Section 58 of the Evidence Act, facts admitted need not be proved. Therefore, the Court was entitled to draw the inference that the same has been admitted.

18. In ***Jaspal Kaur Cheema and another v. Industrial Trade Links and others,*** (2017) 8 SCC 592, the apex Court held that the defendant in the written statement must categorically deny or dispute the averments made in the plaint, as evasive denial would amount to an admission of the allegation made in the plaint.

19. Applying the said analogy to the present case, it is made clear that when a specific plea has been taken by the petitioner in the writ petition at paragraphs-12 and 15, as quoted above, the manner in which the opposite parties have replied in their counter affidavit at paragraphs 14 and 16 is absolutely evasive one, which cannot be accepted. Therefore, an inference can be drawn that the principle of natural justice has not been complied with while issuing the letter under Annexure-7 dated 12.01.2023 in rescinding the contract.

20. The essential of compliance of natural justice is nothing but a duty to act fairly. Natural justice is an antithesis of arbitrariness. It, therefore, follows that *audi alteram partem*, which is facet of natural justice is a requirement of Art.14.

The word 'nature' literally means the innate tendency or quality of things or objects and the word 'just' means upright, fair or proper. The expression 'natural justice' would, therefore, mean the innate quality of being fair.

Natural justice, another name of which is common sense of 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 must not only be done but also appears to be done.

The soul of natural justice is "fair play in action".

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

22. 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'.

23. 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.

24. In ***Ridge v. Baldwin***, (1963) 2 SLL RT 66 at 102, Lord Morris of Borth-y-Gest observed that "it is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet ... My Lords, here is something which is basic to our system: the importance of upholding it far transcends the significance of any particular case".

25. In ***Byrne v. Kinematograph Renters Society Ltd***, (1958) All ER 579, while considering the requirements of natural justice, Justice Narman, J said. ".....First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thereby, of course, that the tribunal should act in good faith. I do not think that there really is anything more".

26. In ***Russel v. Duke of Norfolk,*** (1949) 1 All ER 109, Tucker, LJ, observed that one essential is that the person concerned should have a reasonable opportunity of presenting his case. The view of Tucker, LJ, in Russell's case (supra) has been approved by the Supreme Court of India in ***Rattan Lal Sharma v Managing Committee,*** (1993) 4 SCC 10 : AIR 1993 SC 2115.

27. In ***General Medical Council v. Spackman,*** (1943) AC 627, Lord Wright pointed out that it should give a full and fair opportunity to every party being heard.

28. In ***A.K. Kraipak and others v. Union of India, AIR 1970 SC 150: (1969) 2 SCC 26***2, is a landmark in the growth of this doctrine. Speaking for the Constitution Bench, Hegde, J. observed thus:

> *"If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have far reaching effect than a decision in a quasi-judicial enquiry".*

In ***Maneka Gandhi v. Union of India,*** AIR 1978 SC 597 : (1978) 1 SCC 248, law has done further blooming of this concept. This decision has established beyond doubt that even in an administrative proceeding involving civil consequences doctrine of natural justice must be held to be applicable.

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

> *"The phrase is not capable of a static and precise definition. It cannot be imprisoned in the straight-jacket of a cast-iron formula. Historically, "natural justice" has been used in a way "which implies the existence of moral principles of self evident and urarguable truth". "Natural justice" by Paul Jackson, 2nd Ed., page-1. In course of time, judges nurtured in the traditions of British jurispruduence, often invoked it in conjuction 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."*

30. In ***Basudeo Tiwary v Sido Kanhu University and others*** (1998) 8 SCC 194, the apex Court held that natural justice is an antithesis of arbitrariness. It, therefore, follows that *audi alteram partem*, which is facet of natural justice is a requirement of Art.14.

31. In ***Nagarjuna Construction Company Limited v. Government of Andhra Pradesh***, (2008) 16 SCC 276, the apex Court held as follows:

> *"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. Thus, whenever a man's rights are affected by decisions taken under statutory powers, the court would presume the existence of a duty to observe the rules of natural justice. It is important to note in this context the normal rule that whenever it is necessary to ensure against the failure of justice, the principles of natural justice must be read into a provision. Such a course is not permissible where the rule excludes expressly or by necessary intendment, the application of the principles of natural justice, but in that event, the validity of that rule may fall for consideration."*

32. The apex Court in ***Uma Nath Panday and others v State of U.P. and others***, AIR 2009 SC 2375, held that natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.

33. In ***Mohinder Singh Gill v. The Chief Election Commissioner***, AIR1978 SC 851 : (1978) 1 SCC 405, the apex Court held that natural justice is treated as a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of Authority. It is the bone of healthy government, recognised from earliest times and not a mystic testament of judge-made law. Indeed, from the legendary days of Adam-and of Kautilya's Arthasastra-the rule of law has had this stamp of natural justice which makes it social justice.

34. In ***Bhagwan v. Ramchand***, AIR 1965 SC 1767: (1965) 3 SCR 218, 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.

35. In ***Sukdev Singh v Bhagatram***, AIR 1975 SC 1331: (1975)1 SCC 421, the apex Court held that whenever a man's rights are affected by decisions taken under statutory powers, the court would presume the existence of a duty to observe the rules of natural justice.

36. In view of the facts and law, as discussed above, it is made clear that while issuing letter no. 243 dated 12.01.2023 in rescinding the contract, there was gross violation of the principles of natural justice, which has been admitted in the pleadings made in the counter affidavit filed by the opposite parties. Therefore, in view of the clear admission made by the opposite parties in their counter affidavit, this Court has no hesitation to hold that the impugned order issued under Annexure-7 dated 12.01.2023 cannot be sustained in the eye of law and the same is liable to be quashed and is hereby quashed.

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

—— o ——

2023 (III) ILR-CUT-46

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

W.P.(C) NO. 22976 OF 2017

STATE OF ODISHA & ORS. .....Petitioners

.V.

KHIRODINI ROUT & ANR. .....Opp.Parties

(A) ADMINISTRATIVE TRIBUNAL ACT, 1985 – Section 21(1)(a) – The impugned order passed on 07.04.2007 – The original application filed after eight years challenging the order of punishment – Whether the delay should be condoned? – Held, No – The courts are expected not to travel beyond the permissible extent, so as to condone the enormous delay in a routine or mechanical manner – Power of discretion is to be exercised to mitigate the injustice if any occurred to the litigants – The person who slept over his right, has to necessarily lose his right on account of efflux of time. (Para 19-21)

(B) WORD AND PHRASES – 'SHALL'– Meaning and implication – Held, when a statute uses the word "shall", prima facie it is mandatory.

(i) 'Sufficient cause' – Explained. (Para-11)

(ii) Non-obstante clause – Implications – Explained. (Para-10)

Case Laws Relied on and Referred to :-

1. AIR 1957 SC 912. : State of U.P. Vs. Manbodhan Lal Srivastava.
2. (2011) 4 SCC 306 : Pesara Pushpamala Reddy Vs. G. Veera Swamy.
3. (2013) 9 SCC 460 : C.N. Paramsivam and Anr. Vs. Sunrise Plaza & Ors.
4. AIR 1961 SC 1480 : Sainik Motors Vs. State of Rajasthan.
5. AIR 1961 SC 751 : State of U.P. Vs. Babu Ram.
6. (2014) 14 SCC 638 : Vijay Dhanuka Vs. Najima Mamtaj.
7. 1984 (Supp.) SCC 196: AIR 1984 SC 1022 : Union of India Vs. G.M. Kokil.
8. AIR 1996 SC 1643 : T.R. Thandur Vs. Union of India.
9. (2009) 4 SCC 94 : Central Bank of India Vs. State of Kerala.
10. AIR 1998 SC 554 : (1998) 1 SCC 650 : P. Virudhachalam Vs. Management of Lotus Mills.
11. AIR 1960 220 : Sitaram Ram Charan Vs. M.N. Nagrasharma.
12. AIR 1968 SC 222 : Lonand Grampanchayat Vs. Ramgiri.
13. (1972) 1 SCC 366 : State of West Bengal Vs. Administrator, Howrah Municipality.
14. (1999) 6 SCC 396: AIR 1999 SC 3060 : Sankaran Pillai Vs. V.P. Venguduswami.
15. (2002) 3 SCC 195 : Ram Nath Sao Vs. Gobardhan Sao.
16. (2000) 9 SCC 94: AIR 2000 SC 2306 : State of Bihar Vs. Kameshwar Prasad Singh.
17. AIR 2005 SC 2191 : State of Nagaland Vs. Lipok Ao.
18. 2012 (5) SCC 157 : Maniben Devraj Shah Vs. Muinicipal Corporation of Brihan Mumbai.
19. 2013 (4) SCC 52 : Amalendu Kumar Bera and others Vs. State of West Bengal.
20. 2012 AIR SCW 1812 : Office of the Chief Post Master General & Ors. Vs. Living Media India Ltd. & Anr.
21. 2014 (II) ILR-CTC 847 : State of Odisha Vs. Bishnupriya Routray.
22. 2021 (II) ILR CUT 241 : State of Odisha and anr. Vs. Miss Sumitra Das.

For Petitioners : Mr. A.K. Mishra, Addl Govt. Adv.

For Opp. Parties : M/s. Suvashish Pattnaik, S. Mohanty, B. Moharana, A. Barik, B. Baivab.

JUDGMENT Date of Hearing & Judgment: 31.07.2023

Dr. B.R. SARANGI, J.

The State and its functionaries have filed this writ petition challenging the order dated 27.10.2016 passed by the Odisha Administrative Tribunal, Principal Bench, Bhubaneswar in O.A. No. 1605 of 2015 quashing the punishment order dated 07.04.2007 and directed the petitioners to prepare the pension papers of the deceased Govt. employee in accordance with the relevant rules and draw and disburse such pension and other pre-retiral dues admissible to the applicant/legal heirs of the deceased Govt. employee within a period of four months from the date of receipt of the order.

2. The factual matrix of the case, in brief, is that the husband of opposite party no.1 (Akrura Charan Rout), while working as a Senior Assistant in the office of petitioner no.2-Director of Health Services, was placed under suspension on 19.11.1986 and retired from service on 30.11.1997 while under suspension. A disciplinary proceeding was initiated on 26.08.1989 against him on various grounds including misappropriation of Government cash, forging records and not making over cash entrusted to him etc. in August, 1991. The said proceeding continued without being finalized even after retirement of the deceased Government employee and concluded on 07.04.2007 awarding penalty of recovery of Rs.3,56,185/- from the DCRG, pension and T.I. of the Government employee. Accordingly, certificate case was directed in case further amount remained to be recovered and the period of suspension from 19.11.1986 to 30.11.1997 is to be treated as such. Therefore, the opposite party no.1 approached the tribunal by filing O.A. No. 1605 of 2015 raising objection that the order of penalty has been imposed by the incompetent authority and after retirement of the Government employee. Therefore, the proceeding has to be converted to action under Rule-7 of the OCS (Pension) Rules, 1992, which provides that the Government have reserved to themselves the right of withholding pension or gratuity or both either in full or in part. Thereby, petitioner no.2 has no competence to pass an order for recovery of the amount. Further, the Orissa Public Service Commission has not been consulted before passing such order which is statutory requirement of the aforesaid rules. Furthermore, for the selfsame issue a criminal case was registered against the Government employee, which was ended in acquittal on 07.01.2010 and in view of such acquittal, the findings of the enquiring officer in a disciplinary proceeding cannot be relied upon to award penalty. After due adjudication, the tribunal allowed the original application filed by the opposite party no.1 by quashing the order of punishment imposed against the deceased Government servant and directed the State-petitioners to pay the legitimate claim. Hence, this application.

3. Mr. A.K. Mishra, learned Addl. Government Advocate appearing for the State-petitioners contended that the petitioners, being the respondents before the

tribunal, had raised preliminary objection with regard to maintainability of the original application, as the same was filed beyond the limitation period prescribed and specifically pleaded that the husband of the opposite party no.1 was communicated with the order dated 07.04.2007 with regard to punishment imposed on him by registered post with A.D. But on receipt of the same, the husband of the opposite party no.1 never preferred any appeal and he died on 11.02.2011. It is contended that neither the delinquent official nor after his death, his legal representatives have preferred any appeal against the order of punishment. But, O.A. No. 1605 of 2015 was filed on 22.06.2015, after long lapse of more than eight years challenging the order of punishment dated 07.04.2007. The said original application was not maintainable, being grossly barred by limitation, as per the provisions contained under Section 21 (1) (a) of the Administrative Tribunals Act, 1985. It is contended that even though the question of limitation was raised before the tribunal, but the same was not taken into consideration and, as such, the order impugned has been passed, which cannot be sustained in the eye of law.

4. Mr. B. Baivab, learned counsel appearing on behalf of Mr. B. Moharana, learned counsel for opposite party no.1 contended that since the pension and pensionary benefits are continuing cause of action, the objection raised by the authority with regard to the limitation cannot stand on the way of the tribunal to decide the matter. As such, the tribunal is well justified in passing the order impugned by extending the benefit to the opposite party no.1 by quashing the order impugned dated 07.04.2007, as the same was passed by an incompetent authority. More so, the benefit which has been accrued to the husband of the opposite party no.1, should be paid forthwith. It is further contended that though the opposite party no.1 has already received the provisional pension, but final pension has not yet been finalized because of pendency of the writ petition. Thus, it is contended that the benefit, which is admissible to the opposite party no.1, should be paid to her forthwith in compliance of the order passed by the tribunal.

5. This Court heard Mr. A.K. Mishra, learned Additional Government Advocate appearing for the petitioners-State of Odisha and Mr. B. Baivab, learned counsel appearing for opposite party no.1 in hybrid mode and perused the record. Pleadings having been exchanged between the parties, the matter has been disposed of finally with the consent of learned counsel for the parties at the stage of admission.

6. Considering the factual matrix, as delineated above, there is no dispute before this Court that in pursuance of the proceeding initiated against the husband of opposite party no.1, he was placed under suspension on 19.11.1986 and the proceeding was initiated against him in the year 1989 and while the proceeding was continuing he retired from service on 30.11.1997. But the proceeding continued and finally it was concluded on 07.04.2007 awarding penalty of recovery of Rs.3,56,185/- from the DCRG. The deceased employee has not challenged the same

in any forum nor preferred any appeal as per the provisions of law and kept silent acknowledging the punishment. A criminal case was also instituted against the deceased Government employee, wherein he was acquitted on 07.01.2010. But the present opposite party no.1, the legal representative of the deceased government employee received the copy of the order on 25.04.2011, as stated, and, therefore, it is contended that she approached the tribunal by filing O.A. No. 1605 of 2015 as pension and pensionary benefits are the continuing cause of action.

7. On perusal of the Original Application filed by opposite party no.1, as at Annexure-4, it is mentioned as follows:

> *5. '**Limitation'***
>
> *"The applicant further declares that the application is within the limitation as prescribed under Section 21 of the Administrative Tribunal's Act, 1985".*

8. Section 21 of the Administrative Tribunal Act reads as follows:-

> ***21. Limitation.**—(1) A Tribunal shall not admit an application,—*
>
> *(a) in a case where a final order such as is mentioned in clause (a) of sub-section (2) of section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made;*
>
> *(b) in a case where an appeal or representation such as is mentioned in clause (b) of sub-section (2) of section 20 has been made and a period of six months had expired thereafter without such final order having been made, within one year from the date of expiry of the said period of six months.*
>
> *(2) Notwithstanding anything contained in sub-section (1), where*
>
> *(a) the grievance in respect of which an application is made had arisen by reason of any order made at any time during the period of three years immediately preceding the date on which the jurisdiction,powers and authority of the Tribunal becomes exercisable under this Act in respect of the matter to which such order relates; and*
>
> *(b) no proceedings for the redressal of such grievance had been commenced before the said date before any High Court, the application shall be entertained by the Tribunal if it is made within the period referred to in clause (a), or, as the case may be, clause (b), of sub-section (1) or within a period of six months from the said date, whichever period expires later.*
>
> *(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), an application may be admitted after the period of one year specified in clause (a) or clause (b) of sub-section (1) or, as the case may be, the period of six months specified in sub-section (2), if the applicant satisfies the Tribunal that he had sufficient cause for not making the application within such period."*

9. In view of the aforementioned provisions, it is made clear that a mandate has been put on the Tribunal by using the word "shall" not to admit an application in a case where a final order such as is mentioned in clause-(a) of Sub-section (2) of Section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made.

In ***State of U.P. v. Manbodhan Lal Srivastava***, AIR 1957 SC 912, the apex Court held that the use of word "shall" is a presumption that the particular provision is imperative. As such, instances have been taken on rule-57(2) of the Schedule-II to the Income Tax Act, 1961, which provides that the full amount of purchase of money payable "shall" be paid by the purchaser to the Tax Recovery Officer on or before the fifteenth day from the date of sale of property. Thereby, by using the word "shall", the apex Court held that it is mandatory on the part of the purchaser to pay the full amount to the Tax Recovery Officer. As such, following this principles, the apex Court time and again held similar view in various subsequent judgments and ultimately got approval in the case of ***Pesara Pushpamala Reddy v. G. Veera Swamy***, (2011) 4 SCC 306.

In ***C.N. Paramsivam and Anr. V. Sunrise Plaza and others***, (2013) 9 SCC 460, the apex Court relying upon the word "shall" as well as the earlier decision of the Court on *pari materia* provision in Order XXI of the CPC, held that making of the deposit by the intending purchaser is mandatory.

In ***Sainik Motors v. State of Rajasthan***, AIR 1961 SC 1480, Hon'ble Justice Hidayatullah observed that the word "shall" is ordinarily mandatory but it is sometimes not so interpreted if the context or the intention otherwise demands and points out.

In ***State of U.P. v. Babu Ram***, AIR 1961 SC 751, Hon'ble Justice Subarao, observed that when a statute uses the word "shall", prima facie it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute.

In ***Vijay Dhanuka v. Najima Mamtaj***, (2014) 14 SCC 638, the apex Court, while interpreting Section 202 of the Cr.P.C, which provides that the Magistrate "shall" in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding, held that the word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. However, on looking at the intention of the Legislature, the Court found that the provision is aimed at preventing innocent persons from being harassed by unscrupulous persons making false complaints, and therefore the inquiry or investigation contemplated by the provision before issuing summons was held to be mandatory.

10. Taking into consideration the aforementioned analogy, applying the provisions under Section 21(1) and considering the legislative intent attached to the provisions, it is made clear that using the word "shall" the legislature have put a mandate, i.e., mandatory condition on the Tribunal to entertain the Original

Application in connection with the grievance of the applicant within one year from the date on which such final order has been made. On perusal of the provisions contained under Section 21(1) and (2), it is crystal clear that in a case where an appeal or representation such as is mentioned in Clause (b) of Sub-section (2) of Section 20 has been made and a period of six months had expired thereafter without such final order having been made, within one year from the date of expiry of the said period, the Tribunal can admit an application, whereas Sub-section (2) of Section 21 makes clear that notwithstanding anything contained in Sub-section (1) where the grievance in respect of which an application is made had arisen by reason of any order made at any time during the period of three years immediately preceding the date on which the jurisdiction, powers and authority of the Tribunal becomes exercisable under this Act in respect of the matter to which such order relates, but no proceedings for the redressal of such grievance had been commenced before the said date before any High Court. The application shall be entertained by the Tribunal if it is made within the period referred to in clause (a), or as the case may be, clause (b), of Sub-section (1) or within a period of six months from the said date, whichever period expires later. Sub-section (3) of Section 21 states by using non-abstante clause that notwithstanding anything contained in Sub-section (1) or Sub-section (2), an application may be admitted after the period of one year specified in clause (a) or clause (b) of Sub-section (1) or, as the case may be, the period of six months specified in Sub-section (2), if the applicant satisfies the Tribunal that he had sufficient cause for not making the application within such period. The using of word "notwithstanding", a non-obstante clause, under Sub-section (3) of Section 21 gives overriding effect over the provisions.

In ***Union of India v. G.M. Kokil***, 1984 (Supp.) SCC 196: AIR 1984 SC 1022, the apex Court held that a clause beginning with "notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force", is sometimes appended to a section in the beginning, with a view to give the enacting part of the section in case of conflict an overriding effect over the provision or Act mentioned in the non-obstante clause.

In ***T.R. Thandur v. Union of India***, AIR 1996 SC 1643, the apex Court held that a non-obstante clause may be used as a legislative device to modify the ambit of the provision or law mentioned in the non-obstante clause or to override it in specified circumstances.

In ***Central Bank of India v. State of Kerala***, (2009) 4 SCC 94, the apex Court held that while interpreting a non statute clause the court is required to find out the extent to which the Legislature intended to give it an overriding effect.

In ***P. Virudhachalam v. Management of Lotus Mills***, AIR 1998 SC 554: (1998) 1 SCC 650, the apex Court held that the expression "notwithstanding anything in any other law" occurring in a section of an Act cannot be construed to take away the effect of any provision of the Act in which that section appears.

Therefore, the effect of provisions contained under Sub-sections (1) and (2) of Section 21 with regard to condonation of delay is dependent upon the satisfaction of the Tribunal if the application shows the sufficient cause.

11. The *pari materia* provisions for condonation of delay are derived from Section 5 of the Limitation Act. Therefore, the word "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice when no negligence nor inaction, nor want of *bona fide*, is imputable to the appellant. The term "sufficient cause" under Section 5 of the Limitation Act apparently covers not only those circumstances (such as the Courts being closed or time being spent in obtaining copies, or the party being a minor or insane) which the law expressly recognizes as extending the time, but also such circumstances as are not expressly recognized but which may appear to the Court to be reasonable.

In ***Sitaram Ram Charan v. M.N. Nagrasharma***, AIR 1960 220, the apex Court held that "sufficient cause" means the appellant's explanation for the delay has to cover the whole period of the delay.

In ***Lonand Grampanchayat v. Ramgiri***, AIR 1968 SC 222, the apex Court held that the word "sufficient cause" should receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable.

In ***State of West Bengal v. Administrator, Howrah Municipality***, (1972) 1 SCC 366, the apex Court held that the expression "sufficient cause" occurring in Section 5 of the Act would mean that "no negligence", "no inaction" or mala fides is imputable to the party.

Similar view has also been taken by the apex Court in ***Ram Nath Sao v. Gobardhan Sao***, (2002) 3 SCC 195.

In ***Sankaran Pillai v. V.P. Venguduswami***, (1999) 6 SCC 396: AIR 1999 SC 3060, while construing the provisions contained under Section 11(4) of the T.N. Building (Lease and Rent Control) Act, 1960, the apex Court held that the expression "sufficient cause" under Section 11 (4) of the Act necessarily implies an element of sincerity, bona fides and reasonableness.

In ***State of Bihar v. Kameshwar Prasad Singh***, (2000) 9 SCC 94: AIR 2000 SC 2306, the apex Court held that the expression "sufficient cause" occurring in Section 5 of the Limitation Act would mean that a liberal approach be given for sufficiency of cause for condonation of delay in filing the appeal.

12. In ***State of Nagaland* v. *Lipok Ao,*** AIR 2005 SC 2191, the Court referred to several precedents on the subject and observed that the proof of "sufficient cause" is a condition precedent for exercise of discretion vested in the Court. What counts is not the length of the delay but the sufficiency of the cause and shortness of the delay

is one of the circumstances to be taken into account in using the discretion. The Court also took cognizance of the usual bureaucratic delays which take place in the functioning of the State and its agencies/instrumentalities and observed:

> *"Experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file-pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. The State which represents collective cause of the community, does not deserve a litigant-non-grata status. The courts, therefore, have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression of sufficient cause. Merit is preferred to scuttle a decision on merits in turning down the case on technicalities of delay in presenting the appeal."*

13. The apex Court in **Maniben Devraj Shah v. Muinicipal Corporation of Brihan Mumbai**, 2012 (5) SCC 157, held in paragraphs 24 and 25 to the following effect:-

> *"24. What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. 25. In case involving the State and its agencies/instrumentalities, the court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and/or its agencies/instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest".*

After holding as above, in paragraph 28 the apex court has stated as follows:

> *"28.The application filed for condonation of delay and the affidavits of Shri Sirsikar are conspicuously silent on the following important points:*
>
> *(a) The name of the person who was having custody of the record has not been disclosed.*
>
> *(b) The date, month and year when the papers required for filing the first appeals are said to have been misplaced have not been disclosed.*
>
> *(c) The date on which the papers were traced out or recovered and name of the person who found the same have not been disclosed.*
>
> *(d) No explanation whatsoever has been given as to why the applications for certified copies of the judgments of the trial court were not filed till 23-08-2010 despite the fact that Shri Sirsikar had given intimation on 12-5-2003 about the judgments of the trial court.*
>
> *(e) Even though the Corporation has engaged a battery of lawyers to conduct cases on its behalf, nothing has been said as to how the transfer of Shri Ranindra Y. Sirsikar operated as an impediment in the making of applications for certified copies of the judgments sought to be appealed against."*

14. In ***Amalendu Kumar Bera and others v. State of West Bengal***, 2013 (4) SCC 52, the apex Court in paragraph-9 held as follows:

> *"We have heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondent State. There is no dispute that the expression "sufficient cause" should be considered with pragmatism in justice oriented approach rather than the technical detection of "sufficient cause" for explaining every day"s delay. However, it is equally well settled that the courts albeit liberally considered the prayer for condonation of delay but in some cases the court may refuse to condone the delay inasmuch as the Government is not accepted to keep watch whether the contesting respondent further put the matter in motion. The delay in official business requires its pedantic approach from public justice perspective. In a recent decision in* ***Union of India v. Nripen Sarma****, AIR 2011 SC 1237, the matter came up against the order passed by the High Court condoning the delay in filing the appeal by the appellant Union of India. The High Court refused to condone the delay on the ground that the appellant Union of India took their own sweet time to reach the conclusion whether the judgment should be appealed or not. The High Court also expressed its anguish and distress with the way the State conducts the cases regularly in filing the appeal after the same became operational and barred by limitation."*

15. In ***Office of the Chief Post Master General & Ors. v Living Media India Ltd. & Anr.*** **:** 2012 AIR SCW 1812, it has been held as follows:

> *"13. In our view, it is the right time to inform all the Government bodies; their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the process. The Government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for Government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dated, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay. Accordingly, the appeals are liable to be dismissed on the ground of delay."*

16. It is apt to mention here that referring to the judgment of this Court in ***State of Odisha v. Bishnupriya Routray,*** 2014 (II) ILR-CTC 847, which was authored by one of us (Dr. Justice B.R. Sarangi), similar orders were passed by this Court and challenging those orders the State had moved the apex Court in large number of S.L.Ps., which were dismissed by confirming the orders passed by this Court refusing to condone the delay in preferring the appeal.

17. In ***State of Odisha and another v. Miss Sumitra Das***, 2021 (II) ILR CUT 241, the Division Bench of this Court had relied upon the judgment of the apex Court in the case of ***State of Madhya Pradesh v. Bherulal***, decided on 15.10.2020 in SLP (C) Dairy No. 9217 of 2020, wherein the SLP was dismissed as time barred and the apex Court awarded cost of Rs.25,000/- on the State of M.P. and, as such, the

judgment of the apex Court was also relied upon by this Court in paragraph-6 of the judgment to the following effect:-

> *"6. Thereafter the aforementioned decision has been referred to and reiterated in a number of orders of the Supreme Court. A sampling of such orders is as under:*
>
> *(i) Order dated 13th January 2021 in SLP No.17559 of 2020* ***(State of Gujarat v. Tushar Jagdish Chandra Vyas & Anr.)***
>
> *(ii) Order dated 22nd January 2021 in SLP No.11989 of 2020* ***(The Commissioner of Public Instruction & Ors. v. Shamshuddin)***
>
> *(iii) Order dated 22nd January 2021 in SLP No.25743 of 2020* ***(State of Uttar Pradesh & Ors v. Sabha Narain & Ors.)***
>
> *(iv) Order dated 4th February 2021 in SLP No.19846 of 2020* ***(Union of India v. Central Tibetan Schools Admin & Ors)***
>
> *(v) Order dated 11th January 2021 in SLP No.22605 of 2020* ***(The State of Odisha & Ors v. Sunanda Mahakuda)"***

From the above it would be evident that by order dated 11.01.2021 passed in SLP No.22605 of 2020 (***State of Orissa v. Sunanda Mahakuda***) filed by the State of Odisha, the apex Court dismissed the SLP imposing cost of Rs.25,000/- for filing a belated SLP without offering any credible explanation.

18. The declaration in Paragraph-5 of the Original Application, as mentioned above, clearly spelt out that the application is within the period of limitation, as prescribed under Section 21 of the Administrative Tribunals Act, 1985, which is not true, rather it is a false declaration.

19. This Court would wish to take note that litigations/appeals are expected to be filed within the period of limitation contemplated under the Statutes. Rule is to follow limitation. Condonation of delay is an exception. Exceptions are to be exercised discreetly, if the reasons furnished are genuine and acceptable. The Courts are vested with the power of discretion to condone the delay, that does not mean that enormous delay in instituting the case is to be condoned mechanically. Undoubtedly, if the reasons are candid and convincing, then the Courts are empowered to exercise its power of discretion for the purpose of condoning the delay. Power of discretion is a double-edged weapon. Thus, discretionary powers are to be exercised cautiously and uniformly so as to avoid any prejudice to either of the parties. Exercise of power of discretion if made excessively, it would defeat the purpose and object of the law of limitation. The Courts are expected not to travel beyond the permissible extent, so as to condone the enormous delay in a routine or mechanical manner. Power of discretion is to be exercised to mitigate the injustice, if any occurred to the litigants.

20. Any citizen, who slept over his right, cannot wake up one fine morning and knock the doors of the Court for redressal of his grievances. The person, who slept over his right, has to necessary lost his right on account of efflux of time, which caused expiry of the cause. In the event of institution of appeal or litigation after a

prolonged period, the right of defence will also be affected and further it will lead to unnecessary harassment for a prolonged period. All these mitigating factors are to be considered while condoning the huge delay in instituting the litigations/appeals. Thus, the law of limitation has got a definite reasoning and logic. Various time limitations prescribed under many statutes are adopting the "Doctrine of Reasonableness". The principles of reasonableness would be adopted with reference to the nature of litigations to be instituted. Various time limits are prescribed for civil litigations, appeals and other varieties of litigations, considering various factors and by applying the doctrine of reasonableness. Thus, the law of limitation became substantive and to be followed scrupulously in all circumstances and on exceptional cases, the delay is to be condoned, if the reasons are genuine and acceptable. In absence of the same, the objection raised by the petitioner is well justified and the consequential order passed by the Odisha Administrative Tribunal is illegal, arbitrary, unreasonable and liable to be set aside.

21. The present petitioners raised specific objection, as pleaded in paragraph-15 of the writ petition, to the following effect:-

> *"15. That, It is submitted that the Order impugned before the learned Tribunal was passed vide Order No.12463, dtd. 07.04.2007 and same was communicated to the husband of the Opp. Party No.1 – Applicant vide memo No.12464, dtd.07.04.2007 by the Applicant in the Original Application. The husband of the Applicant expired on 11.02.2011 but the preferred not to challenge the Order dtd.07.04.2007 either by filling Appeal or by filing Original Application till the month of February, 2011. In the instant case, the impugned Order was passed on 07.04.2007 where as O.A. no.1605/2015 was filed only on 22.06.2015. The limitation provided under Section -21(1) (a) of the Administrative Tribunal Act, 1985 is one year from the date of the final order. Hence, in view of the limitation provided in Section 21(1) (a) of the Act, 1985, the learned Tribunal ought to have dismissed the O.A. No.1605/2015 at the threshold being barred by limitation."*

Similarly, in ground-(H) of the writ petition, it has been stated as follows:-

> *"H) For that, it is submitted that the Order impugned before the learned Tribunal was passed vide Order No.12463, dtd. 07.04.2007 and same was communicated to the husband of the Opp. Party No.1- Applicant vide Memo No.12464, dtd.07.04.2007 by Registered Post in the self same address as has been described by the Applicant in the Original Application. The husband of the Applicant expired on 11.02.2011 but he preferred not to challenge the Order dtd.07.04.2007 either by filling Appeal or by filling Original Application till the month of February, 2011. In the instant case, the impugned Order was passed on 07.04.2007 whereas O.A. No.1605/2015 was filed only on 22.06.2015. The limitation provided under Section -21(1) (a) of the Administrative Tribunal Act, 1985 is one year from the date of the final order. Hence, in view of the limitation provided in Section 21(1) (a) of the Act, 1985, the learned Tribunal ought to have dismissed the Original Application i.e. O.A. no. 1605/2015 being barred by limitation."*

22. The order of punishment was been passed on 07.04.2007 and, as such, there was no valid and justifiable reason to entertain such original application after long

lapse of more than eight years. More so, neither the deceased government employee nor the opposite party no.1 preferred appeal against the said order of punishment. Thereby, the order of punishment imposed by the disciplinary authority reached its finality, as a result of which recovery of amount of Rs.3,56,185/- has been sought to be made from the DCRG and pension of the deceased government employee. Once the order of punishment reached its finality, the tribunal could not have passed the order impugned stating inter alia that this is neither a sanction nor an order of the Government as per the stipulation in Rule-7 of the Pension Rules. But it has been mentioned that since DHS (O) is the appointing authority of the deceased Government employee, the proceeding initiated against him may be finalized at his end as per OCS (CC&A) Rules, 1962. The tribunal, while entertaining the original application has come to a finding that punishment order dated 07.04.2007 having been passed by an incompetent authority in contravention of Rule-7 of OCS (P) Rules, 1962, the same cannot be sustained in the eye of law. But, without adhering to the question of limitation, the tribunal has visited beyond its jurisdiction to decide the question by entertaining the original application on the ground of applicability of Rule-7 of OCS (P) Rules, 1962. As such, if the order of punishment has been passed and communicated to the deceased employee, that itself is sufficient and more so the order of punishment so imposed has not been challenged before any forum. If the original application itself is barred by limitation and this question was raised before the tribunal, it is incumbent upon the tribunal to pass order on the question of limitation instead of passing the order on merits.

23. In the above view of the matter, the order dated 27.10.2016 passed by the Odisha Administrative Tribunal, Principal Bench, Bhubaneswar in O.A. No. 1605 of 2015 cannot be sustained in the eye of law and the same is liable to be quashed and is hereby quashed. Since the deceased government employee died long since and an outstanding dues of Rs.3,56,185/- has been determined against him, retaining such amount, any other pensionary benefits as due and admissible to the Government employee, shall be paid to opposite party no.1 to resolve the dispute for all times to come. Needless to say, deduction of amount of Rs.3,56,185/-, as determined by the authority, shall be done from the amount computed in favour of the petitioner towards pensionary benefits and balance amount shall be released in favour of the opposite party no.1 forthwith to resolve the dispute.

24. With the aforesaid observation and direction, the writ petition stands disposed of. However, there shall be no order as to costs.

—— o ——

2023 (III) ILR-CUT-59

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

W.P(C) NO. 21445 OF 2022

M/s. S. MUND CONSTRUCTIONS PVT. LTD. .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Article 226 – Tender – Petitioner had participated in the process of bid in terms of clause 11 of DTCN – The petitioner have not discharged his duty in terms of the agreement executed for which he has been black listed – Whether the petitioner can challenge the clause 11 by stating it as arbitrary, unreasonable and contrary to the provision of law? – Held, No – Petitioner is estopped from making such contention at this point of time once he participated in the process of tender. (Para 16-25)

Case Laws Relied on and Referred to :-

1. (2019) 4 SCC 401: Icomm Tele Limited Vs. Punjab State Water Supply and Sewerage Board.
2. 2022 LiveLaw (SC) 295 : Balaji Ventures Pvt. Ltd. Vs. Maharashtra State Power Generation Company Ltd.
3. [1956] 2 QB 109 : R. Vs. Board of Control, ex. p. Rutty
4. AIR 1965 SC 871 : Kanwar Singh Vs. Delhi Administration.
5. (2013) 2 SCC 355 (365) : B.L. Sreedhar Vs. K.M. Munireddy.
6. (2010) 12 SCC 458 : H.R. Basavaraj Vs. Canara Bank.
7. 2019 (I) ILR-CUT-214 : M/s. Balasore Alloys Ltd. & Anr. Vs. State of Odisha & Ors.
8. AIR 1986 SC 1043 : Om Prakash Sukla Vs. Akhilesh Kumar Sukla.
9. AIR 1995 SC 1088 : Madan Lal and others Vs. State of Jammu and Kashmir & Ors.
10. (2011) 1 SCC 150 : Vijendra Kumar Verma Vs. Public Service Commission, Uttarakhand & Ors.
11. AIR 1953 SC 325 : Makbool Vs. State of Bombay.
12. AIR 1953 SC 131 : Kalawati Vs. State of Himachal Pradesh.
13. AIR 1961 SC 578 : State of Bombay Vs. S.L. Apte.
14. AIR 1961 SC 29 : Raja Narayan Lai Bansilal Vs. Manek Phioz Mistry.
15. AIR 1958 SC 119 : Leo Roy Frey Vs. Superintendent, District Jail, Amritsar.
16. (2009) 3 SCC 57: AIR 2009 SC 1938 : The apex Court in Jitendra Panchal Vs. Intelligence Officer, NCB.
17. (2020) 16 SCC 489 : Silppi Constructions Contractors Vs. Union of India.
18. (2016) 15 SCC 272 : Montecarlo Limited Vs. National Thermal Power Corporation Limited.

For Petitioner : Mr. Asok Mohanty, Sr. Adv., M/s. B.K. Nayak, N.R. Mohanty, L. Pradhan & P.C. Nayak

For Opp. Parties : Mr.T. Patnaik, Addl. Standing Counsel.

JUDGMENT Date of Hearing: 14.08.2023:Date of Judgment: 18.08.2023

Dr. B.R. SARANGI, J.

M/s. S. Mund Constructions Private Limited, a company registered under the Companies Act, 1956, represented through its Managing Director, has filed this writ petition seeking following reliefs:-

> *"i) Admit the writ petition.*
>
> *ii) Call for the Records*
>
> *iii) Issue notice to the Opp. Parties to show cause as to why the writ petition shall not be allowed and upon their filing no cause or insufficient cause allow the writ petition and issue a writ in the nature of mandamus, declaring the Clause-11 of the DTCN to be illegal, irrational, un-constitutional and arbitrary and further prays to strike down the said clause from the DTCN.*
>
> *And pass any other order which will be deemed fit and proper for the end of justice;*
>
> *And for this act of kindness the petitioners as in duty bound shall ever pray."*

2. The factual matrix of the case, in precise, is that the petitioner is a registered Super Class Contractor and has executed several contracts for different departments of the Govt. of Odisha and has never been blamed for any irregularity in completion of the contracts. It has vast experience of civil contract works and has earned a good reputation under the Government of Odisha. In the year 2017-18, pursuant to a public tender notice invited for the work "*Construction of H.L. Bridge over River Indravati at 18th K.M on Kodinga Chirma Nadighat road in the District of Nabarangpur under Biju Setu Yojana*", the petitioner entered into an agreement/contract, vide Agreement No. 01 P1 /2017-18, with the date of commencement as 05.05.2017 and date of completion as 04.11.2019. Consequent upon such agreement and the work order issued in its favour, the petitioner complied with all the requirements and moved its men and machinery to the work site. But the RD (Rural Development) Department, after six months from the date of execution of the agreement, handed over the project site and drawing to the petitioner. Further, due to heavy rain and flood during monsoon season, for about 4 months the work could not be progressed. Thereafter, during execution of the contract, COVID-19 pandemic spread out followed by lock-down, shut-down, containment zone, local problem, labour problem and the delay in payment of running bill amount by the department, for which execution of the work was delayed substantially. Consequentially, the petitioner submitted a representation on 07.09.2020 for extension of time up to 11.06.2021, but no action was taken on such representation. However, the Superintending Engineer, Southern Circle Rural Works, Sunabeda, vide his letter dated 12.11.2020, submitted a rescission proposal to the Engineer-in-Chief, Rural Works Odisha. After submission of the rescission proposal, the Executive Engineer, vide his letter dated 11.12.2020, intimated that there was heavy rain and flood at the work site and sought for instruction in the matter. However, the State authorities, without considering the reasons for delay in execution of the contract, passed an order rescinding the contract, vide order dated 31.12.2020, which

was communicated by the Executive Engineer, vide his letter dated 14.01.2021, with 20% penalty of the value of the left over work.

2.1 Aggrieved by such action, the petitioner approached this Court by filing W.P.(C) No. 7598 of 2021. The said writ petition was disposed of at the stage of admission, vide order dated 04.03.2021, with an observation that the matter involves disputed questions of fact and the petitioner has to seek other appropriate remedies as may be available to him in accordance with law. As a result, the petitioner has filed a civil suit bearing C.S. No. 58 of 2021 before the learned Civil Judge (Senior Division), Nabarangpur challenging the said order of rescission which is pending for adjudication.

2.2 While the matter stood thus, the Engineer-in-Chief (Civil), Odisha issued tender notices in respect of several works. The petitioner, after purchasing the tender papers/documents, participated in four numbers of works, but its tender papers were not considered. On enquiry, the petitioner came to know that, in view of Clause-11 of the DTCN (Detailed Tender Call Notice), its tenders would be disqualified as one of its tender had been rescinded, vide order dated 14.01.2021, which was within last five years. Apprehending rejection of the tender, the petitioner submitted a representation dated 25.04.2022 to the Chief Engineer, DPI (Roads), Odisha, with a request not to disqualify its tenders as its previous tender had been rescinded illegally and a civil suit challenging such rescission order is pending. Without taking into consideration of the same, the four tenders of the petitioner were declared disqualified in the proceeding of the Technical Evaluation Committee meeting held on different dates in respect of all the tenders in view of the Clause-11 of the DTCN.

2.3 The Office of the Engineer-in-Chief, (Civil), Odisha-opposite party no.2 issued a tender notice dated 14.07.2022 inviting tenders in respect of 30 numbers of works and the last date for submission of the bid was fixed to 22.08.2022 at 5.30 PM, which was extended to 08.09.2022 by way of a corrigendum. Pursuant thereto, even though the petitioner submitted its tender, the same was also not accepted, in view of Clause-11 of the DTCN. Hence, this writ petition.

3. Mr. Asok Mohanty, learned Senior Advocate appearing along with Mr. P.C. Nayak, learned counsel for the petitioner vehemently contended that the debarment of the petitioner from participating in the tender for a long period of five years, in view of Clause-11 of the DTCN, amounts to violation of the fundamental rights of the petitioner guaranteed under Article-19(1)(g) of the Constitution of India. Such a condition in the DTCN is also irrational and unreasonable and hit by "Wednesbury Principle". It is also contended that for rescission of the contract the tender inviting authority has the power to impose penalty and it has also imposed the penalty @ 20%, but the stipulation in the Clause-11 that whose contract for any work has been rescinded or who has abandoned any work in the last five years, prior to the date of the bid, shall be debarred from qualification, is itself very unlawful, irrational and arbitrary. It is further contended that as per the provisions of Sections 23, 27 and 65

of the Indian Contract Act, it is very clear that when an agreement is discovered to be void or when a contract becomes void any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it. He further contended that in the DTCN, pursuant to which the petitioner was awarded with the contract, an express clause is available that in case the contract is rescinded, it shall be liable for imposition of penalty at the rate of 20% of the value of the balance work. When there is already one penalty provision available, again the stipulation in Clause-11, that such contractor will be disqualified, if a contract has been rescinded within the last five years, is irrational and unlawful. Therefore, such a stipulation in Clause-11 amounts to imposition of double penalty as the Contractor will be declared disqualified for a period of five years from the date of rescission of the contract. Under the circumstances, he seeks for interference of this Court at this stage and prays that the said Clause-11 should be struck down from the DTCN. To substantiate his contention, learned Senior Advocate appearing for the petitioner has placed reliance on the judgment of the apex Court in ***Icomm Tele Limited v. Punjab State Water Supply and Sewerage Board***, (2019) 4 SCC 401.

4. Per contra, Mr. Tarun Patnaik, learned Addl. Standing Counsel appearing for the State-opposite parties vehemently contended that the argument advanced by the learned Senior Advocate, that the condition stipulated under Clause-11 of the DTCN is illegal, irrational and arbitrary, is not correct and the same is speculative one. The said Clause-11, which was Clause-13 earlier, has been incorporated since 2008 by the Public Works Department, Government of Odisha. The embodiment of the conditions in the DTCN are all informative and intended to aware the potential bidders/ contractors to participate in the tender process. The reason for incorporation of said Clause-11 is only to filter the qualified contractor to participate in the tender process and to debar those bidders who either failed to complete the contract or abandoned the contract causing a loss to the public and government exchequer for last 5 years prior to the date of bid. There is a provision in the DTCN for imposition of penalty of 20% amount of the balance work left at the time of rescission of the contract and debarring the contractor to participate in tender process. As such, both the provisions, such as Clause-11 and Clause-121 are distinct to each other in context of the purpose. The same cannot be equated. Even though there is a provision for rescission of contract and imposition of penalty for non-performance of the contract within the time specified, that is completely separate from the provision contained in Clause-11 of the agreement, which is meant for consideration of eligibility criteria to participate in the bid itself. The debarment of a bidder under Clause-11 of DTCN is an outcome of the self-declaration of the bidder, vide Schedule-E, and Affidavit, vide Schedule-F of the bidding document, that is adherence to the legal process. As such, the contention raised, that the provision of Clause-11 of DTCN is not in consonance with Article-19(1)(g) of the Constitution, is not correct and discriminatory, in view of the provisions contained in Article-

19(6)(i), which empowers the State for laying down reasonable restrictions on freedom of profession, occupation, trade or business. Here restriction of bidders, on rescission of any contract, is not in violation to the Article-19 (1)(g) of the Constitution.

4.1 He further contended that reliance was heavily placed by the learned Senior Advocate on the provisions of Sections 23, 27 and 65 of the Indian Contract Act, 1872 but the said sections will come into play only if the bi-partite agreement between the parties is signed. Therefore, said provisions are not applicable during tender process. Thereby, the petitioner has referred to wrong provisions to justify its action, for which it is not sustainable in the eye of law.

4.2 It is further contended that knowing fully well the conditions stipulated in the DTCN, the petitioner participated in the bid and executed the agreement. Having not performed in terms of the agreement, the order of rescission has been passed and the petitioner has been penalised, now therefore he cannot turn around and say that the Clause-11 is arbitrary, unreasonable and contrary to the provisions of law and, as such, it should be struck down. Otherwise also the petitioner is estopped from taking such a stand at a belated stage. As a result thereof, the prayer made in this writ petition cannot be sustained and is liable to be rejected. He further contended that the condition stipulated in the DTCN or Agreement is within the complete domain of the tendering authority. On the basis of such condition, if it has been acted upon by executing agreement, the petitioner cannot say that Clause-11 should be struck down. Consequentially, he seeks for dismissal of the writ petition. To substantiate his contention, reliance has been placed by the learned Addl. Standing Counsel on ***Balaji Ventures Pvt. Ltd. v. Maharashtra State Power Generation Company Ltd.,*** 2022 LiveLaw (SC) 295.

5. This Court heard Mr. Asok Mohanty, learned Senior Advocate appearing along with Mr. P.C. Nayak, learned counsel for the petitioner and Mr. Tarun Patnaik, learned Addl. Standing Counsel appearing for the State-opposite parties in hybrid mode and perused the records. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

6. Before delving into the merits of the case, it is relevant to refer to the following provisions of the Constitution of India, Indian Contract Act and the Clauses of the DTCN:-

> ***Article 19 (1) (g) & 19 (6)(i) of the Constitution of India.***
>
> *"19. Protection of certain rights regarding freedom of speech, etc*
>
> *(1) All citizens shall have the right*
> *xxx xxx xxx*
> *(g) to practice any profession, or to carry on any occupation, trade or business.*
> *xxx xxx xxx*

(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or"

Sections 23, 27 and 65 of the Indian Contract Act:-

"23. What considerations and objects are lawful, and what not.

The consideration or object of an agreement is lawful, unless —

it is forbidden by law;

or is of such a nature that, if permitted. it would defeat the provisions of any law:
or is fraudulent ;

or involves or implies, injury to the person or property of another:,

or the Court regards it as immoral,

or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

xxx xxx xxx.

27. Agreement in restraint of trade, void.

Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind. is to that extent void.

xxx xxx xxx.

65. Obligation of person who has received advantage under void agreement, or contract that becomes void-

When an agreement is discovered to he void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it."

Clause-11, 120 (relevant provisions) and 121 (c) & (d) of the DTCN.

"11. An applicant or any of its constituent partners of whose contract for any work has been rescinded or who has abandoned any work in the last five years, prior to the date of the bid, shall be debarred from qualification. The bidder is to furnish scanned copy an ***affidavit*** *at the time of submission of bid about the authentication of bid documents. An* ***affidavit*** *to this effect is to be furnished in* ***Schedule-F. Non furnishing*** *of the scanned copy of information in* ***Schedule-E*** *and required affidavit in* ***Schedule-F,*** *the bid document will be* ***summarily rejected****.*

xxx xxx xxx

120 ADDENDUM TO THE CONDITION OF P1 CONTRACT

xxx xxx xxx

2.3 Compensation for Delay.

2.3.1 *If the contractor fails to maintain the required progress in terms of clause 2 of P-1 Contract or to complete the work and clear the site on or before the contract or extended date of completion, he shall, without prejudice to any other right or remedy available under the law to the Government on account of such breach, pay as agreed compensation the amount calculated at the rates stipulated below as the Superintending Engineer (whose decision in writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day f month (as applicable) that the progress remains below that specified in Clause 2 of P-1 Contract or that the work remains incomplete.*

This will also apply to items or group of items for which a separate period of completion has been specified. Compensation @ 1.5% per month for delay of work, delay to be completed on per Day basis.

Provided always that the total amount of compensation for delay to be paid under this condition shall not exceed 10% of the Tendered Value of work. The amount of compensation may be adjusted or set-off against any sum payable to the Contractor under this or any other contract with the Government. In case, the contractor does not achieve a particular milestone mentioned in contract data, (which is in this case the original work programme furnished by the Contractor and approved by the Engineer-in-Charge which formed a part of agreement) or the rescheduled milestone(s) in terms of Clause 2.5 of ***P-1 Contract****, the amount shown against that milestone shall be withheld, to be adjusted against the compensation levied at the final grant of extension of time. Withholding of this amount on failure to achieve a milestone, shall be automatic without any notice to the contractor. However, if the contractor catches up with the progress of work on the subsequent milestone(s), the withheld amount shall be released. In case the contractor fails to make up for the delay in subsequent milestone(s), amount mentioned against each milestone missed subsequently also shall be withheld, However no interest whatsoever shall be payable on such withheld amount.*

xxx *xxx* *xxx*

2.5 Management Meetings.

2.5.1 *Either the Engineer or the Contractor may require the other to attend a management meeting. The business of a management meeting shall be to review the plans for remaining work and to deal with mailers raised in accordance with the early warning procedure.*

2.5.2 *The Engineer shall record the business of management meetings and is to provide copies of his record to those attending the meeting and to the Employer The responsibility of the parties for actions to be taken to be decided by the Engineer either at the management meeting or after the management meeting and stated in writing to all who attended the meeting.*

Clause-2 (b) of Percentage Rate P-1. Agreement: - Rescission of Contract (Amendment as per letter No.10639 dt.27.05.2005 of Works Department. Odisha):-

To rescind the contract (of which rescission notice in writing to the contractor under the hand of the Executive Engineer shall be conclusive evidence), 20% of the value of left over work will be realised from the contractor as penalty

121 *A contractor may be black listed as per amendment made to Appendix XXXIV to OPWD code Vol-II on rules for black listing of Contractors vide letter no.3365 dt. 01.03.2007 of Works Department, Odisha.*

xxx *xxx* *xxx*

c. Constant non-achievement of milestones on insufficient and imaginary grounds and non-adherence to quality specifications despite being pointed out.

d. Persistent and intentional violation of important conditions of contract."

7. The moot question to be considered by this Court is whether Clause-11, as provided in the DTCN, can be declared as arbitrary, unreasonable and contrary to the provisions of law and be struck down. Answering to the said question, if the provision of Clause-11 is taken into consideration, it would be seen that under the DTCN this condition is required for consideration of a tender document to be submitted by the bidder, which specifically prescribes that an applicant or any of its constituent partners of whose contract for any work has been rescinded or who has abandoned any work in the last five years, prior to the date of the bid, shall be debarred from qualification. Thereby, this is an eligibility criteria put for participation in the bid. More elaborately if it is considered, then it would mean, that if the applicant or any of its constituent partners of whose contract for any work has been rescinded or who has abandoned any work in the last five years, prior to the date of the bid, shall suffer disqualification to participate in the bid. To that extent, the bidder has to furnish scanned copy of the information in Schedule-E and an affidavit in Schedule-F. For non-furnishing of the scanned copy of information in Schedule-E and required affidavit in Schedule-F, the bid document will be summarily rejected. Therefore, Clause-11 puts a restriction on participation in the bid to be considered for award of any work for which the advertisement is issued. An applicant incurs a disqualification, if in preceding five years the contract has been rescinded or the contractor has abandoned the work.

8. Clause-11 postulates two stages, namely, (1) an applicant or any of its constituent partners of whose contract for any work has been rescinded; and (2) who has abandoned any work in the last five years, prior to the date of the bid. Then only, one can incur disqualification to participate in the bid.

9 To 'rescind' a contract means to abrogate, annul, avoid or cancel or to do away with a contract. In other words, a contract may be rescinded by agreement between the parties at any time before it is discharged by performance or in some other way. Rescission operates as if the agreement never had any effect. If we will simplify the meaning, the rescission is unmaking of a contract requiring the same concurrence of wills and that which made it and nothing short of this will suffice. Rescission, in other words, is tendering a contract null and void and the contract is no longer recognized as legally binding. A rescission can be unilateral when a party rightfully revokes a contract on account of breach by another party to contract. It can also be mutual when the parties to contract agree to discharge all remaining obligations. Therefore, there is a wide difference between rescission of contract and its mere termination or cancellation. Thereby, there is distinction between rescission of contract and termination of contract. Rescission is utilised as a term of art to refer

to a mutual agreement to discharge contractual duties. Thus, rescission of contract means the undoing of a thing.

10. Whereas 'abandoned' means totally withdraw from the work. In ***R. v. Board of Control, ex. p. Rutty*** [1956] 2 QB 109, while considering the provisions contained in Section 2 (I)(b)(i) of the Mental Deficiency Act, 1913, it has been held that 'abandoned' is a word which connotes a positive act on the part of someone who is responsible for the defective whereby that person has relinquished all care and control and forsaken the defective, thus leaving the defective wholly unprotected and un-provided for.

11. In ***Kanwar Singh v. Delhi Administration***, AIR 1965 SC 871, while considering Section 418 (1) of Delhi Municipal Corporation Act, the apex Court held that the meaning which can reasonably be attached to the word 'abandoned' is "let loose" in the sense of being "left unattended" and certainly not 'ownerless'.

12. Taking into consideration the meaning attached to Clause-11, in so far as the words "rescinded" and "abandoned" are concerned, it is made clear that if for some reason or other the contract is rescinded and if the party abandoned the work in preceding five years period of the bid wants to participate, incurs a disqualification and cannot participate in the process of bid and its bid documents are not eligible to be considered for which it has submitted.

13. Therefore, Clause-11 is a requirement for consideration of the bid before any agreement has been executed between the parties, whereas Clause-120 states about addendum to the condition of P1 contract. Sub- clause 2.3 thereof states about compensation for delay. Sub-clause 2.3.1 makes it clear that if the contractor fails to maintain the required progress in terms of Clause 2 of P-1 contract or to complete the work and clear the site on or before the contract or extended date of completion, then necessary steps shall be taken against him. Sub-clause 2.5 deals with the management meetings. Under Clause 2 (b) of Sub-clause 2.5.2 there is rescission of contract and in that case to rescind the contract (of which rescission notice in writing to the contractor under the hand of the Executive Engineer shall be conclusive evidence), 20% of the value of left over work will be realised from the contractor as penalty. Therefore, a penalty will be imposed on the contract while rescinding the contract due to non- performance within the time specified. That itself is a penal action against him after execution of the agreement and due to non-performance as per the terms and conditions stipulated in the agreement itself. Clause 121 of the DTCN makes it clear that a contractor may be blacklisted as per amendment made to Appendix XXXIV to OPWD Code Vol-II on the rules for blacklisting of contractors vide letter no.3365 dated 01.03.2007 of Works Department, Odisha. For non-performance of the work as per the terms and conditions of the agreement and as per the amendment made to Appendix XXXIV of OPDW Code Vol-II, a contractor may be blacklisted if he has not adhered to the sub-clauses (a) to (h). Therefore, the authorities dealing with the contractors may blacklist the contractor against whom

there were allegation of business malpractices or he has not satisfied the requirement under sub-clauses (a) to (h) as per the amendment to the Appendix XXXIV of OPWD Code Vol-II. The blacklisting has the effect of preventing the person blacklisted from the privilege of entering into contracts with the authority, which blacklisted the person. The authority blacklisting the contractor should observe the fundamentals of fair play before the contractor is blacklisted.

14. As such, a detailed procedure has been envisaged in Appendix XXXIV to OPWD Code Vol-II under Clause 'A' which reads as follows:-

> ***"APPENDIX-XXXIV***
>
> ***CODAL PROVISIONS FOR BLACKLISTING CONTRACTORS***
>
> *A. The Chief Engineer of a department may blacklist a contractor with the approval of concerned Administrative Department on the following grounds.*
>
> *a) Misbehavior/threatening of departmental and supervisory officers during execution of work/tendering process.*
>
> *(b) Involvement in any sort of tender fixing.*
>
> *(c) Constant non-achievement of milestones on insufficient and imaginary grounds and non-adherence to quality specifications despite being pointed out.*
>
> *(d) Persistent and intentional violation of important conditions of contract.*
>
> *(e) Security consideration of the State i.e., any action that jeopardizes the security of the State.*
>
> *(f) Submission of false/fabricated/forged documents for consideration of a tender.*
>
> *The Divisional Officer shall report to the Chief Engineer if in his opinion any of the above wrong has/ have been committed by any contractor. On receipt of such a report from the Divisional Officer the Chief Engineer shall make due enquiry and if considered necessary, issue show cause notice to the concerned contractor who in turn shall furnish his reply, if any, within a fortnight from the date of receipt of the show cause notice. Therefore, if the Chief Engineer is satisfied that there is sufficient ground, he shall blacklist the concerned contractor with the approval of the Administrative Department. After issue of the order of blacklisting of the said contractor, the Chief Engineer shall intimate to all Chief Engineers of other Administrative Departments, the Registering Authority as provided under Rule 4 of PWD Contractor's Registration Rules, 1967 and Department of Information & Technology for publication in web site of State Government."*

From the aforementioned provisions, it is made clear that the contractor blacklisted should be given a reasonable opportunity to represent his side of the case. A contractor blacklisted by one authority need not be treated as blacklisted by all or any other authorities or persons dealing with him. If this meaning of blacklisting is taken into consideration, then the meaning of blacklisting, as prescribed in Clause 121 of the DTCN, is absolutely distinct and separate from Clause-11 of the DTCN. When Clause-11 requires consideration of the eligibility of a bidder to participate in the bid, whereas Clause-121 is invoked after the agreement is executed between the

parties, when the contractor fails to discharge his part of obligation in terms of the DTCN/Agreement.

15. Thus, the contention raised that Clause-11 is in gross violation of provisions contained in Article-19(1)(g) cannot be sustained, as the same is being invoked by putting a restriction under Article-19(6)(i) of the Constitution. To maintain an harmony, if by invoking the provision contained in Article-19(6)(i) certain restriction has been imposed, it cannot be said that it is in violation of Article 19 (1)(g) of the Constitution. Thereby, the arguments advanced to this extent by learned Senior Counsel appearing for the petitioner cannot be sustained.

16. Much argument was advanced by the learned Senior Advocate appearing for the petitioner that Clause-11 of the DTCN is arbitrary, unreasonable and contrary to the provisions of law. But fact remains, the petitioner by following bid process participated in the bid and qualified and by that time the very same Clause-11 was available in the DTCN. The petitioner became eligible taking into consideration the very same Clause-11, as there was no rescission or abandonment of contract by him prior to five years of his participation in the bid. On the basis of the affidavit filed in Appendix-F, his bid was considered and he was selected and thereafter the agreement was executed. But having failed to discharge his duties and responsibility, in terms of the agreement, he has been blacklisted and penalty has been imposed. Though initially, he had approached this Court by filing a writ petition, but the same was not entertained and the petitioner was relegated to the civil court for filing civil suit and, as such, he has already filed the civil suit, which is pending for consideration. Therefore, with eyes wide open the petitioner had participated in the process of bid in terms of Clause-11 and for having not discharged his duty in terms of the agreement executed between the parties he has been blacklisted invoking Clause 121, he cannot turn around and say that Clause-11 is arbitrary, unreasonable and contrary to the provisions of law. As such, he is estopped from making such contention at this point of time.

17. In ***Black's Law Dictionary, 7th Edn.*** at page 570, 'estoppel' has been defined to mean a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true.

18 In ***B.L. Sreedhar v. K.M. Munireddy***, (2013) 2 SCC 355 (365), it has been held by the apex Court that '*estoppel'* is based on the maxim *allegans contrarir non est audiendus* (a party is not to be heard contrary) and is the spicy of presumption *juries et de jure* (absolute, or conclusive or irrebuttable presumption).

19. In the case of ***H.R. Basavaraj v. Canara Bank***, (2010) 12 SCC 458, the apex Court while dealing with the general word, '*estoppel'* stated that '*estoppel* is a principle applicable when one person induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change

his/ her position. In such a case, the former shall be estopped from going back on the word given. The principle of *estoppel* is only applicable in cases where the other party has changed his positions relying upon the representation thereby made.

20. Similar view has also been taken by this Court in the case of ***M/s. Balasore Alloys Ltd. & Anr. Vs. State of Odisha & Ors***, 2019 (I) ILR-CUT-214.

21. In ***Om Prakash Sukla v. Akhilesh Kumar Sukla***, AIR 1986 SC 1043, the apex Court was pleased to hold that when the petitioner therein appeared at the examination without protest and when he found that he would not succeed in the examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

22. In ***Madan Lal and others v. State of Jammu and Kashmir and others***, AIR 1995 SC 1088, the apex Court held 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 Selection Committee was not properly constituted.

23. Similarly, in ***Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and others***, (2011) 1 SCC 150, in paragraphs, 25 to 28, the apex Court held as follows:

> *"25. In this connection, we may refer to the decision of the Supreme Court in G. Sarana (Dr.) v. University of Lucknow [(1976) 3 SCC 585 : 1976 SCC (L&S) 474] wherein also a similar stand was taken by a candidate and in that context the Supreme Court had declared that the candidate who participated in the selection process cannot challenge the validity of the said selection process after appearing in the said selection process and taking opportunity of being selected. Para 15 inter alia reads thus: (SCC p. 591).*
>
> *"15. ... 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."*
>
> *26. In P.S. Gopinathan v. State of Kerala [(2008) 7 SCC 70 : (2008) 2 SCC (L&S) 225] this Court relying on the above principle held thus: (SCC p. 84, para 44)*
>
> *"44. ... Apart from the fact that the appellant accepted his posting orders without any demur in that capacity, his subsequent order of appointment dated 15-7-1992 issued by the Governor had not been challenged by the appellant. Once he chose to join the mainstream on the basis of option given to him, he cannot turn back and challenge the conditions. He could have opted not to join at all but he did not do so. Now it does not lie in his mouth to clamour regarding the cut-off date or for that matter any other condition. The High Court, therefore, in our opinion, rightly held that the appellant is estopped and precluded from questioning the said order dated 14-1-1992. The application of principles of estoppel, waiver and acquiescence has been considered by us in many cases, one of them being G. Sarana (Dr.) v. University of Lucknow [(1976) 3 SCC 585 : 1976 SCC (L&S) 474] ...."*
>
> *27. In Union of India v. S. Vinodh Kumar [(2007) 8 SCC 100 : (2007) 2 SCC (L&S) 792] in SCC at para 18 it was held that: (SCC p. 107)*

> *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."*
>
> *28. Besides, in K.H. Siraj v. High Court of Kerala [(2006) 6 SCC 395 : 2006 SCC (L&S) 1345] in SCC paras 72 and 74 it was held that the candidates who participated in the interview with knowledge that for selection they had to secure prescribed minimum marks on being unsuccessful in interview could not turn around and challenge that the said provision of minimum marks was improper, said challenge is liable to be dismissed on the ground of estoppel."*

24. Though some of the cases cited above relate to service matter, but the principle laid down therein by the apex Court is applicable to the present context. Therefore, by applying the said well settled principle of the apex Court to the present context, it can be construed that the petitioner, having participated in the process of tender, should not have turned around and challenged the conditions of tender by filing this writ petition. As such, the writ petition at the instance of the petitioner is not maintainable.

25. In view of such position and the plethora decisions cited above, the petitioner is now precluded from raising the contention that Clause-11 of the DTCN as arbitrary, unreasonable and the same should be struck down.

26. Mr. Asok Mohanty, learned Senior Advocate appearing for the petitioner relies upon Sections 23, 27 and 65 of the Indian Contract Act, as mentioned above. But on perusal of the aforementioned provisions, it is made clear that the said provisions can be evoked only after the bipartite agreement between the parties is signed. Therefore, applicability of such sections of the Indian Contract Act during tender process is unwarranted. Rather, Clause-11 of the DTCN is placed into service for selection of a bidder for a particular contract. In other words, by filing an affidavit in Schedule-F of the bid document, the bidder has to certify himself that he has never been indulged in any act of rescission of contract or abandonment of the contract for the last five years. Thereby, he has to make a certificate about his good conduct by way of an affidavit in prescribed Schedule-F so as to consider his bid in terms of the clauses of the DTCN. That has got nothing to do with the provisions contained in Sections 23, 27 and 65 of the Indian Contract Act. Needless to say that the bidder is aware of the stipulation contained in the DTCN while bidding. Therefore, if at all it has been included in the rescission of contract or abandonment of the contract and incurred a disqualification to participate in the bid, that cannot be treated as unreasonable, arbitrary and contrary to the provisions of law. Therefore, an administrative process and commercial decision, which is taken fairly on the commercial viability of the party, cannot be construed to be *mala fide* in the decision making process so as to cause interference of this Court at this stage. Once the bidder has submitted his bid, he cannot challenge the terms and conditions mentioned in the clauses of the DTCN, reason being after perusing the clauses containing the conditions of the tender, he had submitted his bid and his bid was

rejected pursuant to the clauses of the DTCN. It is well settled principle of law decided by the apex Court time and again that one unsuccessful bidder cannot challenge the terms and conditions of the tender having participated in the tender process.

27. Mr. Asok Mohanty, learned Senior Advocate appearing for the petitioner contended that taking into consideration preceding five years record of the petitioner, with regard to rescission or abandonment of the contract, if his bid will be considered under Clause-11, it will amount to punishing him. Similarly, under Clause-121, if the petitioner is blacklisted for three years and penalty of 20% of value of the remaining work is imposed, thereby, it will hit by Article 20(2) of the Constitution of India as the petitioner would suffer from double jeopardy.

28. As has been discussed above, both Clauses, i.e. Clause-11 and Clause-121 are being discussed in two separate situations and two separate contexts altogether. They are totally distinct and separate from each other and, thus, cannot be equated at any point of time. Reason being, Clause-11 is a stage, when the petitioner has to participate in the bid, his previous conduct of 5 years has to be taken into consideration. If at all there is rescission or abandonment of contract, preceding to the bid for which he has participated, he incurs a disqualification or in other words, his bid will not be taken into consideration by the tendering authority. Whereas, Clause-121 is a stage, i.e., after execution of the agreement, if the petitioner has not discharged his duty in terms of such agreement, then only the same will be invoked for blacklisting and imposing penalty against him. As regards Article 20(2) dealing with double jeopardy, what it bars is prosecution and punishment, after an earlier punishment for the same offence. 'Offence' here means an offence as defined in Section 3(38) of the General Clauses Act, 1897 applied to the Constitution by Article 367. This question, no more remains *res integra,* in view of the law laid down by the apex Court in the cases of ***Makbool v. State of Bombay***, AIR 1953 SC 325, ***Kalawati v. State of Himachal Pradesh***, AIR 1953 SC 131; ***State of Bombay v. S.L. Apte***, AIR 1961 SC 578; ***Raja Narayan Lai Bansilal v. Manek Phioz Mistry***, AIR 1961 SC 29; ***Leo Roy Frey v. Superintendent, District Jail, Amritsar***, AIR 1958 SC 119. The apex Court in ***Jitendra Panchal v. Intelligence Officer, NCB***, (2009) 3 SCC 57: AIR 2009 SC 1938, where it has been held the offences for which accused was tried and convicted in foreign country and for which he is tried in India are distinct and separate.

Taking into account, the above settled principles of law and applying the same to the present context, it is made clear that the arguments advanced by Mr. Asok Mohanty, learned Senior Advocate appearing for the petitioner on the question of double jeopardy cannot be sustained and the same is hereby rejected on the ground that Clause-11 deals with disqualification, whereas Sub-Clause 2(b) of Clause 2.5 is the penalty on rescission of contract are contrary to each other and no way amounts to double jeopardy, as one is general in nature and the other is outcome of poor performance of the individual contract agreed by the parties.

29. Mr. Asok Mohanty, learned Senior Advocate appearing for the petitioner relies on the judgment of the apex Court in the case of ***Icomm Tele Limited*** (supra), wherein Clause-25(viii) of the notice inviting tender was under consideration as in paragraph-19, the apex Court considered that whether Clause 25 (viii) can be said to be arbitrary and violative of Article 14 of the Constitution of India. The apex Court held, a "deposit-at-call" of 10% of the amount claimed, which could amount to large sums of money, was without any direct nexus to the filing of frivolous claims, as it applied to all claims (frivolous or otherwise) made at the very threshold. Therefore, the clause led to a wholly unjust result of a party who had lost an arbitration being entitled to forfeit such part of the deposit as falling proportionately short of the amount awarded as compared to what was claimed. Further, deterring a party to an arbitration from invoking this alternative dispute resolution process by a pre-deposit of 10% would discourage arbitration, contrary to the object of de-clogging the court system, and would render the arbitral process ineffective and expensive. Thereby, the apex Court held, the sub-clause 25 (viii) being severable from the rest of Clause 25, is struck down. As such, said principle is applicable to the terms and conditions mentioned in telecom agreement executed between the parties. In other words, the ratio laid down by the apex Court is applicable to the facts and circumstances of the respective cases and not to the fact of the present case. Thereby, the said case is distinguishable from the facts and circumstances of the present case.

30. In ***Balaji Ventures Pvt. Ltd.*** (supra), which has been relied by Mr. Tarun Patnaik, learned Addl. Standing Counsel appearing for the State-opposite parties, at paragraph 5.1 of the judgment, it has been stated as follows:-

> *"5.1 Now so far as the impugned Judgment and order passed by the High Court dismissing the writ petitions is concerned, what was challenged before the High Court was one of the tender conditions/clauses. The High Court has specifically observed and noted the justification for providing clause 1.12(V). The said clause was to be applied to all the tenderers/bidders. It cannot be said that such clause was a tailor made to suit a particular bidder. It was applicable to all. Owner should always have the freedom to provide the eligibility criteria and/or the terms and conditions of the bid unless it is found to be arbitrary, mala fide and/or tailor made. The bidder/tenderer cannot be permitted to challenge the bid condition/clause which might not suit him and/or convenient to him. As per the settled proposition of law as such it is an offer to the prospective bidder/tenderer to compete and submit the tender considering the terms and conditions mentioned in the tender document."*

31. In the case of ***Silppi Constructions Contractors vs. Union of India,*** (2020) 16 SCC 489, the apex Court at Paragraph-20 of the said judgment observed as follows:

> *"20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate*

authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

32. In the case of ***Montecarlo Limited vs.National Thermal Power Corporation Limited***, (2016) 15 SCC 272, the apex Court observed and held that the tender inviting authority is the best person to understand and appreciate its requirement and tender documents, so long as there are no mala fides/arbitrariness etc. It is further observed and held that the Government must have freedom of contract and such action can be tested by applying *"Wednesbury Principle"* and also examining whether it suffers from arbitrariness or bias or mala fides.

33. Taking into consideration the fact and law, as discussed above, it is made clear that the tender inviting authority is the best person to appreciate its requirement and the tender documents, so long as there are no mala fides/ arbitrariness etc. Thereby, the tendering authority must have freedom of contract and such action can be tested by applying the "*Wednesbury Principle"*, whether it suffers from arbitrariness or bias or mala fides.

34. In view of the above, this Court is of the opinion that Clause-11 of the DTCN does not suffer from arbitrariness or bias or mala fides, as examined on the touchstone of "*Wednesbury Principle*".

35. In the result, therefore, the writ petition merits no consideration and the same stands dismissed. But, however, under the circumstances of the case, there shall be no order as to costs.

—— o ——

2023 (III) ILR-CUT-74

ARINDAM SINHA, J.

W.P.(C) NO. 8090 OF 2019

BHUSHAN POWER & STEEL LTD. .....Petitioner

.V.

DIR. OF INDUSTRIES-CUM-CHAIRMAN, MICRO & SMALL ENTERPRISES FACILITATION COUNCIL, CUTTACK & ANR. .....Opp.Parties

INSOLVENCY AND BANKRUPTCY CODE, 2016 r/w SECTION 18(3) OF MICRO, SMALL AND MEDIUM ENTERPRISES DEVELOPMENT ACT, 2006 – In the period of moratorium the Opp. party moved to the Micro and Small Enterprises facilitation council – The council proceeds straight way to give finding on admitted principal claim and genuineness of consequent claim of interest U/s. 15 and 16 of 2006, Act – Whether the decision of council sustainable? – Held, No. (Para 11-12)

Case Laws Relied on and Referred to :-

1. AIR 1997 SC 1125: L.Chandra Kumar Vs. Union of India.
2. AIR 1999 SC 22 : Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai.
3. (2019) 213 Company Cases 198 (SC) : Swiss Ribbons P. Ltd. Vs. Union of India.
4. (2021) 6 SCC 258 : P. Mohanraj. Vs. Shah Brothers Ispat (P) Ltd .
5. (2021) 9 SCC 657 : Ghanashyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited.

For Petitioner : Mr. Sanjit Mohanty, Sr.Adv.

For Opp. Parties : Mr. A. K. Sharma, (AGA)
Mr. S. S. Das, Sr. Adv.

JUDGMENT Dates of Hearing : 21.03/03.04 & 28.06 of 2023 : Date of Judgment:20.07.2023

ARINDAM SINHA, J.

1. Mr. Mohanty, learned senior advocate appears on behalf of petitioner and Mr. Das, learned senior advocate, for opposite party no.2, the two contesting parties in this writ petition. Mr. Sharma, learned advocate, Additional Government Advocate appears on behalf of opposite party no.1. Contesting parties earlier appeared and were heard.

2. Submission made on behalf of petitioner was, impugned is award dated 20th February, 2019 made by Micro and Small Enterprises Facilitation Council (opposite party no.1) under sub-section (3) in section 18 of Micro, Small and Medium Enterprises Development Act, 2006. Opposite party no.2 was operational creditor. There was proceeding under Insolvency and Bankruptcy Code, 2016. In the period of moratorium said opposite party moved the Council. He could not have done so. Moreover, on the Authority having approved the resolution plan, payment in accordance with the scheme was made by the successful resolution applicant. Successful resolution applicant is behind petitioner. In the circumstances, said opposite party had and is deemed to have had execution, satisfaction and discharge of its claim against petitioner. This was overlooked in the award. As such, the illegality and material irregularity appear on face of impugned award since the facts stood referred therein.

3. Petitioner rendered demonstration that opposite party no.2,being supplier to petitioner-company, was operational creditor and its position considered in the resolution plan approved by the National Company Law Tribunal (NCLT), on its

judgment dated 5th September,2019. Further demonstration was, pursuant to said judgment opposite party no.2, on his claim taken at Rs.26,79,70,808.27/- the resolution plan had provided for Rs.22,01,84,363/-. Consequently, Rs.47.70% of the accepted amount at Rs.10,50,27,941/- was paid to said opposite party. The payment was made on 24th March, 2022 evidenced by Unit Transaction Reference (UTR) no. SBIN 422083896125. Said judgment has become final on there being no challenge mounted against it. The supplier having had been paid the money in terms of the resolution plan, there was no relevance of any dispute to be referred under the Act of 2006. Hence, impugned award is required to be interfered with on judicial review as opposite party no.2 had participated in the resolution process and accepted payment thereunder. Reliance was placed on sections 31, 60(5) and 238 in the Code.

4. Further submission on behalf of petitioner was with regard to requirement under section 19 in the 2006 Act, on pre-deposit. Reliance was on judgments of the Supreme Court, firstly in **L. Chandra Kumar v. Union of India**, reported in **AIR 1997 SC 1125**, paragraphs 78 and 79 for declaration of law that judicial superintendence over decisions of all Courts and Tribunals within respective jurisdictions of the High Courts is also part of basic structure of the Constitution and can never be ousted or excluded by operation of statute, enacted by the Parliament. Further reliance was on **Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai**, reported in **AIR 1999 SC 22**, paragraphs 14 and 15 for submission that challenge in the writ petition squarely fell under the third contingency stated in paragraph 15, on the order or proceeding under the Act of 2006 being wholly without jurisdiction.

5. On behalf of opposite party no.2 submission was on reliance of **judgment dated 8th October, 2021** of the Supreme Court in **Civil Appeal no.6252 of 2021 (Gujarat State Disaster Management Authority V. M/s. Aska Equipments Ltd.)**, paragraphs 9, 10 and 11 for contention that mandate of section 19 in the 2006 Act, regarding pre-deposit, had to be complied with for seeking setting aside of any decree, award or other order made, inter alia, by the Council.

6. Further submission on behalf of opposite party no.2 was, on the one hand there was non-acceptance by the resolution plan or confusion regarding said opposite party's claim and on the other,pursuant to expiry of 180 days from date of admission of the insolvency resolution process, there was no extension order. As such,the moratorium ceased to exist. For purpose of quantification, opposite party no.2, at that time moved the Council under the Act of 2006.There can be no question arisen on the quantification thereafter made by the Council.

7. Today, Mr. Das draws attention to the reply filed by petitioner in the company petition before the NCLT. Paragraph 7 therefrom is reproduced below.

> *"The Answering Respondent while dealing with the Applicant's claim considered the contract of service (i.e. work order) as well as the invoices submitted, both referred to the*

> *principal amount and not to the interest amount as claimed by the Applicant.* ***Further, there is not even any court or tribunal's order awarding any interest in favour of the Applicant to justify its claim."*** *(emphasis supplied)*

Mr. Das submits, this was the confusion created by petitioner, which is why his client moved the Council. The premise was that principal claim stood admitted but the interest was disputed. It needed quantification on adjudication by appropriate authority, as was alleged to be an omission. He draws attention to impugned award to demonstrate that accordingly, the Council proceeding on the basis of admission of the principal claim, had found interest to also be due to his client. Interest of Rs.17,76,03,939.39 up to 26th July, 2017 is payable under sections 15 and 16 under the Act of 2006. The Council upon verifying the records found that claim of his client is genuine.Hence, there was award. He concedes that direction for payment in impugned award ought not to have been made. However, the quantification on having been made, was not taken into account in considering the claim of his client in the matter of approval of the resolution plan. In the circumstances, impugned award was duly made and should not to be interfered with.

8. He relies on judgments of the Supreme Court:-

> i) **Swiss Ribbons P. Ltd. vs. Union of India**, reported in **(2019) 213 Company Cases 198 (SC)**, placitums 10 and 11. He submits, extracted was the preamble in the Code of 2016. The interpretation, the moratorium was for protection of assets of the corporate debtor.Initiation of the proceeding before the Council pursuant to confusion sought to be created by petitioner regarding omission of quantification of interest was not an action directed at alienating or encumbering any asset of petitioner.
>
> ii) **P. Mohanraj. Vs. Shah Brothers Ispat (P) Ltd**., reported in **(2021) 6 SCC 258**, paragraph 29 for same view taken by the same learned Judge, who authored Swiss Ribbons (supra).

9. In reply Mr. Mohanty relies on judgment of the Supreme Court in **Ghanashyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited**, reported in **(2021) 9 SCC 657**, paragraphs 61 and 62 (Manupatra print). He submits, interpretation of the Supreme Court was that legislative intent of making the resolution plan binding on all stakeholders, after it gets the seal of approval from the Adjudicating Authority upon its satisfaction it was approved by the Committee of Creditors (CoC), meets the requirement as referred in sub-section (2) of section 30. After approval of the plan, no surprise claims should be flung on the successful resolution applicant. The purported adjudication and impugned award made in violation of the moratorium puts forth something that was not contemplated in the resolution plan, approved by the Adjudicating Authority.

10. With reference to section 12 in the Code of 2016 he submits that initially mandated period for completion of insolvency resolution process was 180 days. The time could be extended as provided thereunder for period not exceeding 90 days and the extension could only be granted once. However, there was amendment to the

section by Act 26 of 2019, with effect from 16th August, 2019. Two provisos were inserted by the amendment. He relies on the second proviso. It is reproduced below.

> *"Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019."*

He submits, time for completing the insolvency resolution process stood extended by amended proviso, till 90 days after 16th August,2019. The resolution plan stood approved on 5th of September, 2019,well before expiry of the extended time by amendment. In the circumstances, the moratorium operated during pendency of the insolvency resolution process, as provided in section 14. Proviso under sub-section (4), in facts of this case, operates for the moratorium to have ended on 5th September, 2019. As such, institution of the proceeding on moving the Council was clearly barred by the moratorium and hence, the Council having entered upon the reference to go on to pass impugned award, did so without jurisdiction. Mr. Das submits, impugned award was made much before the coming into effect of the amendment on 16th August, 2019.

11. Facts of the case emerging from pleadings and argument put forth by the contesting parties are not in dispute. Those essential for the adjudication are that there was initiated insolvency resolution process in respect of petitioner-company. Opposite party no.2 being supplier participated in the process on coming to know of it. He filed claims, both on account of principal and interest. In the resolution process, cognizance was taken only of the claim on principal. During pendency of the resolution process the supplier invoked provisions in section 60(5) of the Code. The sub-section is reproduced below.

> *"60(5). Notwithstanding anything to the contrary contained in any other law for the time being in force,* ***the National Company Law Tribunal shall have jurisdiction to entertain or dispose of-***
>
> *(a) any application or proceeding by or against the corporate debtor or corporate person;*
>
> *(b)* ***any claim made by or against the corporate debtor or corporate person****, including claims by or against any of its subsidiaries situated in India; and*
>
> *(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code."* *(emphasis supplied)*

Contesting parties did not bring to notice of Court, order made disposing of said application. However, submission was made on behalf of petitioner that approval of the resolution plan by the NCLT put paid to all objections as might have been raised during pendency of the insolvency resolution process. The omission need not detain the adjudication since, declaration of law by the Supreme Court in **Edelweiss (supra)** is clear, on binding nature of the resolution plan upon approval thereof duly made. It is undisputed that opposite party no. 2 was an operational creditor, who

participated in the resolution process culminating in the duly approved resolution plan. Furthermore, Court accepts contention of petitioner that the moratorium commenced and ran till 5th September, 2019, when the resolution plan stood approved. In the circumstances, the Council entered into the reference during subsistence of the moratorium.

12. Perusal of impugned award reveals record in it that on behalf of petitioner, subsistence of the moratorium was brought to notice of the Council. Impugned award thereafter is silent regarding consideration of the contention. It proceeds straightway to give finding on admitted principal claim and genuineness of consequent claim of interest, claimed under sections 15 and 16 in the Act of 2006. The omission by the Council to deal with this contention points to nonapplication of mind at the first instance and an implication that it could not be dealt with. In the circumstances, the supplier's anxiety in being unable to recover on his claim for interest cannot stand in the way of impugned award being set aside on judicial review.

13. The requirement of pre-deposit is mandated by section 19 in the Act of 2006. It is a statutory requirement. Section 18, in providing for arbitration on thereby made applicable provisions in Arbitration and Conciliation Act, 1996, was resorted to by the Council, resulting in impugned award. Statutory remedy is for challenge of the award under section 34 in the Act of 1996. By operation of section 19 in the Act of 2006, the requirement for pre-deposit overrides provisions in section 36 of the 1996 Act. Having said so, challenge in successfully moving the constitutional writ Court stands on a separate footing and is maintainable in spite of availability of alternative statutory remedy. Mandate of statute cannot impede exercise of constitutional writ jurisdiction. The contention of opposite party no.2 on pre-deposit is not well founded.

14. For reasons aforesaid impugned award is set aside and quashed. Mr. Mohanty submits, his client has filed interim application for quashing the execution case launched by opposite party no.2, pursuant to impugned award, set aside herein. Petitioner has liberty to produce this order before the executing Court and accordingly pray.

15. The writ petition is disposed of.

—— o ——

2023 (III) ILR-CUT-80

ARINDAM SINHA, J & G. SATAPATHY, J.

W.P.(C) NO. 4492 OF 2022

KALINGA INSTITUTE OF INDUSTRIAL TECHNOLOGY (KIIT) ……..Petitioner

.V.

ASST. COMMISSIONER OF INCOME TAX EXEMPTION CIRCLE, BHUBANESWAR & ORS. ……..Opp.Parties

INCOME TAX ACT, 1961– Section 148 – Whether the revenue assessing authority can reopen an assessment already made without disclosing any tangible material? – Held, No – There is conceptual difference between power to review and power to re-assess – For re-assessment, the revenue has to disclose tangible material. (Para-8)

Case Laws Relied on and Referred to :-

1. (2010) 320 ITR 561 (SC) : CIT Vs. Kelivinator India Limited.
2. (2007) 291 ITR 500 : ACIT Vs. Rajesh Jhaveri Stock Brokers P. Limited.
3. (2013) 357 ITR 388 : DIT Vs. Jyoti Foundation.

For Petitioner : Mr. Sidhartha Ray, Sr. Adv.

For Opp. Parties : Mr. Radheshyam Chimanka (Sr. Standing Counsel, I.T)

JUDGMENT Date of Hearing: 18.07.2023 & 31.07.2023:Date of Judgment: 31.07.2023

BY THE BENCH

1. Petitioner (assessee) has challenged notice dated 31st March, 2021 issued under section 148 of Income Tax Act, 1961. The facts are, there was scrutiny assessment order dated 13th December, 2018 in respect of assessment year, 2016-17, regarding which impugned notice stood issued. The scrutiny assessment was made, upon the Assessing Officer (AO) having issued questionnaire and verified documents produced by petitioner. The scrutiny assessment resulted in finding that income of petitioner chargeable to tax was nil.Subsequent thereto, the Commissioner of Income Tax (CIT),Exemption made order dated 30th March, 2021, setting aside the assessment as prejudicial to the interest of revenue. Petitioner preferred appeal before the Tribunal and was successful. The order made under section 263 was set aside. Revenue has preferred appeal to this Court (ITA no.71 of 2022). The appeal has not yet been admitted. However, co-ordinate Bench had passed interim order in the appeal, directing no final order be passed in the reassessment.

2. Mr. Ray, learned senior advocate appears on behalf of petitioner. He relies on judgment of the Supreme Court in **CIT vs. Kelivinator India Limited**, reported in **(2010) 320 ITR 561 (SC),** paragraph 6. He submits, there must be tangible material for reopening an assessment already made. In this case his client underwent scrutiny assessment. All the more that revenue cannot simply say, they have reason to believe. It is nothing but change of opinion.

3. He draws attention to reply affidavit filed by his client disclosing response to the notice annexing the questionnaire, issued by the AO. He demonstrates from the response, his client had responded to it in respect of each and every question asked. In the circumstances, it cannot be said that particulars of donations received from the donors were not disclosed in the scrutiny assessment. The material standing disclosed and subject matter of the scrutiny assessment, cannot again be tangible material for reopening the assessment. It is nothing but change of opinion on earlier appreciation of the disclosures in the scrutiny assessment. He prays for interference.

4. Mr. Chimanka, learned advocate, Senior Standing Counsel appears on behalf of revenue. He draws attention to paragraph 3 in the counter, dealing with paragraph 1 in the writ petition. He submits, the disclosure was in violation of accounting principles and standards. Referring to the answers given by petitioner he points out that each and every one of them are partial. In the circumstances, it cannot be said that there was full disclosure. Hence, the donations escaped notice and therefore reassessment is to be done. As such, the transactions themselves are tangible material for reopening the assessment. That is why the Commissioner found the assessment was prejudicial to the interest of revenue. The reassessment is necessary.

5. He submits further, petitioner had filed objection to impugned notice. The objection was dealt with on reasons communicated to petitioner by letter dated 28th January, 2022. Therein was reliance on judgment of **the Supreme Court in ACIT vs. Rajesh Jhaveri Stock Brokers P. Limited,** reported in **(2007) 291 ITR 500**. A passage from paragraph 1 of said communication is reproduced below.

> *"1. ... ... The only requirement is that whether there was any relevant material on which a reasonable person can form the requisite belief that taxable income has escaped assessment. It has also been held that the word "reason" in the phrase "reason to believe" would mean cause or justification. If the AO has cause or justification to know or suppose that income has escaped assessment,he can be said to have reason to believe that income had escaped assessment. The expression "reason to believe" cannot be read to mean that the AO should have finally ascertained the fact by legal evidence or conclusion. It has also been held by the Hon'ble Apex Court that at the stage of initiation of proceedings u/s. 147 of the Act, the final outcome of the proceedings is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. Thus, at the stage of issue of notice,* ***the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at this stage.*** *... ... ... " (emphasis supplied)*

6. Challenge of petitioner boils down to the question on existence of tangible material, for reopening the assessment. In context of aforesaid, it is necessary to look at order dated 8th April, 2022 passed by the Tribunal in setting aside the order of the Commissioner made under section 263. We reproduce below passages from paragraphs 14 and 15 in said order.

"14. On the first issue, after considering the rival submissions of both the sides and keeping in view the documentary evidences submitted by the assessee in paper book Vol.I and II, we clearly note that case of the assessee was selected for complete scrutiny and the AO has issued notice u/s.142 (1) of the Act on 4.7.2018 alongwith questionnaire, wherein, the assessee was asked to furnish individual ledger account of income and expenditure and to furnish details of specific grant-in-aid alongwith documentary evidence. The said notice was replied by the assessee vide letter dated 15.11.2018 and copy of ledger account and income and expenditure account were submitted by the assessee before the AO. From 'E' filing compliance to the said notice u/s.142(1) of the Act dated 4.7.2018, we note that the assessee has submitted copy of the statement pertaining to development fees received from the students containing 475 pages, which has also been produced before this Bench as PB Vol-II of the assessee.

15. ... ... As we have noted that during the scrutiny assessment proceedings, in reply to notice u/s. 142(1) of the Act, the assessee submitted copies of ledger account and income and expenditure account as Annexure-1 alongwith copy of the audit report for the financial year 2015-16, which includes notes of account No.2(1) wherein, it is clearly discernible that the assessee has received grant-in-aid of Rs.62,03,872/- and development fees of Rs.69,57,67,059/- totaling to Rs.70,19,70,931/- and the same issue has been picked up the Id CIT(E) observing that the assessee has received voluntary contribution including anonymous donation. These documents were submitted before the CIT(E)alongwith reply to notice u/s.263 dated 28.03.2021 in para 3.1. These facts were brought to the notice of CIT(E) along with copies of development fees as Annexure-1 and details of grant-in-aid as Annexure-II and sanction letters of Govt. of India as Annexure-3 but we are unable to see any adjudication by the CIT(E) in the impugned revisionary order on the issue." (Emphasis supplied)

7. The Tribunal found the facts to be that there was disclosure. It went on to say that the Commissioner, without conducting any inquiry, set aside the assessment order, to direct the AO to make further inquiry and redo the assessment. In this context the Tribunal had relied on **DIT vs. Jyoti Foundation, reported in (2013) 357 ITR 388**, whereby a Division Bench in the High Court of Delhi relied on the Court's earlier view. Paragraph 5 is reproduced below.

"5. In the present case, inquiries were certainly conducted by the Assessing Officer. It is not a case ofno inquiry. The order under Section 263 itself records that the Director felt that the inquiries were not sufficient and further inquiries or details should have been called. However, in such cases, as observed in the case of DG Housing Projects Limited (supra), the inquiry should have been conducted by the Commissioner or Director himself to record the finding that the assessment order was erroneous. He should not have set aside the order and directed the Assessing Officer to conduct the said inquiry." (Emphasis supplied)

Above view was reiterated, no doubt in dealing with challenge to an order made under section 263. In absence of further inquiry, all that was there was disclosure by petitioner and, at best, error of omission by the AO, to properly scrutinize.

8. The Supreme Court in **Kelivinator** (supra) said in paragraph 6 of the judgment that it must be kept in mind, there is conceptual difference between power

to review and power to reassess. Here, revenue has moved on two fronts against petitioner. Firstly, there was proceeding under section 263 in finding that the scrutiny assessment was prejudicial to the interest of revenue. Petitioner challenged the order in appeal and was successful. The other front opened by the revenue is on issuance of impugned notice under section 148. Here, what revenue wants to do is reopen the assessment. It is true that just because there has been a scrutiny assessment, same by itself is not an embargo on the assessment being reopened. However, there must be tangible material. So stands declared by the Supreme Court as the law and holding the field. In proceeding to reopen, the revenue through the AO is actually seeking to review the assessment, to rectify earlier error of omission, if any. Error apparent on face of the record is a good ground for review, as stands recognized by law. However, as aforesaid, the Supreme Court had said that there is conceptual difference between power to review and power to reassess. For there to be a reassessment, the revenue must disclose tangible material. It is not necessary for it to establish at the reopening or at the initial stage that there will be a finding of escapement in the reassessment. As was said in **Kelivinator** (supra) so also the Supreme Court said in **Rajesh Jhaveri** (supra) that the only question is, was there relevant material,on which a reasonable person could have formed a requisite belief ? Whether the materials would conclusively prove the escapement is not the concern at this stage.

9. We are aware that from said order of the Tribunal, revenue has preferred appeal but, yet to be admitted. The appeal, if admitted, can only be on substantial question(s) of law arising from the order.The finding of fact regarding disclosure by the assessee, of the donations, cannot be gone into or adjudicated in the appeal under section 260-A. As such, in exercising writ jurisdiction to deal with the challenge, established finding of fact is that there was disclosure and scrutiny assessment made. Apart from the disclosure, the materials on record do not show anything else as tangible material to substantiate issuance of impugned notice. It is set aside and quashed.

10. The writ petition is allowed and disposed of.

—— o ——

2023 (III) ILR-CUT-83

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

CRLA NO. 317 OF 2016

SUMANTA SINGH .....Appellant

.V.

STATE OF ORISSA .....Respondent

INDIAN EVIDENCE ACT, 1872 – Section 32 – Dying declaration – Admissibility, credibility and evidentiary value of a dying declaration – Explained. (Para 13)

For Appellant : Mr. Sk. Zafarulla

For Respondent : Mr. Siti Kanta Mishra, Addl. Standing Counsel

JUDGMENT Date of Hearing : 27.06.2023 : Date of Judgment : 24.07.2023

D. DASH, J.

The Appellant, by filing this Appeal, has challenged the judgment of conviction and order of sentence dated 04.04.2016 passed by the learned Additional Sessions Judge-II, Baripada, Mayurbnahj in S.T. Case No.181 of 2015 arising out of C.T. Case No.70 of 2015 corresponding to Karanjia P.S. Case No.26/15 (T.C. No.516/15) of the Court of the learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Karanjia.

The Appellant (accused) thereunder has been convicted for committing the offence under section 302/451 of the Indian Penal Code, 1860 (for short, 'the IPC'). Accordingly, he has been sentenced to undergo imprisonment for life and pay fine of Rs.10,000/- (Rupees Ten Thousand) in default to undergo rigorous imprisonment for one year for the offence under section 302 of the I.P.C. and rigorous imprisonment for one year with fine of Rs.5,000/- (Rupees Five Thousand) in default to undergo rigorous imprisonment for six months for the offence under section 451 of the I.P.C. with further stipulation that the substantive sentences would run concurrently.

2. On 18.02.2015 the Inspector-in-Charge of Karanjia Police Station (I.O.-P.W.18) received a written report from one Sardu Singh (P.W.1), who happens to the father of the deceased, namely, Jasoda. The report was to the effect that on 01.02.2015 when he was working in the brick kiln, it was around 8.30- to 9 p.m., he received the information from Laxman Singh (P.W.2) who runs a brick kiln that his daughter had been brunt and her condition was critical.

Receiving the said information, he reached his house and found his daughter Jasoda with burn injuries on her waist and downwards. It is stated that Jasoda was then not able to speak. One Ambulance being called, Jasoda was taken to Sub-Divisional Hospital (S.D. Hospital) at Karanjia for treatment and thereafter being referred to the District Headquarter Hospital (in short, 'the DHQ Hospital"), at Baripada for better treatment, she was so shifted. In course of her treatment at DHH, Baripada when the Informant (P.W.1) asked as to how, she sustained burn injuries; Jasoda disclosed that on the relevant night, the accused forcibly entered into their house and attempted to outrage her modesty and when she protested, the accused gaged her mouth with a Chadar and thereafter set fire at her by lighting a matchstick after sprinkling kerosene over her body.

The written report of P.W.1 being received by P.W.18, the same was treated as the F.I.R. and case being registered; the Investigating Officer (I.O.-P.W.18) took up investigation.

3. In course of investigation, the I.I.C. (P.W.18), examined the Informant (P.W.1) and other witnesses. He visited the spot and seized some incriminating materials, such as, the wooden plank, two pairs of chappal of the accused and a plastic bottle emitting the smell of kerosene. He also held inquest over the dead body of the deceased and prepared a report to that effect. P.W.18 then sent the dead body of the deceased for Post Mortem Examination. The I.O. (P.W.18) having received the F.I.R. on 18.02.2015; on 19.02.2015 had got the dying declaration of the deceased recorded by the Executive Magistrate (P.W.6) in presence of the Doctor (P.W.13) and two other witnesses. The incriminating materials were sent for chemical examination through court. On completion of investigation, Final Form was submitted placing the accused to face the Trial for commission of offence under section 451/351/302 of the I.P.C.

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

5. The prosecution, in course of Trial, has examined in total eighteen (18) witnesses. Out of whom, as already stated, P.W.1 happens to be the father of the deceased and had lodged the F.I.R. (Ext.1) and P.W.2 is the employer of P.W.1 from whom he received the information about the happening and suffering of P.W.1's daughter-Jasoda and he is also the scribe of the F.I.R. (Ext.1). P.W.3,4,5,9 and 15 are the witnesses, who had proceeded to the spot soon after the occurrence. The Executive Magistrate, who is said to have recorded the dying declaration of the deceased in the DHH, Baripada has been examined as P.W.6 whereas the Doctor, who was present at that time, is P.W.13. Other two other witnesses present while said recording are P.W.7 and P.W.8. P.W.12 is the Doctor who had conducted post mortem examination over the dead body of the deceased and the Investigating Officer has come to the witness box at the end as P.W.18.

Besides leading the evidence by examining the above witnesses, the prosecution has proved several documents which have been admitted in evidence and marked Exts.1 to 12. Out of those, the F.I.R. is Ext.1 whereas the inquest report is Ext.2. The so-called dying declaration recorded by P.W.6 in the District Headquarter Hospital, Baripada has been admitted in evidence and marked Ext.4. The bedhead tickets of the deceased as well as the accused who too was under treatment in both the Hospitals have been admitted in evidence and marked Ext.6/2 and 6/3 respectively.

6. The defence in support of the plea of denial and false implication and the specific plea that the deceased while on deep sleep had accidentally caught fire from a Dibri (a type of locally made open lamp) when the accused being called was also present in the house and had attempted to save her and in the process had received severe burn injuries has examined three witnesses who are D.W.1,2 and 3. A document which is a list showing the expenditure regarding performance of certain puja has been admitted in evidence and marked as Ext.A.

7. The Trial Court having gone through the evidence of the witnesses mainly the Doctor (P.W.12) and the Post Mortem Examination Report (Ext.7) as well as the inquest report and the evidence of I.O. (P.W.18) has rendered the finding that the deceased died on account of severe burn injuries to the extent of about 50%. In fact, this aspect of the case was not under challenge before the Trial Court and that is also the situation before us.

The prosecution case from the beginning is that the deceased having received burn injuries has finally died in course of treatment. The defence also admits the said fact while saying that it was not at the instance of the accused and he had played no role therein but had accidentally, took place wherein he rather had made all such attempt to save the life of the deceased and in the process had sustained severe burn injuries on his person for which he too was treated in the S.D. Hospital as well as in the D.H. Hospital, Baripada for quite some time.

8. In the backdrop of above, the point for determination here in the case is whether it is the accused who is the author of the crime and had set fire at the deceased which had led to her death.

9. Learned counsel for the Appellants (accused) submitted that here in the case, the incident having taken place on 1st day of February, 2015, the F.I.R. has been lodged by none other than the father of the deceased on 18.02.2015, i.e., 16 days after the occurrence when in the meantime, the deceased was treated in the S.D. Hospital at Karanjia as well as in the DHQ Hospital at Baripada which are about 120 kilometers or even little more apart. He submitted that when during this period there is no whisper before anybody or any authority that the accused had any role in the said incident wherein the deceased received the burn injuries, for such delayed disclosure which is said to be after the deceased said about it before P.W.1, and when such explanation falls flat, the implication of the accused therein is highly suspicious. According to him all these above clearly point out that after long time and with much discussion and after due deliberation, the accused has been falsely arraigned for the grudge that P.W.1 was carrying against him. He further submitted that the oral dying declaration before P.W.1 as well as the recorded dying declaration before the Executive Magistrate (P.W.6), the Doctor (P.W.13) and others (P.W.7 and P.W.8) are not at all acceptable for a moment as it is surrounded by suspicious circumstances, which are of such nature, that those do not at all get explained. He further submitted that there being no acceptable evidence on record

that the deceased from the very beginning was not in a condition to speak for 16 (sixteen) days, all of a sudden she having spoken before P.W.1 and then before the Executive Magistrate, Doctor and others is absolutely unbelievable when the medical evidence on that score does not come to the aid. He further submitted that the prosecution having not led any evidence that for all these period, the deceased was not at all in a condition to speak and for that she having not examined by the Doctor at S.D. Hospital at Karanjia Hospital, who treated the deceased first and when the bedhead ticket (Ext.6/2) mentions nothing about it, the evidence as to the dying declaration after so many days at D.H. Hospital, Baripada that too only a day before her death is extremely hard to believe and appears to be a created one which cannot be accepted. He also submitted that simply by admitting the dying declaration recorded by P.W.6 in evidence and getting it marked as Ext.4 is of no aid to the prosecution when no such evidence is forthcoming from the lips of P.W.6-the Executive Magistrate. P.W.13-the Doctor and P.W.7 and P.W. 8 the independent witnesses what the deceased in clear terms had spoken before them and all what have been written in Ext.4.

10. Learned counsel for the Respondent-State submitted all in favour of the finding returned by the Trial Court. According to him, it being the evidence of P.w.1 (father of the deceased) that her daughter Jasoda (deceased) was not in a condition to speak and no sooner did she tell, the F.I.R. (Ext.1) implicating this accused was lodged and as that evidence in the absence of any material on record cannot be disbelieved; the evidence of P.W.1 coupled with the evidence of P.W.6 (Executive Magistrate), P.W.13 (Doctor), P.W.7 and 8 in support of the recorded dying declaration (Ext.4) are enough to hold that the prosecution has established the charges against the accused beyond reasonable doubt whose explanation has not been proved by preponderance of probability. He submitted that since accused admits his presence by the side of the deceased at the relevant time in that house, he having failed to prove the defence set up by leading evidence for acceptance with the standard of preponderance of probability, the conclusion of the Trial Court is fastening the guilt upon the accused is in order.

11. At the risk of repetition, some background facts which are not in dispute are required to be placed at this stage. The deceased received the burn injuries in her house in the night of 01.02.2015, which was a Saturday. During that night, she was shifted to S.D. Hospital, Karanjia. On the next day being referred by the treating Doctor at S.D. Hospital, Karanjia, the deceased was shifted to D.H. Hospital, Baripada. The father of the deceased (P.W.1) lodged the F.I.R. on 18.02.2015 by stating therein that her daughter (deceased) being able to talk after improvement of her health condition during treatment on being asked by him disclosed that on the night of 01.02.2015, the accused having gone to their house by breaking open the door wanted to sexually assault her and when he failed the accused having gagged a Chadar in the mouth of the deceased and sprinkling kerosene had set fire at her by lighting the matchstick. The F.I.R. was lodged on 18.02.2015 at about 2.30 p.m. at

Karanjia, which is at a distance of about 120 kilometers away when the deceased was under treatment and the case was registered for the first time. Prior to that as there was no disclosure as to the involvement of any one in causing those burn injuries upon the deceased, there was not even any information either to the I.I.C. Karnjia Police Station or Baripada Police Station. The treating doctors and staffs were all unaware. This information in writing (Ext.1) to the police with regard to the said incident is the first one.

Then it is said that, the I.O. (P.W.18) after examining P.W.1 (Informant) at Karanjia to which place P.W.1 had gone to lodge the F.I.R. from Baripada by travelling 120 kilometers leaving his daughter under treatment at D.H. Hospital first visited the spot, i.e., the house where the incident took place and then on the next day, he went to the D.H. Hospital, Baripada where around 9 a.m., he made a requisition to the Sub-Divisional Magistrate, Baripada to depute an Executive Magistrate for recording the dying declaration of Jasoda, which is said to have been recorded on 19.02.2015 at 4.15 p.m as written by the Executive Magistrate (P.W.6), which is now a piece of important evidence in support of the charge against the accused.

12. Before we advert to the actual admissibility and credibility of the dying declaration (Ext.4), it would be beneficial to brass ourselves of the case laws on the evidentiary value of a dying declaration and the sustenance of a conviction solely based thereupon. We may hasten to add that while there is too much of wealth of case laws and incredible jurisprudential contribution by the Hon'ble Apex Court on the subject; we, however, would refer to only few which are closure to the facts of the case in hand.

13. In *Sham Shankar Kankaria v. State of Maharashtra*, it was restated that the dying declaration is only a piece of untested evidence and must like any evidence satisfy the Court that what is stated therein is the unalloyed truth and it is absolutely safe to act upon it. Further, relying upon the decision in Paniben v. State of Gujurat wherein this Court (at SCC pp. 480-81, para-18) summed up several previous judgments governing dying declaration, this Court in Sham Shankar Kankaria reiterated: (Sham Shankar Kankaria, SCC pp. 172-73, para 11)

> "11.(i) There is neither rule of law nor of prudence that dying declaration cnnot be acted upon without corroboration. (See Munnu Raja v.State of M.P.[(1976) 3 SCC 104]):
>
> (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See State of U.P. v. Ram Sagar Yadav and Ramawati Devi V. State of Bihar.)
>
> (iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See K. Ramachandra Reddy v. Public Prosecutor.);

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See Rasheed Beg v. State of M.P.);

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (see Kake Singh v. State of M.P. [1981 Supp SCC 25]);

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See Ram Moanorath v. State of U.P.):

(vii) Merely because a dying declaration does not contain thedetails as to the occurrence, it is not to be rejected. (See State of Maharashtra v. Krishnamuri Laxmipati Naidu.);

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See Surajdeo Ojha v. State of Bihar);

(ix) Normally the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was ina fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (see Nanhau Ram v. State of M.P.);

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See State of U.P. v. Madan Mohan);

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See Mohanlal Gangarom Gehani v. State of Maharashtra.)"

It goes without saying that when the dying declaration has been recorded in accordance with law, and it gives a cogent and plausible explanation of the occurrence, the Court can rely upon it as the solitary piece of evidence to convict the accused. It is for this reason that Section 32 of the Evidence Act, 1872 is an exception to the general rule against the admissibility of hearsay evidence and its Clause (1) makes the statement of the deceased admissible. Such statement, classified as a "dying declaration" is made by a person as to the cause of his death or the circumstances under which injuries were inflicted. A dying declaration is thus admitted in evidence on the premise that the anticipation of brewing death breeds the same human feelings as that of a conscientious and guiltless person under oath. It is a statement comprising of last words of a person before his death which are presumed to be truthful, and not infected by any motive or malice. The dying declaration is therefore admissible in evidence on the principle of necessity as there is very little hope of survival of the maker, and if found reliable, it can certainly from the basis of conviction.

The litmus test, therefore, is whether the deceased had made the statement (Ext.4) and if so, whether such statement can be the solitary foundation for conviction of the Appellant.

14. Having mediated towards the issue, to the extent, it is possible and on a minute examination of the original document (Ext.4) and other surrounding evidence let in by the prosecution which emanate the attending circumstances, we do not find it safe to convict the accused on the basis of said dying declaration (Ext.4). We say so for the several reasons which are summarized hereinafter.

Firstly, the deceased having received the burn injuries, which have been initially assessed at 50% was taken to S.D. Hospital, Karanjia. The Doctor, who had admitted the patient in the said hospital at 8.30 p.m. on 01.02.2015 had prepared the bed head ticket. On the next day, the patient had been referred to D.H. Hospital, Baripada at a distance of 120 kilometers. The bedhead ticket (Ext.6/2) of S.D. Hospital, however, does not find mention of the time of discharge. It is clearly written in the said bedhead ticket that the patient was conscious, pulse rate was 110 bpm and it was regular and the blood pressure was 100/70 mmgh. The doctor has noted that the dehydration at that point of time was moderate. On next day, the patient was found to be conscious, pulse rate was 108 bpm and it was regular. The Doctor who had treated the patient has indicated in the said bed head ticket that the patient had accidentally caught fire from the kitchen and received the burn injuries on upper limb, lower limb and back of trunks. This fact that the patient sustained burn injuries accidentally has not only been noted by one Doctor but the two who treated the patient at S.D. Hospital, Karanjia as can be seen from Ext.6/2. These bedhead tickets have been admitted in evidence through P.W.11, who was working as a Home Guard at Karanjia Police Station since that was seized in his presence on 29.04.20215. The S.D. Hospital bedhead ticket of the accused who has assessed to be having burn injuries of 30% has also been proved through this P.W.11 in whose presence it was seized by the I.O. (P.W.18). The bedhead ticket of the accused (Ext.6/3) also finds mention in the hands of the two Doctors that the accused had accidentally sustained burn injuries on both his hand while trying to put off the fire which had gutted Jasoda (deceased).

Surprisingly the prosecution has not chosen to examine any of the Doctors who had the occasion to treat the deceased at S.D. Hospital, Karanjia. Yet, when the bedhead tickets have been proved from the side of the prosecution, they cannot wriggle out all the contents and must explain those when they project a case in a different manner as the present one.

15. Secondly, in this bedhead ticket (Ext.6/2) it has not at all been mentioned that the patient Jasoda who long thereafter died on account of the burn injuries was not in a condition to speak and it was also not been indicated in the said bedhead ticket that the deceased sustained burn injuries on account of accident also was not her version but the version of someone else or someone who is had either carried Jasoda to the S.D.Hospital or any of her attendants.

16. Thirdly, when admittedly the patient has been admitted in the DHQ Hospital, Bariapda on 02.02.20215, he having remained there under treatment from

That date till her death, i.e., on 21.02.2015. 21.02.2015, the prosecution has not proved the bedhead ticket of DHQ Hospital, Baripada which could have given the clear picture as to whether the patient was at any point of time there in the DHQ Hospital was in a condition either to speak. For this suppression of the bedhead ticket of DHQ Hospital, Baripada relating to the deceased, the prosecution has to be blamed as for such withholding the required evidence before the Trial Court to ascertain the genuineness of the version of P.W.1 when P.W.1 does not indicate in the F.I.R. as to on which particular date and from what point of time his daughter began to speak and till which date and time she was not in a condition to speak for which he could not ask her about what happened in the said incident when fact remains that the accused was all along being treated in the same Hospitals where the deceased was being treated. Therefore, it is extremely unsafe and rather would be hazardous to rely the version of P.W.1 that the deceased being not in a position to speak, the happenings in the incident was not known and thus there was delay in informing the police as to the complicity of the accused as it could be known after such a long time from the deceased who spoke out on a fine morning on being asked after regaining sense.

17. Fourthly, the I.O. (Ext.18) having visited the D.H. Hospital, Baripada on 19.02.2015 does not state to have met the deceased and seen her in a condition to speak before making the requisition to the S.D.M. for deputing an Executive Magistrate and also requisitioning the ADMO, D.H. Hospital, for deputing the Doctor to assist the Executive Magistrate during recording of such dying declaration. This creates genuine doubt in mind as to whether the deceased then was in a condition to speak or not.

18. Fifthly, the dying declaration has been admitted in evidence and marked as Ext.4 through the Executive Magistrate (P.W.6) when it has been written in Ext.4 that to as the answer to the question No.11 as to how the deceased sustained burn injuries; that on 01.02.2015 around 6 p.m. when she was alone in the house and there was power cut and when she was cooking food, the accused came throttled her and then assaulted her by means of a stick/wood and thereafter having sprinkled kerosene over her body, set fire at her with the help of a Dibri, which was lighting. Such version of the deceased when accepted for a moment as to have been so stated before P.W.6 in presence of the Doctor (P.W.13) as noted in Ext.4 completely stands in variance with what P.W.1 has stated to have been told by the deceased on his asking as has been narrated in the F.I.R. and deposed by him during his examination. P.W.1 appears to have then suppressing the fact as to the engagement of the deceased in cooking food in the kitchen when the incident took place and then throttling her and assaulting her. P.W.1 is not stating as to how the accused set fire at the deceased: whether by lighting a match stick or by that Dibri which was lighting or by bringing the fire from the hearth. These rather probabilises the case of the defence which finds noted in the bedhead ticket (Ext. 6/2) to good extent. The prosecution has examined P.W.6 and P.W.13 as well P.W.7 and 8 as its star witnesses

in support of the said dying declaration recorded under Ext.4. P.W.6 in his evidence in-chief does not state anything as to what the deceased had stated before him about her receiving the burn injuries and how it so happened. He simply says that on that day, he recorded the statement of the deceased as under Ext.4 in the absence of the substantive evidence falling from the lips of P.W.6, are inadmissible. The contents of the Ext.4 especially, the reply to question No.11 is thus inadmissible since P.W.6 does neither depose to have asked that question nor the reply to have been so got so that Ext.4 cannot take the place of substantive evidence when the suggestion of the defence is that it is a manipulated one. P.W.13, the Doctor, has also stated in the same vein that the deceased narrated about the incident when asked by P.w.6 and that was reduced into writing by P.W.6 as at Ext.4. She too is silent as to what the deceased narrated before them. This P.W.13 does not state before the Doctor who was treating the deceased in the D.H. Hospital so as to an entry to that effect being made in the bedhead ticket of D.H. Hospital. In fact the prosecution for best reasons/s known to it, has again withheld those bedhead tickets which would have cleared the sky.

P.W.7 simply says that the P.w.6 asked some question and those were reduced into writing. What question he has asked, what answers the deceased gave is not stated by P.W.7. But then he for the first time states that the I.O. (P.W.18) had gone to the deceased and asked her about the cause of injury when she had disclosed the name of one person which the deceased was unable to recollect and say. This reveals a very sorry state of affair that the Public Prosecutor did not even take care to prove the dying declaration by piloting the evidence through P.W.6,7,8 and 13, who are wholly supportive to the prosecution.

19. Sixthly, Ext.4 also reveals that on a question being asked by P.W.6, once the deceased had stated that one boy at that time came and had pressed her neck when there was power failure in the locality and then on subsequent question she is stated to have disclosed the name of the accused to be that boy.

20. In view of all these what have been discussed above, it is seen that the Trial Court has not even discussed the ocular evidence as well as the documentary evidence being alive to the settled position of law with regard to the admissibility of the dying declaration and its acceptance by recording the certificate as to his credibility.

21. Thus, we find a case that when the prosecution has not been serious in piloting the evidence for the reason best known to it, the Trial Court has been equally callous and dealt the matter in a very cavalier fashion and convicted the accused notwithstanding the actual state of affairs which stand in the evidence let in.

22. Resultantly, the Appeal stands allowed. The judgment of conviction and order of sentence dated 04.04.2016 passed by the learned Additional Sessions Judge-II, Baripada, Mayurbhanj in S.T. Case No.181 of 2015are hereby set aside.

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

—— o ——

2023 (III) ILR-CUT-93

D. DASH, J.

RSA NOs. 360 OF 2022 & 12 OF 2023

SWAMI YOGESWARANANDA GIRI ……...Appellant

.V.

YOGADA SATASANGA SOCIETY OF INDIA, DAKSHINESWAR,CALCUTTA & ORS. …….Respondents

RSA NO.12 OF 2023

SWAMI PRAJNANANANDA GIRI -V- YOGADA SATASANGA SOCIETY OF INDIA,DAKSHINESWAR,CALCUTTA & ORS.

(A) CODE OF CIVIL PROCEDURE, 1908 – Order XLI Rule 31– Duty of 1st Appellate Court while deciding an appeal – Discussed and explained with reference to case law. (Para 14-21)

(B) CODE OF CIVIL PROCEDURE, 1908 – Sections 96 and 100 – The first Appellate Court has rendered judgement by not answering the specific points arise for determination with reference to the factual settings of the case as those emerge from the evidence both oral and documentary dealing those with the settled position of law holding the field – Effect of – Held, remit the matter to the First Appellate Court by setting aside the judgment and decree with further direction to decide the same afresh in accordance with law. (Para 21-22)

Case Laws Relied on and Referred to :-

1. (2020) 4 SCC 313 : Malluru Mallappa (Dead) through LRs. Vs. Kuruvathappa & Ors.
2. AIR 1963 SC 698 : Hari Shankar Vs. Rao Girdhari Lal Chowdhury
3. (1969) 2 SCC 74 : Shankar Ramchandra Abhyanakar Vs. Krishnaji Dattatreye
4. (2015) 1 SCC 391 : Vinod Kumar Vs. Gangadhar

For Appellants : Mr.R.K.Mohanty, Sr. Adv.
Mr.Shibashis Mishra (in RSA No.360 of 2022)
Mr.M.K.Fogla & Mr.G.M.Rath (in RSA No.12 of 2023)

For Respondents : Mr.P.K. Rath (in both RSA)

JUDGMENT Date of Judgment: 10.08.2023

D. DASH, J.

1. Since both these Appeals as at (A) and (B) under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code') arise out of one suit, i.e., O.S. No.23 of 257 of 1989/1982(I) of the Court of the Additional Subordinate Judge, Puri arise out of one First Appeal, i.e., RFA No.335/33 of 1990/2022; those were heard together for their disposal by this common judgment.

The Respondent No.1-Society registered under the Societies Registration Act, 1860 arraigned in both these Appeals as the Plaintiff had filed the suit numbered as O.S. No.23/257 of 1989/1982(I) for declaration of title, correction of Record of Right (ROR), injunction, rendition of account, return of documents and recovery of possession of the immovable properties as described in the plaint. In the suit, Swami Hariharananda Giri and Swami Yogeswarananda Giri had been arraigned as the Defendant Nos.1 and 3 respectively whereas the Municipality of Puri was the Defendant No.2. Swami Hariharananda Giri died during pendency of this lis.

The suit came to be decided by the learned Additional Sub-Judge, Puri (as then was) by judgment and decree dated 18.08.1990 and 01.09.1990 respectively. Swami Yogeswarnanda Giri, Appellant of the Appeal as at (A) as a disciple of Swami Hariharananda Giri had been arraigned as Defendant No.1. The present Appellant of Appeal as at (A) being the aggrieved Defendant No.1 had carried the Appeal under section 96 of the Code.

During the pendency of the First Appeal, the Appellant of Appeal as at (B), though was not a party before the Trial Court, came to be arraigned as Respondent No.4 for the first time.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Trial Court and the Appellant of the Appeal as at (B) is hereinafter referred to as the Respondent No.4, the position so assigned in the First Appeal.

3. The Yogada Satsangha of India, Dakhineswar, registered under the Societies Registration Act, 1860 having its registered office at 21 (Twenty One) U.N. Mukherjee Road, Dakshineswar, P.S.-Bolghoria, Calcutta, Distirct-24 (Twenty Four) Parganas, West Bengal through its General Secretary filed the suit seeking the following reliefs:-

> "(i)to declare that the entire property in the schedule belongs to Plaintiff's Society and the Defendant No.1 has no right, title, interest therein;
>
> (At this stage, it would be apposite to mention that the suit schedule properties comprise of three items as shown in Schedule-A, B and C of the plaint and those are all in Mouza-Balisahi);

(ii) to declare that the recording in the remark column of the R.O.R. of the year 1988 in respect of schedule-A property is wrong and for deletion of the name of Defendant No.1 therefrom;

(iii) to declare that the Defendant No.1 is not entitled to act or to manage Yogada Ashram at Puri in the name of Karar Asharm;

(iv) to perpetually injunct and restrain the Defendant No.1 from interfering with the Plaintiff-Society; and

(v) to direct the Defendant No.1 to render the account for all the money paid and received by him."

4. The Trial Court, while decreeing the suit in part, declared the right, title and interest of the Plaintiff's Society over the suit lands constituting Yogada Ashram as shown in the schedules of the plaint followed by declaration that the Defendant No.1 is not entitled to act or manage the said Yogada Ashram in the name of Karar Ashram or in any other name.

The Defendant No.1 was also directed to deliver the possession of the properties described in the Schedules of the plaint in favour of the Plaintiff-Society.

The Defendants were permanently restrained from interfering with the administration of said Yogada Ashram and the possession of the properties and the notes in the remark column of the R.O.R. of Major Settlement of the year 1988 in respect of the suit schedule lands was declared to be wrong and accordingly it was directed to be deleted and in its place it was ordered that the name of the Plaintiff-Society to be inserted. Lastly, the Defendant No.1 was directed to return the two lease deeds of the year 1960 and 1966 in relation to immovable property described in schedule-B and C of the plaint respectively with all other connected documents to the Plaintiff-Society.

5. The First Appellate Court, being moved by the aggrieved Defendant No.1, dismissed the said Appeal and thereby confirmed the judgment and decree passed by the Trial Court.

It would not be out of place to mention here that the Respondent No.4 who had come to be arraigned as such in the First Appeal had raised all his contentions.

Therefore, being aggrieved by the dismissal of the First Appeal, the Defendant No.1 and the Respondent No.4 have filed the above noted Appeals as at (A) and (B).

6. **Plaintiff's Case:-**

That in the year 1906, the Defendant No.2 (Puri Municipality) granted permanent lease of land measuring Ac.0.170 in the name of Priyanath Karar, the premonastic name of Shri Yokteswar Giri. He constituted Trust on 3rd August, 1921 by a deed and assigned the leasehold interest to the Trustees with the sole

motive to improve the moral, social and intellectual atmosphere of Puri Dham. When the Trust was formed, there were five Trustees. They were Maharaj Manindra Chandra Nandi, Swami Yukteswar Giri, Sri Atul Chandra Choudhury, Swami Yogananda Giri and Swami Dhirendra Giri. The Trustees, namely, Manindra Chandra Nandi died in the year 1930 when Swami Yogananda Giri died in the year 1952 and Swami Dhirendra Giri was unheard for twenty years.

The Plaintiff's further case is that a society called Sadhusabha was registered under the Societies Registration Act with the object of taking over the work of the existing Karar Ashram with its properties as endowed. Swami Yogananda Giri and Swami Satyananda Giri remained the President and Vice President of the 'Sadhusabha'. As the time passed, Karar Ashram lost its identity as a distinct, entity and it was identified and known as Yogada Ashram. It is stated that in the year 1939, the Plaintiff Society appointed the Defendant No.1 as a Teacher in its Grammar School at Yogada Ashram, Puri when Swami Sevananda Giri was in charge of Ashram. It is further stated that before the appointment in the Ashram, he was known as Rabinarayan Bhatacharya and with the grace of Paramahansa his identity from Rabinrarayn Bhattacharya was transformed to Brahmachari Rabinarayan. In the year 1964, the Defendant No. 1 represented before Swami Yogananda to assign him some responsible position at Yogada Ashram, Puri. In the year 1950, Swami Sebananda Giri went away from Puri and the Society put the Defendant No.1 in charge of looking after the Yogada Ashram, as an agent. It is alleged that while the Defendant No.1 was in charge of the Ashram at Puri under the direction and instruction of the Society, he acted as Secretary of Yogada Ashram and allowed to propagate the mission of the Plaintiff-Society. The Plaintiff-Society remitted money from time to time to the Defendant No.1 to manage the Yogada Ashram, Puri for its maintenance for conducting its activities such as the expenses involved in the construction of the Samadhi Mandir, the Prayer Hall, the Guest Apartment, Boundary Wall as also his personal expenses. It is stated that the Defendant No.1 in the name of the Plaintiff-Society received funds by way of donations from the public on account of Kriya Yoga Dikshya imparting lessions prescribed by the Plaintiff-Society and through sales of Yogada Satsang Publications. The Defendant No.1 used to render all account to the Plaintiff-Society at Dakshineswar in respect of monies sent to him so also in respect of sum received by him on behalf of the Society. It is stated that the Defendant No.1 worked as an agent of the Plaintiff-Society and described himself as the Secretary of Yogada Ashram, Puri.

The lease-hold land under Plot No.895 estimated to be around Ac.1.00 dec although had been in possession of Yogada Ashram, Puri Municipality mutated Ac.0.746 dec of land in favourof Paramahansa-Swami Yogananda. Although the Plaintiff-Society had purchased Ac.0.127 dec. of land in the year 1960 yet it possessed some more lands adjoining the said property as part and parcel of Yogada Ashram. In the year 1966, Ac.0.34 dec of land was also leased out by Puri

Municipality in favour of the Plaintiff-Society which got added to the estate of the Yogada Ashram. So it is said that the Plaintiff-Society is the owner in possession of all those properties. The Plaintiff's further case is that in the year 1971 acceding to the request of the Defendant No.1, the Plaintiff-Society entrusted the documents, such as, the deed of lease etc. to the Defendant No.1 on good faith for their production before the Settlement Authorities. It is stated that the Defendant No.1 thereafter did not return the documents. In the year 1972, the Defendant No.1 refused to render the accounts and for avoiding the same, he resorted to frivolous grounds. The fact, however, remains that he went on misrepresenting the Public that he was the President of Karar Ashram. On the basis of such misrepresentation, the Defendant No.1 is said to have got the leases transferred in his favour by substituting the name of the original lessee and thereafter refused to receive any financial aid from the Plaintiff-Society. In the year 1974, the Defendant No.1 refused to render accountsof the Ashram to the Plaintiff-Society.The Plaintiff-Society, therefore, raised eyebrows on such conduct of the Defendant No.1. It could then be ascertained that the Defendant No.1 by producing a Will purported to have been executed by Satyanandajee on 25.03.1971 and a deed of Trust by the same executant in his favour and thereby misrepresenting him as the President of Karar Ashram before the Municipality, had got the properties mutated in his name. It is alleged that such recordings of the suit land in favour of the Defendant No.1 is the outcome of collusion between the Defendant No.1 and the Defendant No.2 (Puri Municipality). It was revealed that the Defendant No.1 had transferred a portion of the suit property in favour of the Defendant No.3 without obtaining permission from the Plaintiff-Society.The Defendant No.1, therefore, was served with the notice on 14.04.1975 and asked to render all accounts. He, however, refused to receive the said notice. The Plaintiff thereafter filed Title Suit No.103 of 1975 in the Court of the Sub-Judge, Alipore, Calcutta (as then was) against the Defendant No.1 claiming the same relief for declaration, injunction and rendition of accounts. The Defendant No.1 appeared in the said suit and the Court thereafter held to have no territorial jurisdiction to sit over and adjudicate the suit filed by the Plaintiff-Society. This was challenged by the Plaintiff-Society by carrying a Civil Revision to the High Court, Calcutta. When the Revision was pending, this present suit was filed and thereafter the Revision being not pressed, was dismissed.

7. <u>Case of Defendant No.1</u>

The Defendant No.1 in his written statement while traversing the plaint averments have raised the issue of maintainability of the suit. It is said that the primary beneficiary under the deed of trust and the recorded owner of the suit property being not made parties to the suit, the suit is bad for non-joinder of necessary parties. It is further stated that the description of the address in the cause title of the Defendant Nos.1 and 3 at Yogada Ashram, Puri is wrong. It is stated that the Defendant No.1, the Karar Ashram, Puri was established by

Sadhumandal whose founder was Sri Youkteswar Giri. The said Ashram was managed by Sri Sevananda till 1950 when he left the Ashram and became a Sanyasi. The Trustees mentioned in the deed of trust of the year 1921 except Swami Yogananda could not manage the Ashram. In the year 1936, Sami Yogananda left India and went to America where he breathed his last in the year 1951. While leaving India, he appointed Swami Satyananda as a Trustee to manage Karar Ashram. He, however, failed to manage the Karar Ashram as he was required in the Ashram at Ranchi when Dhirendranath Das in charge of Ranchi Ashram left for America in the year 1928. In the year 1938, when Swami Sevananda was in charge of the Karar Ashram, the Defendant No.1 started practising Kriay Yoga at Puri Ashram and subsequently, became the President of Karar Ashram after death of Swami Satyananda. He continued to manage the Karar Ashram as the President. Swami Satyananda executed a Will in favour of the Defendant No.1 to manage the properties of Karar Ashram and he accordingly got lease of the schedule-A property to the extent of Ac.0.576 dec from Defendant No.2 with the possession of the Schedule-A land being given to Defendant No.1. The Defendant No.2 granted further lease in the name of Karar Ashram for the said extent of area Ac.0.38 dec. adjoining schedule 3B land. The Defendant No.1 obtained the lease of the said area as the Secretary of the Plaintiff-Society by spending money from his pocket with the expectation that the same would be reimbursed by the Plaintiff's Society.

The Defendant No.1 has clearly stated to have no objection in respect of schedule-B and C property as those properties are of the Plaintiff9s Society. He states to have never been engaged for the Plaintiff-Society at any time to manage the Ashram. It is stated that the deed of Trust of the year 1921 envisaged Karar Ashram only to carry out the religious works of 8Sadhu Sabha9 and there was no occasion and necessity for changing the identity of Karar Ashram to Yogada Ashram. The Defendant No.1 has also denied to have been receiving the grants and donations from the Plaintiff-Society for meeting his personal expenses and for carrying out all other activities including construction work over Schedule-A land. He further states to have never acted as agent of Plaintiff-Society and, therefore, he denies to have obligation to furnish the accounts to the Plaintiff-Society regularly. It is stated that there was no Yogada Ashram at Puri but some of its activities were carried out by the Defendant No.1 at Karar Ashram on the request of Plaintiff-Society for which the Plaintiff-Society advanced money for meeting some of the expenses of the inmates of Karar Ashram, who were working for Yogada Ashram.The Defendant No.1has projected an alternative case as to acquisition of title over the suit property by adverse possession.

8. **Case of Defendant No.2**

The Defendant No.2 while traversing the plaint averments has stated that on the application of the Defendant No.1 and on production of Will executed by Swami Satyananda in favour of Defendant No.1, land measuring Ac.0.38 dec. as shown in schedule-B of the plaint was leased out to him as the Secretary of Yogada

Satsangha Society. The allegation of collusion with the Defendant No.1 has been denied and it is also stated that due permission had been given by the Defendant No.1 to transfer a part of the suit land in favour of the Defendant No.3.

9. The Trial Court, on the above rival pleadings, framed the following issues:-

"1) Is the suit maintainable?

2) Has the plaintiff any cause of action to fill the suit?

3) Is the suit defective for non-joinder of parties?

4) Has the plaintiff any interest and possessions over the suit properties?

5) Is the suit defective for non-compliance of section 349 of Orissa Municipal Act?

6) Is the sale deed executed by defendant no.1 in favour of defendant no.3 genuine and valid?

7) Is the suit barred by limitation?

8) Has the suit been property valued and the adequate court-fee been paid?

9) To what relief, if any the plaintiff is entitled?

10) Has the plaintiff title to the lands in schedule 'A' and to Ac.0.030 of land containing in schedule 'B' of the plaint?

11) Is the plaintiff entitled to declaration containing in para 26(b) of the plaint?

12) Is the plaintiff entitled to the mandatory injunction asked for?

13) Is the plaintiff entitled to the mandatory injunction asked for?

14) Is the suit bad for mis-joinder of causes of action?

15) Has defendant no.1 acquired title, over 'A' scheduled lands and Ac.0.038 of land under schedule 'B'of the plaint by way of adverse possession?"

10. Taking up Issue Nos.4 and 10 for decision together, the Trial Court has answered those in favour of the Plaintiff.

Next going to render the decision on Issue No.7, the finding of the Trial Court is that the prayer for rendition of account is barred by limitation.

Then Issue No.14 has been answered in the negative and Issue No.11, as a sequel to the answer on Issue Nos.4 and 10, has been answered by the Trial Court holding that the Defendant No.1 has no right to manage the suit property when the right of the Plaintiff-Society over the same has been declared.

The Issue No.3 has been answered in favour of the Plaintiff holding that the suit is not defective for non-joinder necessary parties.

In respect of Issue No.12 as to the prayer of the Plaintiff for issuing a decree for mandatory injunction, the answer has been in favour of the Plaintiff and then Issue No.6 has been answered holding the sale deed (Ext.29) as not valid and genuine. The Trial Court thereafter proceeding to answer Issue No.15, the claim of the Defendant No.1 has been negated and thereafter the Issue No.16

has been answered in favour of the Plaintiff. Lastly, coming to Issue No.1, the conclusion of the Trial Court is that the suit is maintainable.

11. The First Appellate Court, as it appears from Paragraph-8 of its judgment, has gone to address the rival submission touching upon the sustainability of the finding of the Trial Court as to whether Karar Ashram and Yogada Ashram are two separate institutions or both are one and the same. It appears that while proceeding in that direction, the First Appellate Court has noted that the evidence on record would indicate that the Defendant No.1 was acting as an agent of the Plaintiff-Society and there was no religious or charitable institution in the name of Karar Ashram to which Defendant No.1 asserts to represent.

The First Appellate Court, in delving upon the contention raised by the Respondent No.4 as regards the admission of Defendant No.1, has arrived at the conclusion that the Defendnt No.1, in his letter addressed to President, Yogada Satsang Society has admitted to have purchased the property in his name but for the Society and in order to give a surprise the Secretary of the Ashram. Then on the other question as to the Plaintiff's claim of declaration and possession of Schedule-A property and portion of Schedule-B property, the view of the First Appellate court is that the suit is not coming within the purview of section 92 of the Code and, therefore, the suit seeking reliefs, as advanced, is maintainable. Next dealing the question of maintainability of the suit for non-compliance of the provision contained in section 6 of the Societies Registration Act, 1860, the answer has been given in favour of the Plaintiff. On the issue as to the previous suit filed in the Court at Alipur, Calcutta standing on the way of in the present suit, in view of the provisions contained in section 12 read with Order 2 Rule 2 of the Code, has been that the suit has been found to be entertainable in the present form and for the reliefs claimed. The other issue as to the limitation and final decision, having been rendered in the negative, the judgment and decree passed by the Trial Court have been confirmed.

12. These Appeals have been admitted to answer the substantial questions, which are consolidatedly placed below:-

> "(1) Whether the Plaintiff9s suit is maintainable in view of the bar contained under Section 12 read with Order 2 Rule 2 of the Code of Civil Procedure for filing of the earlier suit in Kolkata?
>
> (2) Whether the Plaintiff's suit is maintainable for non-compliance of the provision contained in Section 92 of the Code of Civil Procedure as the suit framed is not merely against an agent as alleged but to obtain a decree for the purpose prescribed in the said provision?"
>
> (3) Whether the Courts below have erred in law in holding that the Respondent No.1(Plaintiff) has the right, title and interest over the suit lands and by accepting the case of the Respondent No.1 (Plaintiff) that the Respondent No.4 (Defendant No.1) has been possessing the suit properties on behalf of the Respondent No.1-Plaintiff Society, who is its owner?"

13. Heard learned counsel for the parties at length.

14. In order to address the rival submission, in finding out the answers to the substantial questions of law,as noted above, a careful reading of the judgments passed by the Courts below, it would reveal that the provision contained in Order 41 Rule 31 of the Code, which has been held to be mandatory, has been totally lost sight of. In that view of the matter, before proceeding further, this Court feel it apposite to delve into the above aspect of non-compliance of the provisions of law.

15. For the purpose, as above, it would be profitable to refer to the decision of the Hon9ble Apex Court in the case of Malluru Mallappa (Dead) through LRs -V- Kuruvathappa and others; (2020) 4 SCC 313.

At Paragraph-11 of the aforesaid judgment, the Hon'ble Apex Court has said as under:-

> "Section 96 of the CPC provides for filing of an appeal from the decree passed by any court exercising original jurisdiction to the court authorized to hear the appeals from the decisions of such courts. In the instant case, the appeal from the decree passed by the trial court lies to the High Court. The expression 'appeal' has not been defined in the CPC. Black's Law Dictionary (7th Edn.) defines an appeal as "a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority." It is a judicial examination of the decision by a higher court of the decision of a subordinate court to rectify any possible error in the order under appeal. The law provides the remedy of an appeal because of the recognition that those manning the judicial tiers too commit errors."

The Apex Court then, having referred to the decision in the case of In Hari Shankar v. Rao Girdhari Lal Chowdhury; AIR 1963 SC 698, reiterated the same in holding that a right of appeal carries with it a right of re-hearing on law as well as on fact unless the statue conferring the right of Appeal limits the reheating in some way as has been done in Second Appeal under the CPC.

In next paragraph, i.e., paragraph-12, the Apex Court has placed the view taken by the said Court in Shankar Ramchandra Abhyanakar -V- Krishnaji Dattatreye" (1969) 2 SCC 74, which reads as under:-

> "5. …….. In the well known work of Story on Constitution (of United States), Vol. 2, Article 1761, it is stated that the essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. The appellate jurisdiction may be exercised in a variety of forms and, indeed, in any form in which the Legislature may AIR 1963 SC 698 1969 (2) SCC 74 choose to prescribe. According to Article 1762 the most usual modes of exercising appellate jurisdiction, at least those which are most known in the United States, are by a writ of error, or by an appeal, or by some process of removal of a suit from an inferior tribunal. An appeal is a process of civil law origin and removes a cause, entirely subjecting the fact as well as the law, to a review and a retrial……."

16. It has been held by the Apex Court in the very same decision in case of Malluru Mullappa (Dead) through LRs (Supra) as under:-

> "It is a settled position of law that an appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a re-hearing on law as well as on fact and is invoked by an aggrieved person. The first appeal is a valuable right of the appellant and therein all questions of fact and law decided by the trial court are open for re-consideration. Therefore, the first appellate court is required to address itself to all the issues and decide the case by giving reasons. The court of first appeal must record its findings only after dealing with all issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties. The judgment of the first appellate court must display conscious application of mind and record findings supported by reasons on all issues and contentions [see: Santosh Hazari v. Purushottam Tiwari (Deceased) By Lrs.3, Madhukar and others v. Sangram and Others4, B. M. Narayana Gowda v. Shanthamma (Dead) By Lrs. and Another5, H. K. N. Swami v. Irshad Basith (Dead) By Lrs.6 and M/s. Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar7]. (2001) 3 SCC 179 (2001) 4 SCC 756 (2011) 15 SCC 476 (2005) 10 SCC 243 (1980) 4 SCC 259"

It has also been said that a First Appeal under Section 96 of the CPC is entirely different from a second appeal under Section 100. Section 100 expressly bars second appeal unless a question of law is involved in a case and the question of law so involved is substantial in nature.

17. Order XLI Rule 31 of the CPC provides the guidelines for the appellate court to decide the matter. For ready reference Order XLI Rule 31 of the CPC is as under: -

> "31. Contents, date and signature of judgment.- The judgment of the Appellate Court shall be in writing and shall state-
>
> (a) the points for determination;
>
> (b) the decision thereon;
>
> (c) the reasons for the decision; and
>
> (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled; and shall at the time it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

18. In Vinod Kumar v. Gangadhar; (2015) 1 SCC 391, the Apex Court has reiterated the principles to be borne in mind while disposing of a first appeal, as under:-

> "15. Again in B.V. Nagesh v. H.V. Sreenivasa Murthy [(2010) 13 SCC 530 : (2010) 4 SCC (Civ) 808], this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words: (SCC pp. 530-31, paras 3-5)
>
> 3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari [(2001) 3 SCC 179 : (2001) 1 SCR 948] , SCC p. 188, para 15 and Madhukar v. Sangram [(2001) 4 SCC 756] SCC p. 758, para 5.)"

19. In Shasidhar and Ors.v. Ashwani Uma Mathad and Anr.9, it was held as under:-

"21. Being the first appellate court, it was, therefore, the duty of the High Court to decide the first appeal keeping in view the scope and powers conferred on it under Section 96 read with Order 41 Rule 31 of the Code mentioned above. It was unfortunately not done, thereby, causing prejudice to the appellants whose valuable right to prosecute the first appeal on facts and law was adversely affected which, in turn, deprived them of a hearing in the appeal in accordance with law."

20. Bearing in mind the above principles, the judgment of the First Appellate Court, being gone through, it is seen that the First Appeal involved disputed questions of law and fact. The judgment of the First Appellate Court clearly reveal that the provisions of Order 41 Rule 31 of the Code while deciding the Appeal have totally been lost sight of and the decision that has ultimately been rendered has not been by specifically answering the points for determination both with reference to the factual settings of the case as those emerge from the evidence both oral and documentary dealing those with the settled position of law holding the field.

21. For the aforesaid, instead of proceeding to answer the substantial questions of law framed at the time of admission of these Appeals, this Court feels it just and proper to remit the matter to the First Appellate Court by setting aside the judgment and decree (impugned) with further direction to decide the same afresh in accordance with law as explained hereinabove. As the case has been running for long, the First Appellate Court is directed to decide the

First Appeal as expeditiously as possible. However, it is clarified that any observation made hereinabove shall not adversely affect the case of either parties.

22. With the above observation, these Appeals stand disposed of. There shall, however, be no order as to cost.

—— o ——

2023 (III) ILR-CUT-104

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

JCRLA NO.12 OF 2023

ERA MADKAMI .....Appellant

.V.

STATE OF ODISHA .....Respondent

INDIAN PENAL CODE, 1860 – Section 300 (3) – Whether only blow of an arrow shot, though fatal by itself can automatically take the case out of the purview of the provisions of section 300 of IPC – Held, No – In order to bring in clause 3 and section 300, prosecution must prove/fulfil necessary ingredients – Explained. (Para-14)

For Appellant : Mr. Suryakanta Dwibdi, (Amicus Curiae)

For Respondent : Mr.S.K. Nayak, Addl. Govt. Adv.

JUDGMENT Date of Hearing : 03.08.2023 : Date of Judgment :11.08.2023

D. DASH, J.

The Appellant, by filing this Appeal from inside the jail, has called in question the judgment of conviction and order of sentence dated 31st May, 2022 passed by the learned Sessions Judge, Malkangiri, in C.T. No.86 of 2017 arising out of G.R. No.209 of 2017 corresponding to Malkangiri P.S. Case No.74 of 2017 of the Court of the learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Malkangiri.

The Appellant (accused) thereunder has been convicted for committing the offence under section 302/447 of the Indian Penal Code, 1860 (for short, 'the IPC'). Accordingly, he has been sentenced to undergo imprisonment for life and pay fine of Rs.20,000/- (Rupees Twenty Thousand) in default to undergo rigorous imprisonment for one (1) year for commission of the offence under section 302 of the IPC; and undergo imprisonment for three (3) months for commission of the offence under section 447 of the IPC with the stipulation that both the substantive sentences would run concurrently.

2. Prosecution Case:-

On 23.07.2017 around 02.40 p.m., Kasa Padiami (informant-P.W.2) lodged a written report with the Inspector-in-Charge (I.I.C.) of Malkangiri Police Station

stating therein that in view of continuous dispute between his son, namely, Muka Madkami and this accused relating to the landed properties; on 22.04.2017 around 08.00 p.m., the accused, having gone near the house of Muka Madkami, pierced an arrow on the abdominal area and his son (Muka Madkami) had been taken to Malkangiri Hospital for treatment.

Receiving the said written report from the informant (P.W.2), the I.I.C. treated the same as FIR (Ext.6), registered the case and directed one Sub-Inspector of Police (S.I-P.W.13) to take up the investigation.

3. In course of investigation, the Investigating Officer (I.O.-P.W.13) examined the informant (P.W.5) and other witnesses. He issued injury requisition (Ext.3/2) to the Medical Officer of Malkangiri Hospital. He then proceeded to District Headquarters Hospital, Malkangiri and seized the arrow in presence of the witnesses under seizure lsit (Ext.1/1). In the afternoon, he visited the spot and prepared the spot map (Ext.7). He also seized the blood stained and sample earth from the spot under seizure list (Ext.8). He then examined other witnesses. On 26.04.2017 in the afternoon, the I.O. (P.W.13) arrested the accused and forwarded him in custody to Court. On 27.04.2017, he received the injury report (Ext.3) and on 07.05.2017 afternoon, he got the information about the death of Muka Madkami. So, he issued necessary requisition for post mortem examination of the dead body of Muka Madkami and after holding inquest over the same, he prepared the report to that effect (Ext.2). The seized incriminating articles were sent for chemical examination through Court and reports (Ext.13) were obtained. The I.O. (P.W.13) had recorded the statement of Muka Madkami when he was lying injured and undergoing treatment, which has been admitted in evidence and marked Ext.14. On completion of the investigation, the I.O. (P.W.13) submitted the Final Form placing the accused to face the Trial for commission of the offence under sections 447/302 of the IPC.

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

5. In the Trial, the prosecution, in support of its case, has examined in total nineteen (19) witnesses. As already stated, P.W.2 is the informant, who happens to be the father of the deceased and he had lodged the FIR (Ext.6). P.Ws.3, 4, 5, 7, 8, 9 & 10 are the post occurrence witnesses. P.W.6 is the wife of the deceased and she is the eye witnesses to the occurrence. The Doctor, who had medically examined Muka Madkami when he was admitted in the Hospital has been examined as P.W.11 whereas the Doctor, who had conducted autopsy over the dead body of Muka, has come to the witness box as P.W.19. The I.O. is P.W.13 and other witnesses are the witnesses to the seizure, inquest etc.

Besides leading the evidence by examining the above witnesses, the prosecution has also proved several documents, which have been admitted in

evidence and marked Exts.1 to 15. Important of those are the FIR (Ext.6), inquest report (Ext.2), spot map (Ext.7), post mortem report (Ext.15) and the statement of the deceased recorded by the I.O. when he was undergoing treatment in an injured condition has been admitted in evidence and marked Ext.14.

6. The plea of the defence is that of complete denial and false implication. However, being called upon, the accused had not led any evidence in support of said plea.

7. The Trial Court, on going through the evidence of the prosecution witnesses and upon their examination at its level, has arrived at a finding that it is the accused, who has committed the murder of Muka Madkami by piercing the arrow on his abdominal region.

8. Mr.S.K.Dwibedi, learned Counsel for the Appellant (accused), without disputing the nature of death of Muka Madkami to be homicidal, as it reveals from the evidence of the Doctors (P.Ws.11 & 19) and their reports (Exts.4 & 15) as also the evidence of P.W.6, the eye witness; submitted that the Trial Court has committed error by placing reliance upon accepting the evidence of P.W.6, the solitary eye witness to the occurrence, as projected by the prosecution, as reliable. He further submitted that P.W.6 is none other than the wife of the deceased and as such is an interested witness for the success of the prosecution and, therefore, the Trial court ought to have scrupulously scrutinized her evidence to find out as to whether it is of starling quality and that exercise, having not been done undertaken, just in a causal fashion, by simply going on reproducing the depositions of the prosecution witnesses in the judgment, without any analysis and consequentially, without appreciation, has concluded that the accused was the author of the injury found on the abdominal region of the deceased which has led to his death. He, in the alternative, submitted that taking a cumulative view of the facts and circumstances of the case, as those emanate from the evidence on record, the Trial Court ought not to have held the accused liable for commission of the offence under section 302 of the IPC and instead, it should have recorded the conviction for commission of the offence under section 304-II of the IPC and accordingly, awarded the appropriate sentence.

9. Mr.D.K.Mishra, Additional Government Advocate for the Respondent-State submitted all in favour of the finding of guilt against the accused, as has been returned by the Trial Court. He submitted that the evidence of P.W.6 is bound to be accepted as their surfaces no such infirmity therein. According to him, merely because P.W.6 is the wife of the deceased, her evidence is not liable to be eschewed from consideration in the absence of any such glairing infirmity shaking the foundation of the prosecution case by saying that she is an interested witnesses when the fat remains that the circumstances, under which the occurrence took place, she was the only natural witness. He further submitted that the facts of P.W.6 finds corroboration from the evidence of other witnesses before whom the incident was

disclosed by her when she first got the opportunity to meet them. He further submitted that the facts and circumstances emerging from the evidence, being cumulatively viewed would not take the case out of the purview of section 302 of the IPC so as to be held that the accused, for the role that he had played, is not liable to be punished thereunder.

10. Keeping in view the submissions made, we have carefully gone through the impugned judgment of conviction. We have also travelled through the depositions of the witnesses examined from the side of the prosecution as P.Ws.1 to 19 and have perused the documents admitted in evidence marked as Exts.1 to 15.

11. In the instant case, the deceased having received the injury, was taken to the Malkangiri Hospital and he, being admitted, was first of all treated by P.W.11, who, being the Medical Officer, then on duty, had admitted him vide OPD No.4056/23.4.2017. He had noted one laceration of size ½" X ½" bone deep on the lateral side of left side of chest 2" below the arm pit and another lacertation ijury of size of ½" X ½" bone deep situated one inch below the other laceration. He too had examined the arrow sent by P.W.13 to him and he has opined that the injuries noticed were possible by the said arrow. That Muka Madkami, being admitted, underwent treatment and he died on 07.05.2017. P.W.19 is the Doctor, who had conducted the autopsy over the dead body of Muka Madkami. He had noticed one stab wound extended into peritoneal cavity with injury to descending colon, peritoneal cavity packed with pasted small intestine, omentum and faecal matter. As per his evidence, the cause of death was coma due to septicemia caused by colon injury and faecal peritonitis. P.W.19 has indicated all these injuries and feature in his report Ext.15. When even there is no attempt to impeach such injuries, we conclude that Muka Madkami met a homicidal death.

12. Having said as above, as here the star witness for the prosecution is P.W.6, who happens to be the wife of the deceased, let us first examined her evidence. She has stated that in the night of occurrence, when her husband was taking meal, the accused entered into the house with arrow and stabbed her husband near the belly. She has further reiterated during cross-examination to be very much present in the house near the place where the accused attacked her husband. She has also stated that at that time, no other person were present at the spot and the place where the accused stabbed the arrow upon her husband was near the entrance door of the house. Her evidence is to the effect that when the accused stabbed her husband was about to come from the house and at that moment, the accused rushed towards him and inflicted the injury. We find absolutely no infirmity in the evidence of said witness nor we are able to gather any such features so as to entertain any doubt as to her presence at the relevant time in the house so as to view her evidence with suspicion when in ordinary course, her presence in the house at that hour of night was normally expected, which here is not shown otherwise by eliciting anything on that score. So, simply because she is the wife of the deceased, that is no ground to

disbelieve her version when it is also not shown that the prosecution has withheld any other witness who had the occasion to see the incident.

13. P.W.2, who is the father of the deceased, has further stated that his son, i.e., Muka Madkamai while lying injured informed him that the accused had injured him by using arrow. That is also the evidence of P.W.3, who has stated that when he rushed to the house of the deceased, he found an arrow was stuck on the belly of Muka Madkami (deceased) and he then told him that the accused had caused such injury. It has also been so stated by P.W.5 that in the Hospital, he was so told informed by the deceased attributing the authorship of the injuries to the deceased.

P.W.7 is another witness, who too has stated that when he went to the spot and saw the accused with the injury by means of arrow, which had pierced into his stomach and when he asked him, he told that the accused had done so. Evidence of all the above witnesses on the score, as discussed, has not been shaken in any manner nor anything is shown to have surfaced in their evidence to doubt their versions. Therefore, we hold that the prosecution has proved that it is the accused, who had caused said injury on the abdomen area of the deceased in that night in his house.

14. Coming to address the alternate submission of the learned counsel for the Appellant (accused), it cannot be laid down as an universal rule that when one arrow shot or knife injury is inflicted, for the said act, attraction of the offence under section 302 of the IPC shall stand automatically ruled out. It would, however, depend upon the facts and circumstances of each case. The mere fact that only blow was given, or arrow shot made, though fatal by itself, cannot automatically take the case out of the purview of the provisions of Section 300 IPC, if the requisite ingredients of that section are proved. In order to bring in Clause-3 and section 300, prosecution must prove the following facts:-

> "(a) it must establish quite objectively, that a bodily injury is present;
>
> (b) the nature of injury must be proved. These are purely objective assessments;
>
> (c) it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional.
>
> Once these three elements are proved to be present, the enquiry proceeds further; and
>
> (d) it must be proved that the injury of the type described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective."

15. Bearing the aforesaid in mind, we find that the deceased and the accused hail from the rural background from a District, which is within the scheduled are of the State. They too are the members of the Scheduled Tribe Community. When it is said in the FIR (Ext.6) that there was long standing dispute between the accused and the deceased in relation to the landed property, that is neither stated by P.W.6 nor by P.W.2, the informant in the Trial. P.W.6 is, however, giving a hint during cross-

examination that when her husband was in the house, the accused stabbed and that her husband when was about to come, the accused gave a blow. The incident has happened near the entrance door of the house. The I.O. (P.W.13), despite such averment made in the FIR as regards the prior dispute between the accused and the deceased, has not directed the investigation in that light. The accused is not the co-villager of the deceased. No witness has stated to have seen the accused proceeding in the village of the deceased up to his house. The incident, having taken place on 22.04.2017, the injured, in course of treatment in the Hospital, has died on 07.05.2017, i.e., after more than fifteen (15) days and the cause of death is due to septicemia. The medical evidence is not that straight that even with better treatment in some other advanced medical centre, the life could not have been saved. It is not the prosecution evidence that the accused, after causing solitary injury, did any further overt act.

16. Taking a cumulative view of all these above circumstances appearing in the evidence, as discussed; we are of the view that the offence could be properly categorized as one punishable under section 304-I of the IPC. We are thus of the considered opinion that for the role played by the accused and the act done, he would be liable for conviction under section 304-I of the IPC.

17. In the result the Appeal is allowed in part. The judgment of conviction and order of sentence dated 31st May, 2022 passed by the learned Sessions Judge, Malkangiri, in C.T. No.86 of 2017 for commission of offence under section 302 of the IPC is altered to one under section 304-I of the IPC and in so far as the conviction for the offence under section 447 of the IPC is concerned, the same stands confirmed. Consequently, the Appellant (accused) is sentenced to undergo rigorous imprisonment for a period of ten (10) years for the offence under section 304-I of the IPC and rigorous imprisonment for three (3) months for the offence under section 447 of the IPC. These substantive sentences, as awarded, would run concurrently.

18. With the modification as to the judgment of conviction and order of sentence dated 31st May, 2022 passed by the learned Sessions Judge, Malkangiri, in C.T. No.86 of 2017, to the extent, as indicated above, the Appeal stands disposed of.

—— o ——

2023 (III) ILR-CUT-109

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

W.P.(C) NO. 9425 OF 2023

M/s. ADITYA ALUMINIUM, LAPANGA .....Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Articles 226 & 227 – Management raised the question of maintainability of I.D case because the beneficial provision through the certified standing orders of the management company supporting the case of both side is available – The learned labour court rejected the application questioning the maintainability of the proceeding on the premises that there involves mixed question of fact and law – Effect of – Held, impugned order set aside – The matter is remitted to the Labour Court for re-adjudication of the question raised. (Para 5-6)

For Petitioner : M/s.S.S.Tripathy, D.Pradhan, G.S.Das, S.K.Banta & P.Sethy

For Opp.Parties : M/s.R.N.Debata, P.Panigrahi, B.Sahu, P.Debata & C.K.Panda

JUDGMENT Date of Hearing & Judgment : 10.08.2023

BY THE BENCH:

1. The Writ Petition involves the following prayer :-

> "It is, in the above facts and circumstances, humbly prayed that Your Lordship may be graciously pleased to admit the writ petition, issue notice to the Opp.Parties, call for the records of I.D. Case No.4 of 2022 from the learned Labour Court/Opp.Party No.1 and after hearing the parties be pleased to set aside the order dtd.18.3.2022 (Annexure-1) passed by learned Labour Court/Opp.Party No.1 in ID Case No.4 of 2022.
>
> And may pass such other order/orders, direction/directions as this Hon'ble Court deems fit and proper under the fact and circumstances of the case."

2. Taking this Court to the factual position, it is stated that on initiation of an industrial adjudication, vide I.D.Case No.4/2022, the Management, Petitioner herein on its appearance has raised the question of maintainability of the I.D. Case keeping in view the beneficial provision through the Certified Standing Orders supporting the case of both sides in making available of an intra-Appeal provision involving the action involved therein. It is considering such an objection, there has been a decision on such objection and decided, vides the impugned order but against the Management-Petitioner holding that the question raised therein is a mixed question of fact and law resulting in filing of the Writ Petition.

3. On receipt of notice on the statement of claim, it appears, the Management-Petitioner at the threshold challenged the maintainability of the dispute itself. Taking this Court to the Petition raising the industrial dispute along with notice of the Labour Court, vide Annexure-3, the relief sought for therein vis-à-vis prayer and further the provision in the Certified Standing Orders binding on both sides, Mr.S.S.Tripathy, learned counsel for the Petitioner brings to the notice of the Court to the ground raised in the application questioning the maintainability of the industrial adjudication raised in I.D. Case No. 4/2022 and makes an attempt to

Satisfy the Court that the question raised since is directly falling through the provision in the Certified Standing Orders of Aditya Aluminium, a decision could have been taken purely treating the issue involving a question of law. Taking this Court to the observations, it is contended, the Labour Court misdirected itself and gave an erroneous finding in the rejection of the application questioning the maintainability of the proceeding on the premises that there involves mixed question of fact and law. Learned counsel for the Petitioner also taking this Court through the provision in the Certified Standing Orders attempted to satisfy that there is no involvement of fact while taking such a decision.

4. Mr.R.Debata, learned counsel for the Workman-O.P.2 attending through the Virtual Court proceeding at Sambalpur Centre taking this Court to the objection of the Workman to the application questioning maintainability of the I.D. proceeding, grounds therein while not disputing the provision at Clause-26 of the Certified Standing Orders of Aditya Aluminium having a clear intra-Appeal provision but however taking to the other pleas taken therein in the objection of the Workman, contended, the Workman contested the proceeding on the premises of the issue involving the question of fact and law. Taking this Court to the discussions by the Labour Court in the impugned order, Mr.Debata attempted to satisfy the Court that there has been lawful observation and there is no need for interfering in the impugned order.

5. Having heard the submissions of the learned counsel for the Parties and the objection taken herein and in course of hearing, this Court has gone through the provision at Order 26 of the Certified Standing Orders of Aditya Aluminium further also reading together with the provision at Order 25 therein. On perusal of both the orders, this Court finds, the Management may be justified in bringing such a serious question of law. For a justified decision required to be taken by the Labour Court, this Court is not delving into answering on such issue at this stage and leaving it open for a justified decision by Labour Court itself but after entering into further argument from both sides.

6. For the nature of dispute, there is no requirement of going or adverting through the facts involving the dispute. A decision can very well be taken simply going through the provision referred therein in the Certified Standing Orders. It is at this stage of the matter, this Court going through the discussions and observations finds, there has been mechanical consideration of the legal aspect involved herein. While declaring the decision unwarranted and in disapproval of the decision involved herein, this Court interfering with the impugned order at Annexure-1 sets aside both. The matter is remitted to the Labour Court,Sambalpur for re-adjudication the question raised in the application of the Petitioner at Annexure-3 herein after involving fresh argument of the Counsel appearing for both sides and taking into consideration the legal provision through the provisions in the Certified Standing Orders of Aditya Aluminium.

7. Since the matter is remitted for re-consideration of the Labour Court, both the Management and the Workman are directed to appear before the Labour Court, Sambalpur either in person or through their representatives on 25th August, 2023 along with copy of this judgment. Decision on the question of maintainability should also be taken at least within a period of two months from the date of appearance of the Parties.

8. The Writ Petition succeeds to the extent indicated herein above. There is no order as to cost.

—— o ——

2023 (III) ILR-CUT-112

BISWANATH RATH, J.

W.P.(C) NO. 20169 OF 2023

MADHUSMITA SAMANT .....Petitioner

.V.

UNION OF INDIA & ANR. .....Opp.Parties

PASSPORT ACT, 1967 – Section 6(2)(f) – Rejection of application for renewal of passport due to pendency of criminal cases before the court of law and asking the petitioner for court clearance – Whether such order is sustainable? – Held, No – The passport authority violate the provision of section 6 (2) (f) of the Act by asking the petitioner for court clearance and rejecting the renewal application. (Para-11)

Case Laws Relied on and Referred to :-

1. I.L.R. (2018) M.P.677: Navin Kumar Sonkar Vs.Union of India & Ors.
2. 2020 SCC Online Kar 3437 : Krishna Chiranjeevi Rao Palukuri Venkata Vs.Union of India Ministry of External Affairs, represented by its Principal Secretary & Ors.
3. (2019)265 DLT 614 : Ashok Khanna Vs. Central Bureau of Investigation.
4. 2021 SCC Online MP 2326 : Hardik Shah Vs. Union of India and Anr.
5. (2011) 50 OCR -587 : Durydhan Sahoo Vs. Republic of India
6. (2019) 75 OCR-747 : Ballav Kr @ Sriballav Kar Vs. Govt. of India and Anr.

For Petitioner : M/s. J.Pal, L.Dash, S.R.Pradhan & C.Mohapatra.

For O.Parties : Mr.P.K.Parhi, DSGI, Mr.D.R.Bhokta, CGC.

JUDGMENT Date of Hearing & Judgment :10.08.2023

BISWANATH RATH, J.

1. This Writ Petition is at the instance of the Petitioner on the following prayer :-

> "It is, therefore, most humbly prayed that considering the above facts and circumstances your Lordship may be pleased to issue Rule NISI calling upon the Opp.Parties, as to why a writ in the nature of Certiorari shall not be issued to quash the letter dated 14.06.2023 under Annexure-5 issued by Opposite Party No.2 and further, as to why a writ in the nature of Mandamus shall not be issued directing the Opposite Party No.2 to grant renewal of the Passport of the petitioner pending vide renewal application No.BH1075144695923 bearing ARN No.23-1002613901…"

2. Factual background appears to be the Petitioner is already in grant of Passport No.H3734383. The period of Passport remains to be from 24.3.2009 to 23.3.2019. Finding the Passport going to expire and as required under law, the Petitioner, a woman in her sincere attempt in applying for renewal of Passport in due time and appears to be still struggling in the matter of renewal of her Passport.

3. This Writ Petition appears to be in second round of litigation. In the first round of litigation on the Petitioner moving the Writ Petition bearing W.P.(C) No.14051/2022 for expediting the renewal aspect, vide order dated 16.5.2023 this Court after providing opportunity to the Counsel for the Petitioner as well as the Regional Passport Authority finally came to observe as follows :-

> "1. Heard learned counsel for the parties.
>
> 2. In course of submission it has been brought through the communication dated 6.5.2023, the Petitioner has been called upon by the Regional Passport Authority, Bhubaneswar with documents desired under previous communication. Mr.Parhi, learned Deputy Solicitor General of India however submits, for there is communication to the Petitioner, nothing prevents the Petitioner to appear before the Competent Authority on or before 5.6.2023 with required documents as per instruction on 7.3.2023.
>
> 3. Mr.Pal, learned counsel for the Petitioner submits that for there is further scope for satisfaction of the Petitioner's case, he does not want to proceed with the Writ Petition presently and undertakes the Petitoiner will now attend the Office of the Regional Passport Authority, Bhubaneswar with desired documents by the given date. This Court permits the same and observes, on the Petitioner attending the Office of the Regional Passport Authority, the Passport Authority is directed to take a lawful disposal on the application of the Petitioner while also keeping in view the judgment of this Court in W.P.(C) No.4834 of 2022.
>
> 4. With this observation, the Writ Petition stands disposed of."

It appears, pursuant to the aforesaid direction, the case of the Petitioner for renewal of Passport got decided by an order of rejection dated 14.6.2023 appearing at Annexure-5. Hence, the Writ Petition.

4. Mr.J.Pal, learned counsel for the Petitioner, the renewal applicant herein submits rejection of the renewal application herein boils down the development through two criminal cases and an outcome in WA No.1663/2023 decided by this Court on 13.4.2023. Taking this Court to the development through both the criminal cases, Mr.Pal, learned counsel for the Petitioner submitted, the Petitioner herein so far it relates to G.R. Case No.1343 of 2021 arising out of Jagatsinghpur P.S. Case

No.620 of 2021 involving alleged offences against the Petitioner under Sections 379/323/427/506 of the I.P.C., the Petitioner is already on bail being granted by the J.M.F.C., Jagatsinghpur, vide its order dated 15.11.2021 and so far as the second criminal case is found to be obstructing the consideration of renewal aspect involving G.R. No.770/2022 arising out of P.S. Case No.108/2022 involving the offences under Sections 454/294/380 read with Section 34 of the I.P.C. Here the Petitioner is granted bail on the provision at Section 41A of Cr.P.C. Further learned counsel for the Petitioner brings to the notice of the Court that charge sheet/cognizance order dated 2.8.2022 involving G.R. Case No.770/2022 is challenged in High Court in CRLMC No.1875/2023. The High Court by its order dated 19.5.2023 by way of interim direction has granted stay of further proceeding in G.R. Case No.770/2022, which is claimed to be continuing as of now. It is in the above background, Mr.Pal, learned counsel for the Petitioner contended, there was in fact no lawful obstruction and even the order of the Division Bench cannot be found to be obstructing the Petitioner while keeping the renewal of her Passport. Mr.Pal also alleged, there has been an order mechanical and unwarranted.

5. Mr.P.K.Parhi, learned Deputy Solicitor General of India appearing for the Regional Passport Officer while not disputing that the Petitioner is already on bail in one of the criminal cases referred to herein above and also enlarged on bail under the provision of Section 41A of the Cr.P.C. so far as it relates to the second criminal case. However, banking on the judgment and observation of this Court in disposal of Writ Appeal No.1663/2022 disposed of on 13.4.2023, Mr.Parhi contended, the judgment in W.P.(C) No.4834/2022 does not have precedent and consequently has no application to the case at hand. There is, however, no dispute at Bar that the criminal proceedings are an outcome of trivial issues.

6. Considering the rival contentions of the Parties, this Court finds obstruction so far as it relates to consideration of the renewal application of the Petitioner, which appears to be pendency of two cases even assuming the judgment in W.P.(C) No.4834/2022 is not a precedent but the only consideration arises here as to mere pendency of two criminal cases against the Petitioner and even after grant of bail in both the cases, if the right of the Petitioner's visiting overseas for any of the purposes can be curtailed and if the Passport Authority is justified in asking for an order from the trial court to grant renewal of the Passport application ?

7. Here considering the aspect as indicated herein above, this Court finds, undisputedly the Petitioner is already in entitlement of the Passport. Question here involved renewal of existing Passport pending long since. This Court since finds major obstruction in consideration of renewal of Passport and asking the Petitioner to provide court order, this Court here finds, the Petitioner involved in G.R. Case No.1343/2021 for the alleged offences under Sections379/323/427/506 of I.P.C., however the Petitioner is already on bail by order of the trial court dated 15.11.2021, which reads as follows :-

> "Accused person, Smt.Madhusmita Samanta (40) D/o.Tapas Samanta of Mahanadi Vihar, Plot No.1580, Cuttack A/p.W/o.Rajesh Singh of vill-Hariharpur, Bada Bazar, P.S./dist- Jagatsinghpur is produced in custody through the escort party of J.S.pur P.S. after being arrested by the I.O. and forwarded to this court in connection with J.S.pur P.SD.Case No.620/21 along with forwarding report U/s.379/427/323/506 IPC. She complains of no ill treatment by the police while in police custody. Perused the forwarding report, C.Ds, U/s.161 Crpc statement of witnesses, Check list, Arrest Memo, injury report Covid-19 report and other connected papers. I.O. has prayed to remand the accused person for a period of 15 days.
>
> Advocate Sri Pitambar Panda and his associates files a V.Nama on behalf of accd. Person and also filed bail petition to release her on bail. Copy Served on LD. App.Who put her objection. The V.nama is accepted. Heard on the bail petition from both side. The Ld. Advocate for the accd.person on his petition has mentioned that, the accd.person has been falsely implicated in this case with this he prayed to take lenient view, and prayed to release the accd. Person on bail. On perusal of case record it is seen that the accd. Alleged to have committed offence U/s.379/427/323/506 IPC. Out of which offences U/s. 379/506 IPC are non-bailable in nature and which offences are triable by this court and offences are punishable for a maximum period of three years imprisonment. Further the accused is a lady. Hence, keeping in view fact and circumstances, nature and gravity of offence, prescribed punishment for the alleged offence. I am inclined to enlarge the accd. person on bail. Accordingly the bail petition is allowed.Let the accd. be released on bail on furnishing of bail bond of Rs.20,000/- with one solvent surety for the like amount with following condition that :-
>
> i) She shall not commit any offences while in bail.
> ii) She shall not tamper the prosecution evidence
> iii) She shall not threaten the prosecution witnesses. Put up when bail bond is filed."

8. Similarly so far as the second case, i.e., G.R. Case No.770/2022 registered on the File of the J.M.F.C.-I, Cuttack, the Petitioner is not only enlarged on bail on application of Section 41A of Cr.P.C. but on the challenge of the Petitioner to the order taking cognizance in CRLMC No.1875/2023, in issuing notice as an outcome in I.A. No.1639/2023, this Court passed the following order :-

> "In the interim, it is directed that further proceeding in G.R. Case No.770/2022 pending in the court of learned S.D.J.M.(S), Cuttack shall remain stayed till the next date."

On verification it is found, above order is still continuing. Reading the aforesaid and the protection the Petitioner is in enjoyment in both the criminal cases, this Court nowhere finds, there is any obstruction imposed by all these three courts herein, i.e., two courts on the ground of bail and this Court in staying the further proceeding in one of the G.R.Cases and no Court here imposed any condition restricting the Petitioner's visiting right to overseas. It is in this view of the matter, this Court finds, there is no justification in asking the Petitioner herein for providing an order from the competent court of law authorizing her visiting right overseas.

9. To add to this, this Court here finds the following decisions also come to the rescue of the Petitioner.

"A) Looking to the direction of the Hon'ble apex Court in the case of ***Vangala Kasturi Rangacharyulu Vs. Central Bureau of Investigation***, (I.A.No.52346/ 2021 involving Crl.A.No.1343/2017 decided on 27.09.2021, this Court finds here the case involves conviction of the party involved therein under Sections 120-B, 420, 468, 471, 477 A of the Indian Penal Code read with section 13(2) and 13(1) of the Prevention of Corruption Act,1988. This Court reading the aforesaid judgment of the Hon'ble Apex Court finds there has been permission for renewal of passport even after a party is convicted and his challenge to such conviction is pending consideration vide Criminal Appeal No.1343 of 2017 but in consideration of I.A.No.52346 of 2021 involving Crl. Appeal No.1343 of 2017.

B) In the case of ***Navin Kumar Sonkar Vs. Union of India & Ors***., I.L.R. (2018) M.P.677, this Court here finds the decision involves charges under Sections 498-A & 406 of I.P.C. vis-à-vis a refusal of the passport. The High Court involved relying on a decision in the case of ***Union of India and Ors. Vs. Charanjit Kaur***, AIR 1987 (SC) 1057, considering the request for renewal of the passport directed the competent authority to issue passport within two weeks but however upon furnishing an undertaking in terms of Clause 6 (2) (d) taken note hereinabove.

C) Similarly, in the case of ***Krishna Chiranjeevi Rao Palukuri Venkata Vs. Union of India Ministry of External Affairs, represented by its Principal Secretary and Others***. 2020 SCC Online Kar 3437, the Karnataka High Court in similar situation involving a criminal case pending against the applicant therein under Section 120B read with Section 420, 419,467, 468 and 471 of I.P.C. again taking into consideration the provision in the Passports Act, 1967 and the Government Circular has come to allow the claim of the Petitioner. This decision has also taken into account the decision in ***Ashok Khanna Vs. Central Bureau of Investigation***, (2019) 265 DLT 614 allowing the application with direction to the Passport Authority.

D) In the case of ***Hardik Shah Vs. Union of India and Another***,2021 SCC Online MP.2326. Going through the decision, this Court finds this is also a similar case of refusal of grant of passport again involving a criminal case against the petitioner therein involving F.I.R. alleging demand of dowry etc. and there has been allowing of renewal of passport.

E) In the case of ***Duryodhan Sahoo Vs. Republic of India***, (2011) 50 OCR -587 disposed of by this Court involving offence under Sections 7.13(2) read with 13(1)(d) of Prevention of Corruption Act, 1988 and there has been direction for grant of passport.

F) In the case of ***Ballav Kr @ Sriballav Kar Vs. Govt. of India and another***, (2019) 75 OCR-747, this Court also gave permission for availing the passport."

10. Even though the Passport Authority is relaying on a Division Bench order in creating the judgment of this Court in W.P.(C) No.4834/2022, unfortunately the order in creating such proceeding by virtue of such judgment does not give any reasoning as to why such judgment shall not be precedent. The Writ Appeal judgment with great humiliation and respect, this Court observes, it is absolutely unreasoned and unwarranted and appearing to be in abuse of process of law and in spite of the Single Bench judgment passed taking care of so many Hon'ble apex Court judgments indicating herein above allowing parties involved in grave criminal cases having there visiting overseas, the Division Bench appears to have completely ignored all such judgments,which have been passed by the Hon'ble apex Court even.

11. For the Hon'ble apex Court judgments indicated herein above applying to the case of the Petitioner and the reasons assigned on the aspect of illegality on the part of the Regional Passport Authority in asking for a court clearance, there has been illegal application of the provision at Section 6(2)(f) of the Passports Act, 1967. This Court, therefore, interfering in the direction part at Paragraphs-4 & 5 of the impugned order at Annexure-5 granting the Petitioner 30 days time from the date of receipt of that order producing before the Passport Issuing Authority an order from the concerned court allowing to go abroad and setting aside that part directs the Regional Passport Officer, O.P.2 for there is no hindrance in the foreign visit of the Petitioner to grant the renewal of the Passport without further involvement of the Petitioner and remits the renewal Passport of the Petitioner by completing all such exercise within seven days from the date of submission of this judgment.

12. Before parting with the case, it is observed, this Court in its entire practice period of 28 years and judgeship of 9 years has never come across in taking out the effect of such judgments in just three lines order by a higher Bench. There may not be any misunderstanding that the Division Bench has no jurisdiction, however, the Division Bench in such matter is required to apply its mind and give reason in taking out effect of such judgments otherwise such judgments will not be applicable in the legal parlance. It is also clarified here that for the Bench system in High Court and the practice followed in the roster or assignment for the administrative side decision of the Hon'ble Chief Justice, certain matters are taken up at Single Bench side and certain matters are taken up at Division Bench side. It is strange to observe here, there is perhaps a feeling in the Division Bench that they are having the absolute appellate authority over Single Bench judgment. Yes, there is no doubt, Writ Appeals lie in certain cases but only in letters patent otherwise there is no difference so far as functioning of the Single Bench and the Division Bench is concerned. In the event, Writ Appeals are taken up as a matter of routine then there is no confidence and sanctity in the Single Bench functioning.

13. The Writ Petition succeeds. No cost.

—— o ——

2023 (III) ILR – CUT- 117

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

W.P.(C) NOs. 845 OF 2019 WITH 30253 OF 2022

REGIONAL MANAGER, INDIAN OVERSEAS BANK, BHUBANESWAR .....Petitioner

.V.

TRILOCHAN DAS & ANR. .....Opp.Parties

W.P.(C) NO.30253 OF 2022

TRILOCHAN DAS -V- REGIONAL MANAGER, INDIAN OVERSEAS BANK, BHUBANESWAR

(A) CONSTITUTION OF INDIA, 1950 – Article 226 and 227– Scope of interference on the observation of fact finding authority/ Industrial adjudicator – Held, there is no scope for entertaining the writ petition at the instance of the management in exercising the writ Jurisdiction, when the fact finding observation of the industrial adjudicator is reasonable. (Para 11-12)

(B) BACK WAGES – The Labour Court directed 50% back wages – The workman challenge the same – Effect of – Held, in the entire reading of the statement of claim no where finds any averment or pleading of the workman disclosing that he remained wholly unemployed all through – It is in the above background of the matter, grant of 50% of back wages by the Labour Court is well justified. (Para 15-16)

For Petitioner : M/s. S.Udgata, A.Mohanty & A.Mishra
M/s.A.Mishra, R.K.Bose & A.K.Parida [WP(C) 30253/2022]

For Opp. Parties : M/s. A.Mishra, R.K.Bose & A.K.Parida
M/s. S.Udgata, A.Mohanty & A.Mishra [WP(C) 30253/2022]

JUDGMENT Date of Hearing & Judgment : 08.08.2023

BY THE BENCH

1. W.P.(C) No.845/2019 is filed at the instance of the Management challenging the whole award dated 25.1.2018 passed by the Presiding Officer, CGIT-cum-Labour Court, Bhubaneswar in I.D.Case No.2/2000 at Annexure-5 whereas W.P.(C) No.30253/2022 is filed at the instance of the Workman represented through the second party confining a challenge to the award of compensation towards backwages aspect in the same award. Both the Writ Petitions since involve common parties, however, the challenge by such parties aims differently but there are common statement of claim, common written statement and evidence and the materials. Both these matters are taken up together and decided by this common judgment.

2. Background of the case is as follows :-

The Workman was an Employee of the Management herein. Being duly selected the Workman was appointed as Clerk-cum-Cashier cum-Godown Keeper by the Regional Manager, Calcutta and posted as such in the Indian Overseas Bank, Bhawanipatna. While continuing as such, the Workman was transferred to Lanjigarh Branch in the same capacity. There again involves another transfer of the Workman

to the Indian Overseas Bank, Bhubaneswar Branch. The Workman while so continuing was placed under suspension from his service on 14.11.85 on the allegation that he had clandestinely removed bank draft leaf no.OL/84/71946 from Draft Book at the Branch and filled up the draft in favour of one Sarat Kumar Pujapanda for Rs.16,000/- showing to be prepared on 17.4.1986 and Sl.No.19/42 and he had drawn the same at Sahid Nagar Branch of the Bank. He was charge-sheeted under the premises of misutilising the draft along with the forgery signature of the Branch Manager and the Accountant in preparing such draft. This led to a disciplinary proceeding by submission of charge-sheet on the Workman along with the suspension order dated 24.8.87. On being communicated with the charge-sheet and asking to show cause, the Workman submitted his show cause reply on 22.1.1988 completely denying the allegation. In conclusion of the enquiry, the Enquiring Officer submitted a report finding the Second Party to be guilty of the charges. The Workman has preferred an Appeal before the appellate authority. Material discloses, the Appeal was also dismissed. On the Workman preferring a Review Petition though the statement of claim indicated that the Review Petition was pending for disposal, however, there has been no further information as to the development, if any, involving such Review Petition. It is on the premises of completion of enquiry proceeding in half-hazard manner and without following natural justice, the Workman raised an industrial dispute. Since there was inordinate delay in making reference, it appears, the Workman was constrained to bring a Writ Petition to this Court being registered as O.J.C. No.5645/1994. Both the Parties made it clear to this Court that the said Writ Application was dismissed on 9.2.1995 and as a consequence of the direction in the above Writ Application, appropriate reference was made under the provision of Section 10(2-A) of the Industrial Disputes Act (herein after called as "the Act"). On 26.12.90/13.7.2000 for industrial adjudication of the following reference :-

> "I) Whether the action of the Management of the Indian Overseas Bank in dismissing the Workman from his service of the Bank is justified?
>
> II) To what relief the Workman is entitled to ?

3. Reference having been made, the Workman submitted statement of claim under the following premises :-

> "9. That the Enquiry Officer did not take into account the relevant material facts of the depositions of the witnesses presented before him and failed to show impartiality in conducting enquiry. Irrelevant facts and inadmissible evidence for the purpose of the enquiry were taken into account against the Second Party.
>
> 10. That through all the witnesses adduce evidence in favour of the Second Party as to conduct and past service record that was not taken into consideration. Even there was no material as to ill-motive or intention of the Second Party to cause damage to the property of the Bank or prejudicial to the interest of the bank or causing serious loss to Bank the Enquiry Officer found the second party lack of integrity and conduct unbecoming of a bank employee.

11. That none of the provisions of the settled principles of law were adhered to before the commencement of enquiry. Even the appeal of the petition was not dealt with as per the guidelines and settlement.

12. That the established facts in the enquiry was not taken into consideration. The procedural latches of the Management and deviation of regular principle and practice of the bank which led to victimisation of the second party was not taken into consideration by the Enquiry Officer. Moreover, the mind of the disciplinary Authority who acted as Enquiry Officer has titled against the second party from the very beginning. As without authority, the enquiry officer initiated the proceeding the Second Party failed to get the fruits of justice and equity.

13. That so far as the basis or the source of the charge sheet was not made known to the second party at the first instance available to the Management. And this latches on the part of the Management also led to failure of justice to the Second Party workman in the enquiry.

14. That the Enquiry Officer has not applied his judicious mind to the material particulars of the evidence. The evidences and documents placed in the enquiry if taken into consideration can under no circumstances prove the preponderance of probabilities.

15. That though there is no evidence regarding presentation of the called forged demand draft on the drawing bank it was held to be an act of attempt against the interest of the bank. On the contrary it is a proved case of the second party through the witnesses presented by the first party Management that there cannot be any suspicion on the conduct of the Second Party Workman.

16. That so far as the dismissal of the appeal of the second party by the appellate authority is concerned the order of dismissal was not passed judiciously. Rather in a mechanical manner the appeal of the Second Party was dismissed in late."

4. Statement of claim is appearing at Annexure-1 to W.P.(C) No.845/2019.

5. Consequent upon service of statement of claim, the Petitioner in the first Writ Petition and the O.P. in the second Writ Petition in the capacity of Mandamus brought written statement, vide Annexure-2 to W.P.(C) No.845/2019. In their attempt to the opposition of reference and the statement of claim they challenged on the following grounds:-

"14. That as regards the averments made at paragraph-1 of the statement of claims it is humbly submitted that the reference is bad on the ground of long delay of 12 years and lack of existence of industrial dispute. The 2nd party-workman is guilty of laches as he did not pursue his remedy with the ministry of labour and the learned industrial tribunal for early consideration of claim and hence the present claim made by the 2nd party-workman is liable to be rejected as stale and highly belated.

15. That the averments made at paragraphs-2 and 3 of the statement of claim are matters of records and do not need any comment, except that the allegations made at paragraph-3 are very serious in nature and derogatory to the standard of conduct expected of a bank employee.

16. That the averments made at paragraphs-4 and 5 of the statement of claim are matters of records. As already stated earlier the enquiry was conducted as per the provisions of

the bipartite settlement and allowing all reasonable opportunities to the 2nd party-workman in due adherence to the principles of natural justice.

17. That the averments made at Paragraph-6 of the statement of claims are not all correct and such of the averments which are contrary to records are denied. It is humbly submitted that the 2nd party submitted an appeal dt.29.8.88 against dismissal order but not against the findings of the Enquiry Officer as stated wrongly. The appeal preferred by the 2nd party was duly considered by the Appellate Authority and disposed of on 29.11.88 confirming the punishment of dismissal. The appellate order is well reasoned and speaking order. It is denied that the review petition filed by the 2nd party is still pending for disposal with the 1st party-Bank. There is no provision under the bipartite settlement enabling a dismissed workman to seek review of the punishment and therefore there is no question of the Bank considering any review of the punishment nor the 2nd party could ventilate any grievance on this score.

18. That the averments made at paragraph-7 of the statement of claim are not correct and do not improve the case of the 2nd party as he had received the subsistence allowance as per the provisions and participated in the enquiry along with his defence representative. At any rate, there has never been any dispute pertaining the suspension/subsistence allowance at any time in the past.

19. That the averments made at paragraph-8 do not assist the 2nd party workman in any manner. The enquiry has been conducted adhering to the rules in that behalf set-out in the bipartite settlement. The 2nd party has never ventilated any grievance as regards the examination of any particular witness nor, there has been any deviation in the examination of M.Ws. in the domestic enquiry. At any rate, he was free to examine any witness in his defence in the enquiry proceeding. Examination of number of witnesses or any particular witness in order to establish the charges cannot be at the desire of the 2nd party-workman. Of course, for non-examination of any particular witness for which the charges may not be fully established, the 2nd party could always take advantage of the same. But in the present case the charge having been established, the 2nd party-workman cannot derived any benefit by alleging that so called star witness has not been examined in the enquiry. If anything of the type has happened, the workman can always capitalise from such lapses.

20. That the averments made at paragraph-9 and 10 of the statement of claim are vague and/or incorrect. The 2nd party workman should have substantiated his contention as to which relevant material fact of the deposition of the witnesses was not taken into consideration by the Enquiry Officer. He has also not given any account at to which irrelevant fact was taken into account by the Enquiry Officer against the 2nd party. It is submitted that the Enquiry Officer has taken into account all material evidence both oral and documentary, placed in the enquiry and after duly considering the same he came to the conclusion that the charges framed against the 2nd party were fully established. The allegation that the Enquiry Officer failed to show impartiality in conducting enquiry is not only subjective and unsupported by materials, but is totally false and hence denied. There is no presumption that past records of an employee which was not tainted with same, would continue to be good at all future time. If any charge is established based on materials on record, the plea of past good conduct loses its credibility. In the present case the charges proved against the 2nd party were serious. The Bank cannot retain such person of doubtful integrity, in service as this will be prejudicial to the interest of the Bank. The mere fact that there was no loss to the Bank will not justify the serious

misconduct committed by the 2nd party involving in deceitful activities of the nature as in the present case. The Bank thrives on public good will and integrity of the bank employee is the paramount consideration to command faith of his employer. An employee who ventures to stealthily remove important material and forge signatures of other officials in preparing a document by which the bank could be defrauded of money to the tune of Rs.16,000/- cannot have any right to defend himself to continue in bank service. Exhibition of such conduct by a bank employee is grave enough to render him unworthy of bank service and untrust worthy of reposing confidence on him and entrusting him duties in a bank.

21. That the averments made at paragraph-11 of the statement of claim are evasive and imaginary and hence denied. As already stated earlier the principles of natural justices and provisions contained in bipartite settlement were fully followed while holding enquiry against the 2nd party. It is denied that principles of law were not adhered to before commencing the enquiry. The 2nd party has not stated that principles of law were not adhered to the enquiry has been initiated and concluded in conformity of the procedure laid down in the bipartite settlement. It is denied that the appeal of the 2nd party was not dealt with as per guidelines of settlement. The Appellate Authority fully considered the relevant materials on records of the enquiry and came to the right conclusion that the 2nd party was guilty of charges.

22. That the averments and allegations made at paragraph-12 of the statement of claim are vague, unsustainable and incorrect and hence, denied. The 2nd party has not stated which facts were not taken into consideration by the Enquiry Officer. He has also not mentioned what were the procedural lapses and deviation of regular principles and practice of the Bank in the matter of disciplinary proceeding. It is asserted that the proceeding against the 2nd party has been followed conforming to the procedure laid down in the bipartite settlement. It is denied that the mind of the Disciplinary Authority tilted against the 2nd party from the beginning as alleged. It is humbly submitted that the Disciplinary Authority acted in fair and impartial manner in conducting the enquiry in conformity with the procedure as per the rules. It is also denied that the Enquiry Officer acted without authority, as alleged. In terms of provisions contained in the bipartite settlement, Sri V.Srninvasalu was appointed as Enquiry Officer and he was himself the Disciplinary Authority. As per bipartite settlement the Chief Executive of the 1st party had issued circular appointing Sri V.Srinivasalu as Enquiry Officer and he had full authority to hold enquiry and to pass necessary orders imposing punishment. This is in conformity with the provisions of the bipartite settlement. Hence, it is incorrect to state that the Enquiry Officer acted without authority.

23. That the averments and allegations made at paragraph-13 of the statement of claim are not correct and hence denied. The charge-sheet was specific and descriptive so as to be understood in its meaning and purport. The charges framed against the 2nd party were fully established by the oral and documentary evidence placed in the enquiry by the Management and the 2nd party had been extended ample opportunity to meet and defend his case. In the circumstances, there was failure of justice meted out the 2nd party-workman in the enquiry, as alleged. The allegations are neither real nor convey any specific meaning.

24. That the averment made at paragraph-14 of the statement of claim are vague and also not correct and hence, denied. It is submitted that the Enquiry Officer fully applied his mind to the material evidence available on records while coming to definite conclusions.

It is denied that the evidence and documents placed in the enquiry have not proved the guilt of the 2nd party, as alleged. On the other hand the charges have been fully established in the enquiry on the basis of material legally brought on records of the enquiry.

25. That the averments made at paragraph-15 of the statement of claim are not correct and hence denied. The fact that a draft leaf was removed by the 2nd party and fille in him and the signatures of the management and accountant were forged, have been fully established in the enquiry. Merely because the spurious demand draft for an amount of Rs.16,000/- was not presented for payment, does not absolve the 2nd party of the seriousness of the misconduct committed by him in unauthorisedly removing the documents and forging signature of the other officers of the Bank and his preparations for defrauding the Bank by Rs.16,000/-. The averments in this paragraph by no stretch of imagination would render the activities and conduct of the 2nd party innocent merely because he was caught before he had presented the draft for encashment.

26. That the averments made at paragraph-16 are not correct. The order passed by the Appellate Authority is well reasoned and a speaking order. It has not been passed mechanically as alleged. It is denied that the same was not passed judiciously.

27. That the averments made at paragraph-17 of the statement of claim are not correct and denied. The punishment of dismissal as inflicted on the 2nd party is warranted and justified taking into consideration the seriousness of the misconduct committed by him. The 2nd party stealthily removed the blank demand draft leaf from the custody of the branch and forged it to appear as if it was true one and forged signatures of the Branch Manager and Accountant. Such serious acts of misconduct warrant detergent penalty. The 2nd party who was a bank employee was expected to have highest degree of integrity but he was found to be totally untrustworthy by betraying the confidence of the employer. Hence, the punishment inflicted on the 2nd party is well merited in the facts and circumstances of the case. It is asserted that there has been no infraction of para 17.12(C) of the settlement as alleged or that any alleged deviation shall render the final action invalid.

28. That no relief as prayed for, or at all, it available to the 2nd party and the prayer made in the statement of claim be negatived.

29. That the 1st party has conducted a fair enquiry preceding the dismissal of the 2nd party from service under the 1st party, it is humbly submitted that the learned Tribunal may be pleased to take up the fairness of the enquiry as a preliminary issue and in case for any reason, what-so-ever, it is adjudged that the enquiry is not fair and proper, the 1st party may be permitted to substantiate the charges by leading fresh/additional evidence."

There is material disclosure that there has been also adducing of evidence both in pre and post phase hearing. As an outcome there has been allowing of answering of reference in positive in favour of the Workman, while observing there is no fair conducting of the disciplinary proceeding, the Labour Court held, the dismissal of the Workman since illegal and unjustified, considering the Workman had already superannuated in the meantime since November, 2015, in its award dated 25.1.2018 granted by way of relief payment of 50% of his entitled wages, for the period from the date of his dismissal to the date of his superannuation and other

consequential service benefits to which the Workman would have been entitled to at the time of superannuation in the event of his continuance in service. It was also further directed, the award, vide Annexure-5 was to be complied with within three months from the date of its notification in the official gazette, failing which the Workman was to be entitled to receive the accrued amount with simple interest of 9% from the date of award.

6. As stated earlier both the Management as well as the Workman has come in two different Writ Petitions indicated herein above. The Management in the first Writ Petition challenged the award at Annexure 5 on the following grounds :-

> "9) That the petitioner respectfully submits that the learned Tribunal failed to appreciate that the domestic/disciplinary inquiry cannot be said to have been not properly held if (i) the employee proceeded against has been informed clearly of charges levelled against him, (ii) the witnesses are examined ordinarily in the presence of the employee- in respect of the charges, (iii) the employee is given a fair opportunity to cross examine witnesses, (iv) the employee is given a fair opportunity to examine witnesses including himself in his defence if he so wishes on any relevant matter, and (v) the inquiry officer records his findings with reason for the same in his report.
>
> 10) That the petitioner respectfully submits that the learned Tribunal failed to appreciate that there was no failing on any of the aforementioned condition, the inquiry proceeding was held in due compliance with principle of natural justice and the industrial dispute between the Indian Overseas Bank Ltd and its workmen as amended from time to time hereinafter called in short the disciplinary action and procedure therefor. True copies of the said enquiry proceeding and the relevant extract of the settlement for the industrial dispute between the Indian Overseas Bank Ltd and its workmen are annexed hereunto and marked as Annexure-6 & 7 Series.
>
> 11) That the petitioner respectfully submits that the learned Tribunal failed to appreciate from the materials available on record that the workman did not cross examine the 4th witness who was the investigating officer in the CBI Case in spite of receipt of copy of deposition and several opportunities extended to him.
>
> 12) That the petitioner respectfully submits that the learned Tribunal failed to appreciate that rules of evidence do not apply to departmental enquiries, wherein the only test is compliance with the principle of natural justice and rules governing the enquiry. Hence the disciplinary authority is well within his rights to act upon the statement made by the witnesses voluntarily before the investigating officer of the CBI during the course of interrogation.
>
> 13. That the petitioner respectfully submits that the learned Tribunal failed to appreciate from the material available on record that the workman admitted to have the list of witnesses and documents including the demand draft and at no point of time raised any objection in this regard.
>
> 14) That the petitioner respectfully submits that as per the disciplinary action and procedure therefor, the appointment of presenting officer is not provided and the disciplinary authority can act as inquiring officer and in the instant case the disciplinary action and the inquiry has been done by a duly notified officer as per the disciplinary action and the inquiry has been done by a duly notified officer as per disciplinary action and procedure therefor.

15) That the petitioner respectfully submits that pursuant to the said disciplinary action procedure, the person competent to take disciplinary action and hold inquiry has been duly notified. A true copy of the said notice in favour of the disciplinary authority is annexed hereunto and marked as Annexure-8.

16) That the petitioner respectfully submits that after following the due procedure and observance of natural justice at every stage of inquiry the workman was dismissed from service and the workman preferred an appeal before the competent authority. The appellate authority on due consideration of the appeal filed by the workman and the material available on record confirmed the order of punishment of dismissal and dismissed the appeal. True copies of the said appeal preferred by the workman and the order of the appellate authority are annexed hereunto and marked as Annexure-9 Series.

17) That the learned Tribunal failed to taken into consideration the contention of the said appeal preferred by the workman and marked as Ext-9/31 where the workman clearly admitted to his lapses and assured not to repeat the same in future.

18) That the petitioner respectfully submits that the impugned finding of the learned Tribunal is perverse in as much as the copy of the bank draft filed in Tribunal was marked Ext-10 without objection. True copy of the said bank draft is annexed hereunto and marked as Annexure-10.

19) That the petitioner respectfully submits that the learned Tribunal failed to appreciate that the delay in filing the ID Case No.2 of 2000 caused severe prejudice to the petitioner in as much as most of the material witnesses have retired. A few of them expired in the meanwhile and there is immense difficulty in retrieving the old record subject matter of CBI investigation as well as disciplinary proceeding held long back.

20) That the petitioner respectfully submits that the learned Tribunal committed jurisdictional error in granting the workman 50% of his entitled wages and other consequential benefits even though the workman has not pleaded of his neither being gainfully employed nor employed for lessor wages.

21) That the petitioner respectfully submits that the learned Tribunal ought to have declined to grant back wages to the workman in the facts and circumstances of the case.

22) That the petitioner respectfully submits that the learned Tribunal committed grave illegality in not granting adequate opportunity to the petitioner to prove its case by bringing in the witnesses and the old documents in an ID Case initiated by the workman belatedly twelve years after his dismissal from service.

23) That the petitioner respectfully submits that the learned Tribunal committed grave illegality with material irregularity in not considering the notes on submission filed by the petitioner.

24) That there being no alternative efficacious remedy the petitioner move this Hon'ble Court for appropriate relief(s) enumerated hereunder."

7. Similarly the Workman bringing the subsequent Writ Petition confined its challenge to the quantum aspect only on the following grounds:-

"10. That, it is not out of place to mention here that while considering the case on its proper perspective and on the basis of documents available, the learned CGIT, Bhubaneswar though categorically observed that the Departmental enquiry was not conducted in a fair and proper manner with conformity with the principle of natural

justice as well as, the enquiry has not conducted by the Enquiry Officer. Even though ample opportunity was provided to the Opposite Party-Management Bank. Therefore, the award dated 25.01.2018 is bad, illegal, improper, unjust and liable to be set aside.

11. That, as per the settled principle of laid down in many judicial pronouncements that the Enquiry Officer to any enquiry is always acted as an Umpire being an impartial person to adjudicate the dispute. But in the present context, it is the specific observation of the learned CGIT that the Enquiry Officer has played a triple roles during course of enquiry by acted himself as Disciplinary Authority, Enquiry Officer and Presiding Officer. So, on this ground though the finding of the Tribunal is in clear cut affirmation, but awarding benefit of 50% of entitlement of wages with other consequential benefit instead of 100% entitlement of wages is not correct and that portion indicated at para-11 of the Award be set aside and modified to 100% of entitlement.

12. That, even though in the Award, preliminary issue was framed on fairness and propriety of the domestic enquiry, but the Management did not availed the opportunity to cross examine the Workman-Petitioner for which the evidence on affidavit remains unchallenged and uncontroverted. So, on that basis also the 100% entitlement should have been awarded by the learned CGIT. But restricting to 50% Award is not correct and required to be modified.

13. That, apart from the other issues, when it is found and established from record that the enquiry has been found defective due to non-compliance of natural justice, thereby the dismissal from service was not proper. Furthermore, during enquiry also the forged Bank Draft Leaf was neither produced nor any explanation to that effect was also advanced by the Management-Opposite Party. Therefore, the entire charge against the Petitioner-Workman is appears to be baseless and concocted.

14. That, furthermore, it was not established during course of enquiry that the Management-Opposite Party do not make out any prima facie of serious misconduct being committed by the Petitioner-Workman, but the finding of the Disciplinary Authority was based on mere surmises and conjecture for which the Award to pay 50% of the Entitlement wages from the date of dismissal to date of retirement is not proper and required to be modified.

15. That, though the Petitioner-workman was suspended on 14.11.1986, but the charge-sheet was submitted on 24.08.1987. But the enquiry could not be conducted in time, due to negligence in part of the Management-Opposite Party for which the innocent Petitioner-Workman should not suffer. As a result, the operating portion of the Award at para-11 is required to be modified in the interest of justice.

16. That, it is also apt to mention here that when Management-Opposite Party could not established the charge against the Petitioner-Workman beyond reasonable doubt by way of producing cogent evidence. In that event, the Workman-Petitioner should not suffer due to latches of the Management-Opposite Party. Therefore, the Petitioner Workman is entitled to 100% of wages from the date of dismissal till the date of retirement.

17. That, it is further to submit here that when the Management-Opposite Party have himself failed to the charges levelled against the Petitioner-Workman by way of domestic enquiry, but latter on finding of the learned Tribunal about payment of 50% of the entitled wages is not correct and liable to be modified.

18. That, it is also the trite of law that any delinquent/ Workman should not suffer due to delay and latches for which the party concern like the Petitioner is not responsible. In

> that event the learned Tribunal in a pragmatic approach should have Award 100% admitted wages for which the operative portion of the Award at page-11 is not proper, required to be modified in the interest of justice.
>
> 19. That, it is not out of place to mention here that when the duty cast upon the Disciplinary Authority to prove the charges beyond reasonable by adducing cogent evidence, but non-exhibiting the evidence in support of the charges, the Petitioner-Workman have honorary discharge/ exonerated from the liability but passing of Award by the learned Tribunal restricting the benefit to 50% instead of 100% is not sustainable and liable to be modified.
>
> 20. That, in view above facts and circumstances, the Petitioner-Workman feels it justify approaching this Hon'ble Court under Article 226 and 227 of the Constitution of India for justice and efficacious remedy by way of exercising the extraordinary plenary power of this Hon'ble Court."

8. Mr. A. Mohanty, learned substituted counsel appearing for the Management taking this Court to the stand of the Management through the written statement filed in the industrial adjudication and the grounds taken note herein took support of the above in assailing the award involved herein.Mr.Mohanty took us to the discussions, findings and observations of the Industrial Adjudicator in his attempt to establish his case. Mr.Mohanty attempted to contend that the adjudication of the Industrial Adjudicator is bad in law and prayed for setting aside the same.

9. Mr.A.Mishra, learned counsel for the Workman similarly taking this Court to the reasoning in the statement of claim further taking support of the grounds in its Writ Petition and taking this Court again to the observation of the Industrial Adjudicator attempted to satisfy that there has been less payment towards backwages.

10. It is keeping in view the rival contentions of the Parties, this Court finds, undisputedly the dispute already involved a disciplinary proceeding proceeded up to Appellate stage, proceeded up to Review stage, however with concrete information as to confirmation of the order of the Disciplinary Authority. This Court in the above background finds, in examining the reference involved, the Labour Court was right in entering into first determining the fairness in the disciplinary proceeding. In his proceeding to find fairness in the disciplinary proceeding to lead to final outcome in the industrial adjudication, the Labour Court asked both the Parties to lead their evidence to substantiate their respective pleas on the validity of the disciplinary proceeding. Based on submission of the learned counsel for the respective Parties and materials brought through the evidence led by both the Parties answering on the question as to whether the domestic enquiry conducted against the Workman was fair and proper? framed as Issue No.1 in the industrial adjudication, the Labour Court has the following observations :-

> "8. Coming to the fresh evidence directly led before this Tribunal by the Management for establishing the misconduct of the workman it is seen that the Management has depended upon the oral testimony of M.W.-1, who is stated to be working along with the

disputant workman in its Sahidnagar Branch at the relevant time and the domestic enquiry proceeding file marked as Ext.-9/01 to 9/32 in view of the principles and observations made by the Hon'ble Apex Court as discussed in supra there is no confusion to say that evidence or materials led before the enquiry officer except the documents led and exhibited before this Tribunal are anyway helpful to the Management to prove the misconduct of the workman. Admittedly, the forged Bank draft leaf in original has neither been produced before this Tribunal nor any explanation has been led as to where-about of the said forged Bank draft. Though, M.W.-1 has made a statement that the draft the leaf was stolen by the disputant workman, he has admitted to have not seen the workman stealing the same. On the other hand, it is emerging from the cross examination that the concerned Bank draft book was with him when the draft was stated to have been stolen. There is nothing specific either in the oral evidence of the M.W.-1 nor in the departmental proceeding file to suggest that the stolen Bank draft after being filled-up in favour of Shri Sarat Chandra Pujapanda was ever in possession of the disputant workman. It is not also in evidence of the Management led before this Tribunal or any paper exhibited along with departmental proceeding file to arrive any conclusion that the CBI had recovered the forged draft from the possession of the workman. It emerges from the oral testimony of M.W.-1 that the departmental proceeding was initiated against the workman after he was being entangled by the CBI in an investigation carried against stealing of such Bank draft was sent along with the hand-writing of the disputant workman for examination by a hand writing expert, no evidence is produced before this Tribunal to show the opinion of the hand writing expert. There is no material or evidence at all on behalf of the Management to establish that the hand-writing found in the Bank draft leaf belonged to the hand-writings of the disputant workman. He was never entrusted any Bank draft book and it is stated that such books are being kept in the lock and key of the Management Bank. The Management is also unable to say as to the result of the case against the disputant workman initiated by the CBI. Thus, the materials and evidence led before this Tribunal by the Management do not make out any prima facie case of serious misconduct being committed by the disputant workman and he appears to have been held guilty of misconduct on mere suspicion only.

9. In domestic enquiry the strict rules of evidence are not applicable and guild need not be established beyond reasonable doubt. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided; it has reasonable nexus and credibility. But in the instant case the findings of enquiry officer appears to be without any evidence. So also the Management has failed to led any probative materials before the Tribunal to hold the disputant workman either to have stolen the Bank draft leaf of in possession of the same or the entries and hand-writing found thereon was the hand-writing of the disputant workman. Hence, it can be held safely that the Management has failed miserably to establish the misconduct of the workman and as such the dismissal of the workman cannot be said legal and justified in any manner."

11. Reading the aforesaid, this Court observes there has been clear finding by the industrial adjudicator holding the disciplinary proceeding involved herein is unfair. For the fact-finding observation of the industrial adjudicator with sound reasoning, this Court finds, there is defect in entering into the questions raised by the Management in exercise of writ jurisdictional power of High Court. It is in the

circumstance and for the clear finding of the Labour Court, this Court finds, there was no other alternative on the part of the industrial adjudicator, the Labour Court to come to hold, the disciplinary proceeding involved herein remains unfair and accordingly compelled to answer Issue No.I in favour of the Workman.

12. In the circumstance, this court finds, there is no scope for entertaining the Writ Petition at the instance of the Management, which is hereby dismissed for having no merit.

13. This Court is taking up two Writ Petitions together as indicated herein above. The first Writ Petition bearing W.P.(C) No.845/2019 is at the instance of the Management involving the same award dismissed as held in the paragraph above. So far as W.P.(C) No.30253/2022 is concerned, this Writ Petition as already disclosed herein above at the instance of the Workman confining to the part of the grant of relief as a consequence of industrial adjudicator holding the disciplinary enquiry is unfair and as a consequence directing reinstatement of the Workman with grant of backwages @ 50% for the period the Workman was prevented from working unlawfully.

14. Coming to deal with the above, keeping in view the rival contentions of the Parties in this regard, this Court finds, this issue has been taken care of by the industrial adjudicator all through. In its answer to Issue No.II & IV, Issue No.IV particularly keeping in view the challenge of the Management on the maintainability of the reference for the industrial dispute raised at a belated stage came to give its finding at Paragarph-10 taken down as herein below :-

> "10. Challenge has been made to the maintainability of the reference on the ground of the industrial dispute being raised at a belated stage i.e. after lapse of twelve years from the order of dismissal of the disputant workman. Undisputedly the workman was dismissed from service on 17.07.1988 and the reference was made to this Tribunal on 26.12.1990. Though, pleadings have been advanced in the statement of claim that the workman raised a dispute timely and preferred writs before the Hon'ble High Court of Orissa challenging the action of the Management, any evidence either in shape of document or in oral has been led before this Tribunal in regard to the reason of the reference being made to the Tribunal after such lapse of twelve years. At the same time it cannot be over-sighted that the limitation Act, 1963 is not applicable to the reference made under the Act. However, delay in raising industrial dispute is definitely an important circumstance which the Labour Court must keep in view at the time of exercise of discretion irrespective of whether or not such objection has been raised by the other side. It is profitable to mention here that in the case between Ajaib Singh-versus- The Sirhind Co-operative Marketing Cum-Processing Service Society Limited and Another (1996) 6 SCC 82 while dealing with similar plea of delay in raising the dispute have opined that relief cannot be denied to the workman merely on the ground of delay, stating that:-
>
> "It follows, therefore, that the provisions of Article 137 of the Schedule of Limitation Act, 1963 are not applicable to the proceedings under the act and that the relief under it cannot be denied to the workman merely on the ground of delay. The plea of delay if

> raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the labour court can be generally questioned on the ground of delay alone. Even in a case where the delay is shown to be existing, the tribunal, Labour Court or board, dealing with the case can appropriately mould the relief by declining to grant back wages to the workman till the date he raised the demand regarding his illegal retrenchment/termination or dismissal. The Court may also in appropriate cases direct the payment of part of the back wages instead of full back wages.
>
> It is also well settled that when the order of discharge or dismissal of a workman is found to be illegal and unjustified, the powers of the adjudicator are wide enough to grant the relief to the aggrieved workman {(Rambhau – versus - Maharashtra State Road Transport Corporation (1992) 2 LLI 872, 880 (Bomb)} can be reinstatement with back wages or it may even be of a part of back wages in the case if the workman was not wholly blameless. Lump-sum compensation in lieu of reinstatement or back wages can be also awarded. The power to give these reliefs is inherent in industrial adjudication. It is well settled that before exercising its judicial discretion the Tribunal or Court has to keep in view all relevant factors including the mode and manner of appointment, nature of employment, length of service, the ground on which termination has been set aside and the delay in raising industrial dispute before granting relief in an industrial dispute usually followed."

15. Reading the aforesaid, this Court finds, for the factual scenario involved herein, there cannot be any fault found with the Workman on his attempt before the Industrial Adjudicator and the delay caused by the Central Government being the appropriate Government, even then the Labour Court here has come to grant 50% of backwages. This Court here further observes, in the entire reading of the statement of claim and the Writ Petition at the instance of the Workman, further the counter affidavit at the instance of the Workman to W.P.(C) No.845/2019 nowhere finds any averment or pleading of the workman disclosing he remained wholly unemployed all through. It is in the above background of the matter, this Court finds, grant of 50% of backwages by the Labour Court is well justified.

16. In the circumstance, this Court finds, there is no substance in W.P.(C) No.30253/2022, which is accordingly dismissed.

17. Thus while dismissing both the Writ Petitions for having no merit, this Court here finds, by order dated 18.3.2019 passed in W.P.(C) No.845/2019, there has been grant of interim stay of operation of the award dated 25.1.2018, vide Annexure-5, which order is continuing as of now. This Court thus finds, for there is stay of operation of the impugned award passed by this Court, the benefit followed through the award could not be released in favour of the Workman. At the same time, for the interim protection in favour of the Management, there is bona fide retention of the benefit through the award by the Management. This Court here also considers the plight of the workman for not able to enjoy the fruit of the award for such long period, benefit falling through the award may be for the reason of interim protection of this Court.

18. Considering the benefit accrued through the award is at the hand of the Nationalised Bank, it is here keeping in view the interest of the Workman in the minimum, the workman will be entitled to interest @ 5% per annum on the amount involving the award from the date of filing of W.P.(C) No.845/2019 on 11.1.2019. It is made clear, if the entitlement of the Workman falling through the award involved herein is not released within a period of one month, he will also be entitled to interest @ 9% per annum from the date of award.

19. As a word of caution in the case of staying the benefits through industrial adjudication, for the opinion of this Court, we should be careful enough while staying the award of this nature involved at least to ensure keeping the benefit falling through the award in Fixed Deposit to appropriately benefit the Party in win.

20. Both the Writ Petitions stand dismissed but however in the circumstance, there is no order as to cost.

—— o ——

2023 (III) ILR-CUT-131

S.K. SAHOO, J.

JCRLA NO. 27 OF 2020

SIBA SAHOO .....Appellant

.V.

STATE OF ODISHA .....Respondent

(A) CRIMINAL TRIAL – Offence U/s. 376(2)(i) of the Indian Penal Code r/w Section 6 of the Protection of Children from Sexual Offences Act, 2012 – The victim was sixteen years at the time of occurrence – Evaluation of evidence of child witness – Law regarding admissibility of evidence of child witness – Discussed.

(B) CRIMINAL TRIAL – Reduction of sentence – Relevant factors discussed with reference to case laws.

Case Laws Relied on and Referred to :-

1. (2023) SCC OnLine Ori 4474 : Dilu Jojo Vs. State of Odisha.
2. (2014) 1 SCC 129 : Sunil Damodar Gaikwad Vs.State of Maharashtra.
3. (1980) 2 SCC 684 : Bachhan Singh Vs. State of Punjab.
4. (1983) 3 SCC 470 : Machhi Singh & Ors. Vs. State of Punjab.
5. (2019) 9 SCC 622: Rabi S/O Ashok Ghumare Vs. State of Maharashtra.

For Appellant : Mr. Manoranjan Padhi

For Respondent : Mr. Manoranjan Mishra, ASC

JUDGMENT Date of Hearing & Judgment : 02.08.2023

S.K. SAHOO, J.

1. The appellant Siba Sahoo faced the trial in the Court of learned Special Judge (POCSO)-cum-Second Addl. Sessions Judge, Berhampur, Ganjam in G.R. Case No.77 of 2014 for commission of offence under section 376(2)(i) of the Indian Penal Code (hereinafter 'I.P.C.') and section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO Act') on the accusation that on 29.08.2014 at about 7.30 p.m. at Puruna Bazar Street, Bhanjanagar, he committed rape on the victim, who was under sixteen years of age and also committed aggravated penetrative sexual assault on the victim.

Learned trial Court vide judgment and order dated 07.01.2020 found the appellant guilty of both the charges and sentenced him to undergo rigorous imprisonment for a period of fifteen years and to pay a fine of Rs.10,000/- (rupees ten thousand), in default, to undergo rigorous imprisonment for a further period of six months for the offence under section 376(2)(i) of the I.P.C. No separate sentence was awarded for the offence under section 6 of the POCSO Act in the view of section 42 of the said Act.

One Simanchala Behera (P.W.2), the father of the victim (P.W.1) lodged the first information report (hereinafter 'F.I.R.') on 30.08.2014 before the I.I.C., Bhanjanagar Police Station stating therein that on 29.08.2014, the victim, who is his minor daughter and aged about six years, had been to one shop situated at Puruna Bazar Sahi, which was styled as Jaga Balia shop, for purchasing milk and the appellant called the victim on the pretext of giving her chocolates and committed rape on her and also assaulted her. The victim came back home crying and narrated the incident before her family members.

On receipt of such F.I.R., Bhanjanagar P.S. Case No. 237 dated 30.08.2014 was registered under section 376 of the I.P.C. and section 4 of the POCSO Act. The I.I.C., Bhanjanagar Police Station directed Shradhanjali Subudhi (P.W.16), Sub-Inspector of Police attached to Bhanjanagar police station to take up investigation of the case and accordingly, P.W.16 examined the informant, recorded the statements of witnesses and she also seized the wearing apparels of the victim, which she was wearing at the time of occurrence being produced by the informant as per seizure list vide Ext.3. The victim was sent for medical examination to S.D. Hospital, Bhanjanagar on police requisition. The I.O. examined the grandmother of the victim, prepared the spot map, arrested the appellant and sent him to S.D. Hospital, Bhanjanagar for his medical examination. She also seized the biological samples of the appellant and the victim being produced by the escorting police constables, seized the wearing apparels of the appellant as per seizure list vide Ext.7. The statement of the victim was recorded under section 164 of Cr.P.C. on the prayer of the I.O. She also received the medical examination reports and the exhibits were forwarded to the R.F.S.L., Berhampur for chemical analysis and the chemical examination report (Ext.12) was received and on completion of the investigation,

charge sheet was submitted under section 376(2)(i) of the I.P.C. and section 6 of the POCSO Act.

Witnesses & Exhibits:

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

P.W.1 is the victim. She supported the prosecution case and stated about commission of rape on her by the appellant.

P.W.2 Simanchala Behera is the father of the victim and he is also the informant in this case who lodged the F.I.R. vide Ext.2. He stated about the disclosure made by the victim about the commission of sexual assault on her by the appellant.

P.W.3 Anitarani Behera is the mother of the victim and she supported the prosecution case and stated to have noticed white stains over her panty and she also stated about disclosure made by the victim about the occurrence.

P.W.4 Dr. Resmarani Tripathy was working as Asst. Surgeon, Sub-Divisional Hospital, Bhanjanagar. She medically examined the victim on police requisition and she proved her report vide Ext.4/1.

P.W.5 is the grandmother of the victim (P.W.1) who supported the prosecution case and stated about the disclosure made by the victim about commission of rape on her by the appellant.

P.W.6 Susil Kumar Behera is the brother-in-law of the informant and stated about the disclosure made by the victim regarding commission of rape on her by the appellant.

The evidences of P.W.7 to P.W.12 are no way relevant for the case.

P.W.13 Sibaram Das was posted as an Assistant Sub-Inspector of Police at the Bhanjanagar Police Station. He was a witness to seizure of blue colour panty of the victim which was seized by the I.O. vide seizure list Ext.3 and one Moser Baer DVD which was seized vide seizure list Ext.5.

P.W.14 Hrushikesha Badatia was also the Assistant Sub-Inspector of Police posted at the Bhanjanagar Police Station who stated about the seizure of biological samples of the appellant and the victim as per seizure list Ext.6 and also the wearing apparels of the appellant vide seizure list Ext.7.

P.W.15 Brundaban Chandan Gouda was posted as O & G Specialist at Sub-Divisional Hospital, Bhanjanagar. He examined the appellant on police requisition and opined that appellant was capable of having sexual intercourse. He proved his report Ext.8/2.

P.W.16 Shradhanjali Subudhi was posted as the Sub-Inspector of Police at the Bhanjanagar Police Station and she is the I.O. of the case.

P.W.17 Saraga Kumar Satapathy was the Headmaster of St. Xavier's High School, Bhanjanagar who stated about the seizure of school admission register by the I.O. wherein the date of birth of the victim was mentioned to be 14.11.2008.

The prosecution exhibited thirteen numbers of documents. Ext.1 is the statement of the victim recorded under section 164 of the Cr.P.C., Ext.2 is the plain paper F.I.R., Ext.3 is the seizure list, Ext.4/1 is the medical examination report of the victim, Ext.5, Ext.6 and Ext.7 are the seizure lists, Ext.8 is the consent memo, Ext.9 is the spot map, Ext.10 is the command certificate, Ext.11 is the forwarding letter of learned S.D.J.M., Berhampur, Ext.12 is the chemical examination report and Ext.13 is the school admission register.

The defence plea of the appellant is one of complete denial.

Finding of the Trial Court:

The learned trial Court, after assessing the oral and documentary evidence on record, has been pleased to hold that the victim was below 16 years of age at the time of occurrence and hence, she was a 'child' within the meaning of section 2(d) of the POCSO Act. Learned trial Court further held that the evidence of the victim relating to rape being committed on her is getting support from the prosecution witnesses and particularly, her family members and it could not be assailed in any manner by the appellant. Learned trial Court further held that the prosecution has satisfactorily established its case that the appellant committed rape on P.W.1 (victim) and found him guilty under section 376(2)(i) of the I.P.C. and section 6 of the POCSO Act.

Contentions of Parties:

Mr. Manoranjan Padhi, learned counsel for the appellant contended that it is the prosecution case that the victim had been to the tea stall of one Jaga to bring milk when and the appellant approached her to give chocolates and told her to accompany him and forcibly took her to his shop and committed 'kharap kama' with her but Jaga has not been examined by the prosecution. It is further argued that though the victim came to her house and disclosed before her family members about the occurrence and also being examined as P.W.1 stated that the appellant removed her panty and committed wrong with her (SE MO SAHITA KHARAPA KAMA KALA), unless it is brought on record by clinching evidence what was the actual overt act committed on with her by the appellant, it is very difficult to come to the conclusion that there has been either 'rape' or 'aggravated penetrative sexual assault' on the victim. It is further argued that though the panty of the victim was seized during course of investigation and it was sent for chemical examination but the chemical examination report (Ext.12) indicates that the panty did not contain stain of either blood or semen. It is further argued that the mother of the victim stated that there were white stains over the panty of the victim; however, had that been so then the panty would have contained the stains of blood or semen.Therefore,

it falsifies that there was any kind of white stain on the panty of the victim. Learned counsel further submitted that minimum sentence prescribed for the offence under section 376(2)(i) of the Indian Penal Code is ten years and in view of the poverty, poor socio-economic condition and undeserved adversity in the life of the appellant, when the appellant has preferred this Jail Criminal Appeal and when the nature of the overt act committed by the appellant with the victim is not clear, the sentence should be reduced from fifteen years to minimum sentence of ten years, especially having sympathetic consideration for the fact that the appellant is in judicial custody since 30.08.2014, if at all this Court upholds the conviction of the appellant.

Mr. Manoranjan Mishra, learned counsel for the State on the other hand supported the impugned judgment and submitted that not only the evidence of the victim is clear, cogent and trustworthy but also from the evidence of the Headmaster of the School, who proved the admission register, it is established that the victim was six years of age at the time of occurrence. The victim narrated the whole incident before her family members immediately after the occurrence and her parents and grandmother have also stated about such disclosure. Learned counsel further argued that there was no earthly reason for the victim, a girl aged about six to seven years, to implicate the appellant falsely in a case of this nature and her disclosure immediately after the occurrence is admissible as res gestae under section 6 of the Evidence Act. It is further argued that the doctor (P.W.4), who examined the victim on the next day of occurrence, found that there was some white discharge present on her vagina and the general appearance of hymeneal opening was congested, inflamed and reddish and it corroborates the evidence of the victim. Learned counsel for the State further submitted that non-examination of the shop keeper Jaga cannot be a factor to disbelieve the evidence of the victim in a case of this nature. It is argued that the learned trial Court is empowered under section 376(2)(i) of the I.P.C. to impose punishment for life and therefore, it cannot be said that the Court has committed any illegality in sentencing the appellant to R.I. for fifteen years keeping in view the age of the victim and the nature and gravity of the accusation and therefore, the appeal being devoid of merit should be dismissed.

Age of the Victim:

Adverting to the contentions of the learned counsel for the respective parties, let me first analyze the evidence on record relating to the age of the victim. It appears from the evidence of the victim that she stated her age to be eight years when she deposed on 06.06.2016 and further stated that she was a student of Standard-III at the time of deposition and the occurrence took place when she was studying in Standard-II. The learned trial Court has assessed the age of the victim to be eight years and accordingly, reflected the same in the deposition sheet.

P.W.17, the Headmaster of the school, where the victim was prosecuting her studies, proved the school admission register (Ext.13) wherein the date of birth of the victim was mentioned to be 14.11.2008. He has denied the suggestion made by

the learned defence counsel that the date of birth entry has been made in the school admission register without any basis. In view of the settled position of law, the school admission register entry is admissible under section 35 of the Evidence Act. The defence has not brought any impeccable evidence of reliable persons and contemporaneous documents like the date of birth register to discard the entry in the school register. Since the learned defence counsel has not challenged the age of the victim when she was examined in Court as P.W.1 and in view of the entry of date of birth of the victim in the school admission register, she was aged about six years at the time of occurrence, I am of the humble view that the finding of the learned trial Court that the prosecutrix was less than sixteen years of age, when she was made a victim of the lust of the appellant, is quite justified.

Evidence of the victim whether acceptable:

The victim, being examined as P.W.1, was put some questions by the learned trial Court to assess her level of understanding. The learned trial Court recorded the questions and also the answers given by the victim to those questions and found that rational answers have been given by the victim to all the questions and therefore, she was held to be a competent witness to depose in the case.

The victim (P.W.1) stated that she was sent by her mother (P.W.3) to bring milk from the tea stall of one Jaga and she met an uncle who was standing at the said shop and was purchasing something. He gave her two chocolates and told her to accompany him and when she denied, the appellant forcibly took her to the shop and by removing her panty committed wrong with her (SE MO SAHITA KHARAPA KAMA KALA). Then the appellant gave slaps on her face for which she cried. The victim further stated that she returned her home crying and since the appellant threatened her not to disclose the incident before her mother, initially she did not tell her anything. However, subsequently, she being asked disclosed the entire incident to her mother. In the cross-examination, the victim has stated that she had gone to Jaga tea stall several times prior to the occurrence and that tea stall is near to her house. She further stated that except the appellant, no other person was present at Jaga tea stall. She also identified that Siba uncle (appellant) in Court. Nothing has been elicited in her cross-examination to disbelieve the evidence of this child witness.

Law is well settled that evidence of a child witness must be evaluated very carefully and scrupulously, as a child may be swayed away by what others tell her and can fall an easy prey to tutoring. Evidence of a child witness is acceptable if Court finds her competent after careful scrutiny of her evidence and if that is found to be reliable and of good quality.

The position of law regarding admissibility of evidence of child witnesses was precisely reiterated by this Court recently in the case of **Dilu Jojo –Vrs.- State of Odisha reported in (2023) Supreme Court Cases OnLine Ori 4474**, wherein it was held as follows:

> "Section 118 of the Evidence Act states that a child is a competent witness provided that he understands the questions put to him and is in a position to give rational answers to such questions. It is the duty of the Court while assessing the evidence of a child witness to see whether the child understands the duty of speaking the truth. The Court should make necessary examination of the child witness by putting a few questions in order to find out whether the witness is intelligent enough to understand what he had seen and afterwards to inform the Court thereof and also give his opinion that why it thinks that the child is a competent witness. The evidence of a child witness should be scanned carefully and if no flaws or infirmities are found therein then there is no impediment in accepting his evidence."

In the case in hand, the learned trial Court, after posing a few questions and recording answers of the victim thereto, has arrived at a conclusion that the child is able to give rational answers to all the questions and declared her as a competent witness, before adverting to record of her evidence. The testimony of the victim has remained unshaken and no evidence has been brought out to suggest that she propagated falsehood to foist a false case on the appellant.

The evidence of victim's mother (P.W.3) indicates that the victim had gone to Jaga tea stall for purchasing milk and the appellant offered her chocolates, took her inside his shop and removed her panty. There were white stains over the panty of her daughter and the appellant had threatened the victim not to disclose anything against him before anybody. She further stated that after the victim came home, she was in a state of panic being threatened by the appellant. She stated to have noticed white stains over the panty and on being asked, the victim disclosed about the occurrence. Therefore, the evidence of the victim gets corroboration from the evidence of P.W.3.

P.W.5, the grandmother of the victim stated that the victim returned home crying and on being asked, she told that the appellant did 'KHARAP KAMA' with her and she narrated the incident before her in details. She disclosed that the appellant took her inside the room, took off her panty despite her protest and he also took off his own pant, made her lie on the floor and he slept over her. The victim further told her that when she did not put off her panty, the appellant physically assaulted her. Therefore, not only before P.W.3 but also before P.W.5 there has been disclosure as to what has been done by the appellant with the victim. P.W.2, the father of the victim and P.W.6, the brother-in-law of P.W.2 have also stated about the disclosure made by the victim (P.W.1) implicating the appellant in her sexual assault.

It is correct that the victim has simply stated that the appellant did 'KHARAP KAMA' with her by removing her panty and not stated in details what was the 'KHARAP KAMA' but in view of the evidence of her mother (P.W.3) and grandmother (P.W.5) before whom she disclosed about the occurrence in details, it cannot be said that the appellant had not committed any overt act with her which would attract either the ingredients of the offence under section 376(2)(i) of the I.P.C. or section 6 of the POCSO Act.

The doctor (P.W.4) examined the victim on the very next day of occurrence on police requisition and she found that there was white discharge present on her vagina and general appearance of hymeneal opening was congested, inflamed and reddish. Of course P.W.4 found no sign of injury either on the body or the private part of the victim. Therefore, the evidence of the doctor (P.W.4) strengthens the prosecution case. The appellant was also medically examined by the doctor (P.W.15), who also opined that the appellant was capable of having sexual intercourse.

The chemical examination report, marked as Ext.12, no doubt indicates that the panty of the victim was having no blood or no semen stains, however, small patches of human semen were found on the jeans pant of the appellant, which was seized during investigation.

In the statement recorded under section 313 of the Cr.P.C., several questions have been put to the appellant, but except telling that he has been falsely implicated, no material evidence has been adduced on his behalf as to why he would be falsely implicated in a case of this nature by a young girl aged about six years. The evidence of the victim (P.W.1), her parents (P.W.2 & P.W.3), grandmother (P.W.5) and the doctor (P.W.4) clearly prove the ingredients of the offence under section 376(2)(i) of the I.P.C. and section 6 of the POCSO Act against the appellant.

Conclusion:

In view of the age of the victim at the time of occurrence which was six years and having regard to the definition of 'aggravated penetrative sexual assault' under section 5(m) of the POCSO Act which states that commission of 'penetrative sexual assault' as defined under section 3 of the POCSO Act on a child below twelve years would attract the offence, the learned trial Court has rightly convicted the appellant under section 6 of the POCSO Act so also under section 376(2)(i) of the I.P.C.. It appears that the minimum sentence provided for the offence under section 376(2)(i) of the I.P.C. is ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and he shall also be liable to fine.

In the case of **Sunil Damodar Gaikwad -Vrs.- State of Maharashtra reported in (2014) 1 Supreme Court Cases 129** while holding that the Court must not only look at the crime but also the offender and it must give due consideration to the circumstances of the offender, the Hon'ble Supreme Court has further held that poverty and socio-economic condition can be considered as some of the mitigating factors in addition to those indicated in the cases of **Bachhan Singh -Vrs.- State of Punjab reported in (1980) 2 Supreme Court Cases 684 and Machhi Singh & Others -Vrs.- State of Punjab reported in (1983) 3 Supreme Court Cases 470**.

Also, in the case of **Rabi S/O Ashok Ghumare -Vrs.- State of Maharashtra reported in (2019) 9 Supreme Court Cases 622**, the Hon'ble Apex Court has held that socio-economic condition of the appellant as a person below the

poverty line, can also be considered as one of the mitigating factors while weighing the aggravating and mitigating factors. There is no dispute that the appellant in this case is a below poverty line person which is manifested from the fact that he has preferred this Jail Criminal Appeal through the Prisoner Welfare Officer, Circle Jail, Berhampur on account of his financial difficulty. The case record does not indicate any criminal antecedent against the appellant.

Considering the poor financial condition of the appellant and in view of the aforesaid precedents of the Hon'ble Supreme Court, the passage of time since the date of occurrence, the period of detention in judicial custody which is about nine years by now and the young age of the appellant at the time of occurrence, I reduce the sentence awarded to appellant from rigorous imprisonment for fifteen years to rigorous imprisonment for ten years, which is the minimum sentence prescribed for the offence under section 376(2)(i) of the Indian Penal Code. No separate sentence is required to be passed under section 6 of the POCSO Act in view of section 42 of the said Act, as rightly done by the learned trial Court.

With the above modification of sentence, the JCRLA stands dismissed.

Trial Court records with a copy of this judgment be sent down to the concerned Court forthwith for information.

Before parting with the case, I would like to put on record my appreciation to Mr. Manoranjan Padhi, learned counsel for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned counsel shall be entitled to his professional fees, which is fixed at Rs.7,500/- (rupees seven thousand five hundred only). This Court also appreciates the valuable help and assistance provided by Mr. Manoranjan Mishra, learned Additional Standing Counsel.

—— o ——

2023 (III) ILR-CUT-139

S.K. SAHOO, J.

CRLA NO. 172 OF 2007

PRADEEPTA KUMAR PRAHARAJ ……Appellant

.V.

STATE OF ODISHA (VIG.) …….Respondent

(A) PREVENTION OF CORRUPTION ACT, 1988 – Offence punishable U/s. 7 and Section 13(2) r/w Section 13(1)(d) of the Act – There is no acceptable evidence that as per the instruction of the appellant the tainted money was kept on the table and below to the table calendar – Whether mere recovery of the bribe amount from the

accused is sufficient to fasten guilt, in absence of any evidence with regard to demand and acceptance of the gratification – Held, No – Reason indicated. (Para 7.1)

(B) CRIMINAL TRIAL – Evidentiary value of FIR – Discussed. (Para-9)

(C) PREVENTION OF CORRUPTION ACT, 1988 – Offence punishable U/ss. 7, 13(2), 13(1) – Whether guilt can be presumed?– Held, No – Reason indicated with reference to case law. (Para-10)

Case Laws Relied on and Referred to :-

1. (2015) 3 SCC 220 : Vinod Kumar Vs. State of Punjab.
2. (2013) 4 SCC 731 : Neeraj Dutta Vs. State (Govt. of N.C.T. of Delhi)
3. (2018) 125 CLT 339 : Shri Satyananda Pani Vs. State of Orissa (Vig)
4. (2023) 1 CLT (CRI) (Supp) 410 : Rajeev Ranjan Vs. Republic of India.
5. 1979 CLJ 1087 : Suraj Mal Vs. The State (Delhi Administration)
6. (2018) 71 OCR 436 : Sushil Kumar Pati Vs. State of Orissa.
7. (2022) 4 SCC 574 : K. Shanthamma Vs. State of Telangana.
8. (2014) 13 SCC 55 : B. Jayaraj Vs. State of Andhra Pradesh.
9. (2014) 58 OCR 566 : Bhagirathi Pera Vs. State of Orissa.
10. (2015) 3 SCC 247 : M.R. Purushotham Vs. State of Karnataka.
11. A.I.R. 2013 SC 3368 : State of Punjab Vs. Madan Mohan Lal Verma.
12. (2009) 44 OCR 425 : State of Maharashtra Vs. Dnyaneshwar.
13. A.I.R. 2002 SC 486 : Punjabrao Vs. State of Maharashtra.
14. A.I.R. 2016 S.C. 2045 : V. Sejappa Vs. State.
15. A.I.R. 1979 S.C. 1191 : Panalal Damodar Rathi Vs. State of Maharashtra.
16. (2016) 64 OCR (S.C.) 1016) : Mukhitar Singh Vs. State of Punjab.
17. (2016) 3 SCC 108 : Krishan Chander Vs. State of Delhi.
18. (2015) 10 SCC 152 : P. Satyanarayana Murthy Vs.District Inspector of Police.
19. A.I.R. 1995 SC 1437 : Madhusudan Singh Vs. State of Bihar.
20. (2010) 46 OCR (SC) 600 : Utpal Das Vs. State of West Bengal.
21. 1975 CLJ 1224 : Sita Ram Vs. The State of Rajasthan.

For Appellant : Mr. Satya Smruti Mohanty

For Respondent : Mr. M.S. Rizvi, Addl. Standing Counsel (Vigilance)

JUDGMENT Date of Argument: 03.08.2023 : Date of Judgment: 21.08.2023

S.K. SAHOO, J.

The appellant Pradeepta Kumar Praharaj faced trial in the Court of learned Special Judge (Vigilance), Berhampur, Ganjam in G.R. Case No. 38 of 1998 (V)/T.R. No.73 of 2000 for offences punishable under section 7 and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter '1988 Act') on the accusation that on 14.09.1998 being a public servant employed as an Asst. Surgeon in Project Hospital, Khatiguda in the district of Nabarangpur, he accepted Rs. 300/- (rupees three hundred only) from the informant Gajendra Nayak

(P.W.5) by way of illegal gratification, other than legal remuneration as a motive or reward for doing an official act i.e. for issuing his medico-legal opinion in respect of the injury sustained by the informant and obtained pecuniary advantage of such amount from P.W.5 by corrupt or illegal means and thereby abused his position as a public servant.

The learned trial Court vide impugned judgment and order dated 22.03.2007 found the appellant guilty of the offences charged and sentenced him to undergo R.I. for six months and to pay a fine of Rs.1,000/-, in default, to undergo R.I. for three months more for the offence under section 7 of the 1988 Act and further to undergo R.I. for one year and to pay a fine of Rs.2,000/-, in default, to undergo R.I. for six months more for the offence under section 13(2) read with section 13(1)(d) of the 1988 Act and both the substantive sentences of imprisonment were directed to run concurrently.

The Prosecution Case:

2. The factual matrix of the prosecution case, as per the written report presented by P.W.5 Gajendra Nayak before the Deputy Superintendent of Police, Vigilance, Jeypore on 13.09.1998 is that on 23.08.1998, he had been to village Upara Gadigaon under Khatiguda police station to see his relatives and one Prabhudan Harijan of that village had assaulted him there by means of a 'Tenta' causing severe bleeding injury on his right palm. Thereafter, he reported the matter at Khatiguda Police Station and the investigating officer sent him to Project Hospital, Khatiguda for his medical examination and treatment. It is further stated that the appellant being the Medical Officer of the said hospital admitted him in the hospital and demanded bribe of Rs.500/- for his complete treatment and when he expressed his inability to pay such a huge amount, the appellant took Rs.100/- from him and asked him to make payment of the balance amount of Rs.400/- within four to five days. The informant was discharged from the hospital on 04.09.1998 and the appellant demanded the rest amount. It is further stated that the appellant threatened the informant that he would not issue a favourable medical certificate and shall abstain from making further treatment unless the balance amount of Rs.400/- is paid to him. It is also stated in the written report that the appellant asked the informant to pay Rs.300/- by 14.09.1998 and finding no other option, the informant arranged Rs.300/- and reported the matter before the Deputy Superintendent of Vigilance, Jeypore.

On the basis of such written report, Berhampur Vigilance P.S. Case No. 38 of 1998 was registered under section 7 and section 13(2) read with section 13(1)(d) of the 1988 Act and D.S.P. (Vigilance) directed P.W.6 Bijoy Kumar Jena, Inspector, Vigilance, Nawarangpur to detect the case by laying a trap and to investigate the case.

On 14.09.1998 a preparation for the trap was held at the Vigilance Squad Office, Nawarangpur. Requisitions were sent to two Government independent

witnesses and P.W.5 was asked to reach the Vigilance Squad Office, Nawarangpur. In presence of all the witnesses and Vigilance Officers, P.W.5 was introduced to the trap party members and he narrated the F.I.R. story before the witnesses and also produced six nos. of fifty rupee G.C. notes to be used in the trap. The numbers of the G.C. notes were noted down by the official witnesses. A demonstration relating to the reaction of phenolphthalein powder with sodium carbonate solution was made and the sample chemical liquid was collected in empty bottle and it was sealed. The G.C. notes were smeared with phenolphthalein powder and it was handed over to P.W.5 with instruction to give it to the appellant only on demand. A preparation report (Ext.2) was made and the trap party members signed thereon. P.W.3 K. Prasad Rao was asked by the trap laying officer (P.W.6) to accompany P.W.5 to act as over hearing witness, to see the receipt of tainted notes by the appellant from P.W.5 and then to relay signal to the trap party members.

After preparation of the trap, except P.W.4, the other members of the trap party proceeded towards the Project Hospital, Khatiguda in a Government Jeep. On 11.09.1998 at about 11.10 a.m. they arrived at Khatiguda and the jeep was parked at the back side of the said hospital and P.W.5, the accompanying witness P.W.3 and Tumbeswar Nayak, the brother of P.W.5, who were waiting there, were instructed to proceed ahead to the hospital by walking and accordingly, they proceeded towards the premises of the Project Hospital. Some members of the trap party entered into the premises of the hospital and keeping positions, waited for the signal. Some members of the trap party remained outside the hospital. At about 12.10 p.m. getting the pre-arranged signal of the accompanying witness P.W.3, the trap party members, who were inside the premises of the hospital, rushed to the spot and the other members of the trap party immediately followed them. The appellant was found sitting on his chair whereas the informant (P.W.5) and his brother were found near the entrance door of the office of the appellant. P.W.6 challenged the appellant, after disclosing his identity and the identities of other members of the trap party, to have demanded and accepted Rs.300/- from P.W.5. The appellant denied to have demanded and accepted any bribe from P.W.5. A.S.I. A. Mohanty (not examined) was asked to prepare solution of sodium carbonate in two separate glasses of water. The appellant was asked to dip his fingers of both the hands in the solution, but no change of colour of solution was visible to the naked eyes. P.W.6 preserved the samples of the hand wash and when the appellant denied to have received bribe from P.W.5, P.W.6 interrogated P.W.5 and the accompanying witnesses. P.W.5 stated before them that he along with his brother waited for about one hour as per the direction of the appellant and met him in the office room when all the patients were disposed of. The appellant thereafter demanded money and asked him to keep the same on his table and on receipt of which the appellant prepared the injury report and handed over to him. P.W.6 thereafter searched the places as per the version of P.W.5 and his brother and found the tainted G.C. notes under the table calendar lying on the office table of the appellant. The official witnesses verified the numbers

and compared their initials, which tallied. P.W.6 seized the tainted G.C. notes along with the calendar frame from the office table of the appellant, the calendar frame was taken and the same was tested with the solution of sodium carbonate which turned to rose pink. The sample was preserved for chemical examination. P.W.6 seized the injury certificate given by the appellant to P.W.5, on production by him, in presence of the official witnesses. P.W.6 interrogated the witnesses, seized the bribe money, the injury report of P.W.5 and other connected documents under different seizure lists and prepared the detection report (Ext.6). On completion of investigation, P.W.7 submitted charge sheet on 09.03.2000 against the appellant under sections 7 and 13(2) read with 13(1)(d) of the 1988 Act.

3. The defence plea of the appellant was one of complete denial of the occurrence and it was pleaded that he was a member of the Committee relating to Rehabilitation, Resettlement and Age Determination and one Tumbeswar Nayak, the brother of P.W.5 appeared before the said Committee and the said Committee had overruled his claim relating to his age for which a trap case has been foisted against him.

Witnesses & Exhibits:

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

P.W.1 Pravakar Panda was working as a Senior Clerk in the office of the Chief Medical Officer, Upper Indravati Project Hospital, Khatiguda and he is a witness to the seizure of duplicate service book of the appellant as per seizure list vide Ext.1.

P.W.2 Dibakar Behera was working as Senior Clerk in the office of I.T.D.A., Nawarangpur and he was a member of the trap party and a witness to the preparation report vide Ext.2. He also stated about the recovery of the tainted G.C. notes on the table of the appellant under a table calendar. He is also a witness to the seizure of G.C. notes as per seizure list Ext.3, seizure of medical certificate of P.W.5 as per seizure list Ext.5 and detection report as per seizure list Ext.6.

P.W.3 K. Prasad Rao, who was working as Senior Clerk in the office of the Sub-Collector, Nawarangpur, stated about the preparation for the trap. He acted as an over hearing witness to the trap. He also stated about recovery of tainted G.C. notes beneath the calendar of the table of the appellant. He proved the preparation report (Ext.2),detection repot (Ext.6) and seizure of paper chit containing the numbers of the G.C. notes as per seizure list Ext.7.

P.W.4 Basanta Kumar Swain, who was attached as Constable in the office of Inspector of Vigilance, Nawarangpur, stated that as per the direction of the I.O., he prepared the pre-trap chemical solution and tested the G.C. notes in presence of independent witness.

P.W.5 Gajendra Nayak is the informant in the case, who stated about the demand of money by the appellant for issuance of medical certificate in his favour. He has proved the written report marked as Ext.8. He stated about putting the tainted G.C. notes on the table of the appellant as per the instruction of the trap members.

P.W.6 Bijaya Kumar Jena was the Inspector of Vigilance, Nawarangpur and the initial investigating officer of the case, who stated about the preparation for trap, receipt of signal from P.W.5, about recovery of tainted G.C. notes beneath the calendar on the table of the appellant. He has proved the seized G.C. notes as per seizure list Ext.3, the medical certificate issued in favour of P.W.5 as per seizure list Ext.4, the injury report and bed-head ticket as per seizure list Ext.5, the detection report (Ext.6) and the chemical examintion report vide Ext.11.

P.W.7 Arjuna Bhoi, was the Inspector of Vigilance, Bhawanipatna, who took over the charge of investigation from P.W.6 and on completion of investigation, he submitted charge sheet on 09.03.2000.

The prosecution exhibited fifteen documents. Exts.1, 4, 5 and 7 are the seizure lists, Ext.1/2 is the zimanama, Ext.2 is the preparation report, Ext.6 is the detection report, Ext.8 is the written report, Ext.9 is the paper chit, Ext.10 is the injury report, Ext.11 is the chemical examination report, Ext.12 is the sanction order, Ext.13 is the bed head ticket, Ext.14 is the medical certificate and Ext.15 is the calendar.

The prosecution proved six material objects. M.O.I, M.O.II and M.O. IV are the sample bottles, M.O.III is the packet containing the G.C. notes and M.O.VI is the calendar.

One witness has been examined on behalf of the defence. D.W.1 Suresh Chandra Mohapatra who was working as Senior Clerk in the office of the Project Director, R & R, U.I.H.E.P., Khatiguda, produced the proceedings of the age determination committee of village Benakhamara and a list of persons entitled to get compensation as per the rehabilitation policy of the Government in the submerged area vide Ext.A.

Findings of the Trial Court:

5. The learned trial Court, after assessing the evidence on record, came to hold that the evidence of the decoy that the appellant had been demanding bribe for issuance of a favourable medical certificate finds sufficient corroboration from the evidence of P.Ws.2, 3, 4, 5 and 6 and further held that the circumstance that a favourable injury report was essential for supporting the plea of assault to the decoy (P.W.5) gives further credence to the prosecution case that the appellant had been demanding bribe for issuance of such certificate to P.W.5. The learned trial Court further held that the appellant, after demanding and accepting the bribe, has issued the medical certificate in favour of P.W.5 to show official favour. With regard to

validity of sanction, learned trial Court has held that the Government of Odisha has rightly accorded sanction for launching prosecution against the appellant being satisfied with regard to existence of prima facie case and further held that the prosecution has ably proved the case against the appellant beyond all reasonable doubts.

Contentions of the Parties:

6. Mr. Satya Smruti Mohanty, learned counsel appearing for the appellant urged that there are number of discrepancies in the story narrated in the F.I.R. and the evidence adduced by the informant (P.W.5) in the Court. The learned counsel pointed out that though the informant has stated in the F.I.R. that he was treated for eleven days in the hospital and was discharged on 04.09.1998, but during the examination-in-chief, he stated that he was in the hospital for only nine days. However, the bed head ticket (Ext.13) shows the date of discharge to be 28.08.1998. Further, he argued that though the amount of demand in the F.I.R. was stated to be Rs. 400/-, but in the examination in-chief, the informant stated that the appellant demanded Rs.300/-. With regard to pre-trial preparation, the informant has stated in the deposition that three days after lodging the F.I.R., he visited the Vigilance office where he met the witnesses for preparation of the trap. However, the record reveals that F.I.R. was reported on 13.09.1998, registered on 14.09.1998 and the trap was conducted on the very same day i.e., 14.08.1998. Again, he highlighted, with regard to the demand, the F.I.R. story indicates that on 04.09.1998, the appellant demanded the balance amount of Rs.400/- and threatened to the informant that unless the same is paid, he would not issue a favourable injury report and will not continue with the treatment of the informant. However, during the cross-examination, the informant has categorically stated that the appellant-doctor did not charge any money for his treatment and he did not pay any money. Mr. Mohanty, the learned counsel for the appellant further argued that the informant (P.W.5) in the examination-in-chief has not uttered a single word on the issue of chemical test or regarding any demonstration or sealing and preservation of the hand wash solution and he has been declared hostile by the prosecution and P.W.3, the overhearing witness has also not stated anything about the chemical test, the sealing and preservation of the solution, although the said witness is a vital one for the prosecution and has signed on various other seizure lists containing the tainted notes and other documents. Further, he brought to the notice of the Court that P.W.2, though has stated that the hand wash of the appellant did not change colour, but he has not stated anything about the manner in which the said solution was preserved and sealed. The counsel further submitted that P.W.6, the T.L.O. has stated about preparation of chemical solution and asking the appellant to dip his hands in the said solution and that the solution in both the glasses did not change colour, but he has not narrated the method and the procedure followed for sealing and preservation of these solutions. Also, he stated that the forwarding report of the Chemical Examiner reveals that the specimen seal used in sealing bottles marked as Exhibits I to V in presence of Sri Balaram Patra,

O.A.S., O.I.C., Election Section, Collectorate, Nabarangpur, in whose custody the seal has been kept, however, Sri Patra was neither a member of the trap laying party nor was he present at the time of taking of the hand wash of the appellant and also, he was not examined by the prosecution during trial. Therefore, there is no cogent material that the solution bottles were sealed at the time of trap rather it appears that the same was done subsequently at the office of the Vigilance Department and as such tampering of the exhibits cannot be ruled out.

Mr. M.S. Rizvi, learned Standing Counsel appearing for the Vigilance Department, on the other hand, contended that there is no infirmity or illegality in the impugned judgment of the learned trial Court and the prosecution has proved all the three aspects i.e. demand, acceptance and recovery of bribe money and the explanation of the appellant that a false trap case has been foisted upon him since he was a member of the Rehabilitation, Resettlement & Age Determination Committee, in which the brother of the informant was not found suitable for getting compensation, is not acceptable. The learned counsel for the Vigilance Department relied upon the decisions of the Hon'ble Supreme Court in the cases of **Vinod Kumar -Vrs.- State of Punjab reported in (2015) 3 Supreme Court Cases 220** and **Neeraj Dutta -Vrs.- State (Govt. of N.C.T. of Delhi) reported in (2013) 4 Supreme Court Cases 731** and contended that the appeal should be dismissed.

Analysis of the Evidence:

7. **Occasion for demand of bribe**:

Adverting to the contentions raised by the learned counsel for both the parties and on careful perusal of the depositions of witnesses and the documents proved by both the sides, it is apposite to weigh the circumstances and the evidence available on record. It is mentioned in the F.I.R. that the appellant had demanded bribe from the informant (P.W.5) on 04.09.1998 for issuance of favourable injury report to the police and for completing the treatment of the informant. However, the bed head ticket of P.W.5 shows that he was treated and discharged from Project Hospital, Khatiguda on 28.08.1998 i.e. almost a week before the alleged demand and thus, there was no occasion for the appellant to raise a demand of bribe on 04.09.1998 for completing the treatment of P.W.5.

Similarly, the reverse of the medical requisition, which has been marked as Ext.10, contains the injury report which is signed by the appellant on 24.08.1998 and duly sent to the police station. There is no evidence that the preparation and dispatch of the injury report was deliberately delayed by the appellant. Hence, it is apparent that there was no occasion for the appellant to demand the bribe amount for a favourable injury report on 04.09.1998. It is but natural that if someone has demanded a bribe for doing certain official work for someone and expecting the bribe to be fulfilled, he would delay the completion of such work till he receives the same.

7.1. **Demand and acceptance:**

Now, coming to the demand and acceptance of bribe money of Rs.300/- from P.W.5 by the appellant, this Court in the cases of **Shri Satyananda Pani -Vrs.- State of Orissa (Vig) reported in (2018) 125 CLT 339** and **Rajeev Ranjan -Vrs.- Republic of India reported in (2023) 1 CLT (CRI) (Supp) 410** considering the observations made in **Suraj Mal -Vrs.- The State (Delhi Administration) reported in 1979 Criminal Law Journal 1087**, has been pleased to hold as follows:

> "The principle of law that emerges from the views expressed by different Courts including the Hon'ble Supreme Court in the above decisions placed by both the parties is that mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. In order to constitute an offence under section 7 of 1988 Act, proof of demand is a sine qua non.
>
> xx xx xx
>
> It is only when this initial burden regarding demand and acceptance of illegal gratification is successfully discharged by the prosecution, then burden of proving the defence shifts upon the accused and a presumption would arise under section 20 of the 1988 Act. The proof of demand of illegal gratification is the gravamen of the offence under sections 7 and 13(1)(d)(i) and (ii) of 1988 Act and in absence thereof, unmistakably the charge therefore, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, de hors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under sections 7 or 13 of the Act would not entail his conviction thereunder."

P.W.5, the informant in his examination in-chief has stated that he kept the money as per the instruction of the appellant-doctor on his table. However, in the cross-examination, P.W.5 has firmly denied about the factum of any demand of money made by the appellant for his treatment and stated that he did not pay anything for the treatment given to him and the appellant discharged him from the hospital after his treatment was over. Apart from the sole evidence of P.W.5 in his examination-in-chief that he kept the tainted notes as per the instruction of the appellant, which has been retracted in the cross-examination, no other evidence has been adduced by the prosecution to prove or corroborate the demand and acceptance of the illegal gratification by the appellant.

P.W.3 K. Prasad Rao was directed by the T.L.O. (P.W.6) to accompany and overhear the conversation between the appellant and the informant (P.W.5) and to give signal by combing his hair by means of his hand in the event of receipt of bribe money by the appellant from P.W.5, but P.W.3 has stated that he did not hear the appellant demanding any money and has also not seen him accepting the tainted G.C. notes. He has simply stated that after reaching Khatiguda hospital, he found the

appellant-doctor sitting in his chamber and upon seeing the appellant, P.W.5 kept the tainted notes on the table of the appellant and came and told him that he kept the money on the table of the appellant and at this, P.W.3 gave pre-arranged signal and upon getting his signal, other witnesses and vigilance officials rushed to the spot. P.W.3 has not been declared hostile by the prosecution. In the cross-examination, he has stated that P.W.5 along with his brother entered inside the room of the appellant and he remained outside the room and that he could not say anything in what manner the money transaction relating to the tainted G.C. notes happened in the room of the appellant as he was present outside the room. Therefore, P.W.3 only saw the informant keeping the money on the table of the appellant without there being any demand or acceptance of the same by the appellant. It is not understood as to why in spite of specific instruction being given to him to accompany P.W.5, to overhear the conversation and after acceptance of the bribe money by the appellant, to relay the signal to the trap party members, he remained outside the room. The brother of P.W.5, namely, Tumbeswar Nayak who according to P.W.3 also entered into the room of the appellant on the date of occurrence with P.W.5 has not been examined by the prosecution even though he is the charge sheet witness no.2 in the case. His evidence would have lent corroboration to the evidence of P.W.5 as he was closer to the appellant at the relevant point of time when P.W.5 allegedly kept the tainted notes on the table of the appellant on the instruction of the appellant. P.W.3 has not stated that when P.W.5 came out of the room of the appellant and told him that he kept the money on the table of the appellant, the appellant also told him that the same was done as per the instruction of the appellant. Therefore, there is no acceptable evidence that as per the instruction of the appellant, the tainted money was kept by P.W.5 on the table of the appellant below the table calendar.

On the issue of overhearing witness, this Court in the case of **Sushil Kumar Pati -Vrs.- State of Orissa, reported in (2018) 71 Orissa Criminal Reports 436** has observed as follows:

> "The overhearing witness (P.W.2) is completely silent regarding any demand stated to have been made by the appellant to P.W.3 even though he remained outside the room near the door of room no.34 which was open and there was a curtain on the entrance door of the room. P.W.3 has stated that no patient was present either inside the room or outside. In such a situation had there been any demand by the appellant, it would not have missed the ears of P.W.2 who had accompanied P.W.3 for a specific purpose. The silence of P.W.2 on such a material aspect speaks volumes regarding the alleged demand made inside room no.34 on 12.11.2000."

The Hon'ble Supreme Court in the case of **K. Shanthamma -Vrs.- State of Telangana, reported in (2022) 4 Supreme Court Cases 574** has observed as follows:

> "14……. In the pre-trap mediator report, it has been recorded that LW8, Shri R.Hari Kishan, was to accompany P.W.1 - complainant at the time of offering the bribe. P.W.7 Shri P.V. S.S.P. Raju deposed that P.W.8 Shri U.V.S. Raju, the Deputy

> Superintendent of Police, ACB, had instructed LW8 to accompany P.W.1 - complainant inside the chamber of the appellant. P.W.8 has accepted this fact by stating in the examination-in-chief that LW8 was asked to accompany P.W.1 and observe what transpires between the appellant and P.W.1. P.W.8, in his evidence, accepted that only P.W.1 entered the chamber of the appellant and LW8 waited outside the chamber. Even P.W.7 admitted in the cross-examination that when P.W.1 entered the appellant's chamber, LW8 remained outside in the corridor. Thus, LW8 was supposed to be an independent witness accompanying P.W.1. In breach of the directions issued to him by P.W.8, he did not accompany P.W.1 inside the chamber of the appellant, and he waited outside the chamber in the corridor. The prosecution offered no explanation why LW8 did not accompany P.W.1 inside the chamber of the appellant at the time of the trap."

P.W.3 did not enter into the room of the appellant, did not hear any conversation between P.W.5 and the appellant, did not see the acceptance of the tainted notes by the appellant but only stated to have seen P.W.5 keeping the tainted G.C. notes on the table of the appellant and coming back. The prosecution being satisfied with his evidence has not declared him 'hostile' nor put him any questions with the permission of the Court invoking the provision under section 154 of the Evidence Act. The evidence of P.W.3 coupled with the evidence of P.W.5 makes the demand and acceptance of bribe money by the appellant a doubtful feature.

Law is well settled that mere recovery of the bribe amount from the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. In order to constitute an offence under section 7 of 1988 Act, proof of demand is a sine qua non. The burden rests on the accused to displace the statutory presumption raised under section 20 of the 1988 Act by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in section 7 of the 1988 Act. For arriving at the conclusion as to whether all the ingredients of the offence i.e. demand, acceptance and recovery of illegal gratification have been satisfied or not, the Court must take into consideration the facts and circumstances brought on the record in their entirety. The standard of burden of proof on the accused vis-à-vis the standard of burden of proof on the prosecution would differ. The proof of demand of illegal gratification is the gravamen of the offence under sections 7 and 13(1)(d)(i) and (ii) of 1988 Act and in absence thereof, unmistakably the charge therefore, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, de hors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under sections 7 or 13 of the Act would not entail his conviction thereunder. The evidence of the informant should be corroborated in material particulars. Even if the trap witnesses turn hostile or are found not to be independent, if the evidence of the informant and the other circumstantial evidence on record are found to be consistent with the guilt

of the accused and not consistent with his innocence, there should be no difficulty for the Court in upholding the prosecution case. The trial Court which has the occasion to see the demeanour of the witnesses is no doubt in a better position to appreciate it and the Appellate Court should not lightly brush aside the appreciation done by the trial Court except for cogent reasons. (**Ref:- B. Jayaraj -Vrs.- State of Andhra Pradesh reported in (2014) 13 Supreme Court Cases 55, Bhagirathi Pera -Vrs.- State of Orissa reported in (2014) 58 Orissa Criminal Reports 566, M.R. Purushotham -Vrs.- State of Karnataka reported in (2015) 3 Supreme Court Cases 247, State of Punjab -Vrs.- Madan Mohan Lal Verma reported in A.I.R. 2013 Supreme Court 3368, State of Maharashtra -Vrs.- Dnyaneshwar reported in (2009) 44 Orissa Criminal Reports 425, Punjabrao -Vrs.- State of Maharashtra reported in A.I.R. 2002 Supreme Court 486, V. Sejappa -Vrs.- State reported in A.I.R. 2016 S.C. 2045, Panalal Damodar Rathi -Vrs.- State of Maharashtra reported in A.I.R. 1979 S.C. 1191, Mukhitar Singh -Vrs.- State of Punjab reported in (2016) 64 Orissa Criminal Reports (S.C.) 1016).**

In case of **Krishan Chander -Vrs.- State of Delhi reported in (2016) 3 Supreme Court Cases 108**, it is held that the demand for the bribe money is sine qua non to convict the accused for the offences punishable under sections 7 and 13(1)(d) read with section 13(2) of the 1988 Act. In case of **P. Satyanarayana Murthy -Vrs.- District Inspector of Police reported in (2015) 10 Supreme Court Cases 152**, it is held that the proof of demand is an indispensable essentiality and of permeating mandate for an offence under sections 7 and 13 of the Act. Qua section 20 of the Act, which permits a presumption as envisaged therein, it has been held that while it is extendable only to an offence under section 7 and not to those under section 13(1)(d)(i) & (ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasized, could follow only if there was proof of demand. Axiomatically, it was held that in absence of proof of demand, such legal presumption under section 20 of the Act would also not arise.

In the case in hand, it is reflected from the bed-head ticket that the informant (P.W.5) was discharged from the hospital on 28.08.1998. In his F.I.R., P.W.5 has alleged that the appellant demanded illegal gratification on 04.09.1998. However, it is already discussed that the demand of bribe money by the appellant almost seven days after he discharged P.W.5 from the hospital is a doubtful feature, particularly when the injury report had also been prepared and there is no evidence of its delayed dispatch to police. In the face of such inherent improbability and in absence of any clinching evidence, the demand of bribe prior to the date of trap cannot be accepted. P.W.5 has stated that the appellant did not charge any money for his treatment and though he did not pay any money to the appellant, he treated him and discharged him from the hospital. The evidence of P.W.5 that as per the instruction of the appellant, he kept the tainted money on the table of the appellant is also not acceptable as has already been discussed. Therefore, not only the demand but also

the acceptance of tainted money by the appellant is a doubtful feature in this case and merely because the tainted money was recovered below the table calendar of the appellant, it cannot be said that the appellant demanded and accepted the money and that keeping of the money by P.W.5 was within the knowledge of the appellant.

7.2. **Preservation of hand wash of the appellant in safe custody**:

Though some of the witnesses have stated that the hand wash of the appellant was taken in chemical solution and the colour of the solution did not change but no evidence was adduced by the prosecution as to the procedure of seizure and preservation of the hand wash solution. Further, there is no statement on record either of the I.O. or the decoy or the overhearing witnesses or other trap laying witnesses about the manner of sealing the bottles containing the hand wash solution and the use of brass seal in sealing the bottles and there is no oral evidence adduced as to in whose zima the brass seal was kept. If the hand wash solution is not properly sealed at the spot itself with paper seal containing signature of the witnesses and the same is retained in the vigilance office or at any other place without proper sealing, without evidence of its safe custody prior to its production before the Court, there would be chances of tampering with the same. Similarly, belated production of the seized sample bottles in Court raises question mark regarding the conduct of the prosecution. In such cases, even if the chemical examination report finding favours the prosecution case and phenolphthalein is detected in the exhibits, still then the Court may doubt about the authenticity of such report and in appropriate cases, may not place implicit reliance on the findings of such report where tampering with the solution seized at the spot before its production in Court cannot be ruled out. It is a settled principle of law that apart from the factum of hand wash of the accused being taken properly following due procedure of law in presence of witnesses, it is also the duty of the prosecution to establish and cover the entire path right from the beginning by adducing cogent, reliable and unimpeachable evidence that the hand wash solution of the accused was properly sealed, preserved and there was no chance of tampering with the same during its retention by the investigating agency before being produced in Court for sending it to the chemical examiner.

In the case in hand, when the prosecution has failed to prove that the seized solution was sealed at the spot rather it appears that it was sealed in the vigilance office in the presence of one Shri Balaram Patra, O.A.S. and there is no evidence as to whose seal was used in sealing the solution, where the seal was kept and in what manner the solution was preserved, it can be said that the prosecution has failed to cover the entire path right from the hand wash being taken, its sealing, preservation of the solution, its production in Court and forwarding of the sample to the chemical examiner for analysis by clinching evidence to rule out tampering with the same and therefore, the chemical examination report which has been relied upon heavily by the learned trial Court cannot and should not form the basis for convicting the appellant. It is pertinent to note that the failure of the prosecution in examining Shri

Balaram Patra, who stated to have taken the custody of the seal and had witnessed the procedure of sealing as per the forwarding report, raises doubts on the prosecution case. Even though the hand wash taken stated to have contained phenolphthalein as per the chemical examination report (Ext.11) but in view of the suspicious feature relating to sealing and preservation of the sample before its production in Court, no importance can be attached to such report.

Relevance of the conduct of the appellant:

7.3. It is relevant to state here that P.W.2 in his evidence has stated that after arrival in the office of the appellant, Vigilance Inspector caught hold of both the hands of the appellant and challenged him to have accepted bribe, but the appellant refused to have received any bribe from the informant. Similarly, P.W.3 in his cross-examination has stated that when the Vigilance Officer asked the appellant if he had received the money, the appellant told that neither he demanded any money from the informant nor the informant offered any money to him. P.W.6 also in his examination-in-chief has stated that when he asked the appellant if he had received the bribe from the informant, the appellant outrightly denied the demand or acceptance of the bribe at the time of the trap. Therefore, the appellant has categorically, vehemently and consistently denied to have demanded or accepted the bribe at the time of the trap.

This Court in the case of **Sushil Kumar Pati** (supra) as follows:

> "When the appellant on being confronted by the trap laying officer (P.W.6) about the acceptance of bribe money, without fumbling or getting panicked gave a spontaneous explanation right at the moment when the crime is allegedly committed and there was no opportunity to fabricate such explanation or concoct a story, the explanation becomes admissible as res gestae within the meaning of Section 6 of the Evidence Act."

Therefore, taking into account the conduct of the appellant in denying confidently and consistently to have accepted any illegal gratification which has been proved by the evidence of a number of witnesses, it can be said that his acts and reactions following the trap are relevant and constitute a chain of evidence in his favour which is admissible under section 6 of the Evidence Act. It is a contemporaneous statement made by the appellant when challenged by the vigilance officials to have demanded and accepted bribe money from P.W.5. What a prosecution witness said at or about at the time of occurrence is a part of res gestae and that can be used as a corroborative evidence of his own testimony and that is relevant and admissible.

Defence plea:

8. Now coming to the defence plea, the appellant has pleaded that as the case of the brother of P.W.5, namely, Tumbeswar Nayak was rejected by him as part of the committee which determined the age for rehabilitation and resettlement benefits for village Benakhamara, this case was falsely instituted for wreaking vengeance.

D.W.1 has exhibited the original proceeding of the age determination committee dated 06.08.1994 of village Benakhamara which proves that the appellant was a member of the said Committee and the case of Tumbeswar Nayak, which stands at serial no.33, has been rejected. This evidence has not been dislodged by the prosecution even though in the cross-examination by the prosecution, it has been brought out that other applicants of the list were also disqualified. Law is well settled that there should not be any differentiation in evaluation of a witness's testimony depending on the party who calls him for examination. The witnesses both for the prosecution and the defence must be treated equally while evaluating their evidence. Defence can establish its case by preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from materials on record but also by reference to the circumstances upon which he relies. The learned trial Court has completely ignored and overlooked the defence plea and the evidence of D.W.1 and the documentary evidence proved by D.W.1 to show that there were chances of false implication of the appellant.

Evidentiary value of F.I.R.:

9. Even though the demand aspect has been mentioned in the F.I.R., but law is well settled as held in the case of **Madhusudan Singh -Vrs.- State of Bihar reported in A.I.R. 1995 Supreme Court 1437** that the F.I.R. does not constitute a substantive evidence, however it can be used as a previous statement for the purpose of corroboration/contradiction to the maker thereof. The allegation has to be proved at the trial. Conviction cannot be based only on the basis of the allegations made in the F.I.R. In case of **Utpal Das -Vrs.- State of West Bengal reported in (2010) 46 Orissa Criminal Reports (SC) 600**, it is held that the F.I.R. does not constitute substantive evidence. It can, however, only be used as a previous statement for the purposes of either corroborating its maker or for contradicting him and in such a case, the previous statement cannot be used unless the attention of witness has first been drawn to those parts by which it is proposed to contradict the witness.

Whether guilt can be presumed:

10. Learned counsel for the Vigilance Department placed reliance in the case of **Vinod Kumar** (supra), wherein it is held that if the informant turns hostile in a case of this nature, then the entire prosecution case cannot be discarded or rejected. Indeed, the above position of law is unquestionable; however, apart from the allegation made in the F.I.R., there is hardly anything for the prosecution to prove its case. In case of **Sita Ram -Vrs.- The State of Rajasthan reported in 1975 Criminal Law Journal 1224**, the evidence of the informant was rejected and it was held that there was no evidence to establish that the accused had received any gratification from any person. On that finding the presumption under section 4(1) of the Prevention of Corruption Act was not drawn. All that was taken as established was the recovery of certain money from the person of the accused and it was held that mere recovery of money was not enough to entitle the drawing of the

presumption under section 4(1) of the Prevention of Corruption Act. In **Suraj Mal** (supra), it was held that mere recovery of money divorced from the circumstances under which it was paid was not sufficient when the substantive evidence in the case was not reliable to prove payment of bribe or to show that the accused voluntarily accepted the money.

Conclusion:

11. In the case of **Neeraj Dutta** (supra), the Hon'ble Supreme Court has been pleased to hold that the offer by the bribe giver and demand by the public servant have to be proved by the prosecution as a fact in issue. Mere acceptance or receipt of an illegal gratification without anything more would not make it an offence under section 7 or section 13(1)(d),(i) and (ii) respectively of the Act. The presumption of fact with regard to the demand and acceptance or obtainment of an illegal gratification may be made by a Court of law by way of an inference only when the foundational facts have been proved by relevant oral and documentary evidence and not in the absence thereof.

After careful consideration of the evidence on record, I am of the humble view that the prosecution case suffers from serious infirmities. The reasoning assigned by the learned trial Court is faulty and genuine material evidence available on record in favour of the appellant has been overlooked and it appears that the impugned judgment is one-sided in favour of the prosecution. There is no sufficient, cogent and reliable evidence available on record to establish the guilt of the appellant. In the absence of any clinching evidence relating to the demand and acceptance of the bribe money by the appellant, no guilt can be fastened upon him in a callous manner. In the circumstances, since the guilt of the appellant has not been established beyond all reasonable doubt, I am constrained to give benefit of doubt to the appellant.

In the result, the criminal appeal is allowed. The impugned judgment and order of conviction of the appellant under section 7 and section 13(2) read with section 13(1)(d) of the 1988 Act and the sentence passed thereunder is hereby set aside and the appellant is acquitted of all the charges.

The appellant, who is on bail by order of the Court, is hereby discharged from liability of the bail bonds and the surety bonds shall also stand cancelled.

The trial Court records with a copy of this judgment be sent down to the concerned Court forthwith for information and necessary action.

—— o ——

2023 (III) ILR-CUT-155

K.R. MOHAPATRA, J.

W.P.(C) NO. 34178 OF 2022

AJAY KUMAR NANDA @ PINTU .....Petitioner

.V.

ASHOK KUMAR PADHEE & ORS. .....Opp.Parties

FAMILY COURTS ACT,1984 – Sections 10, 20 r/w Order VII Rule 14 of CPC – Petitioner filed an application U/o. VII Rule 14 to file certain document in support of his case to show that he has sufficient means to maintain the child – The Family Court rejected the application on hyper-technical ground – Whether the rejection order is sustainable?– Held, No – The Learned Family Court should adopt a pragmatic approach to see that the truth is revealed – The impugned order is set aside and petition filed for production of documents relating to assets and property is allowed subject to payment of cost . (Para 5 to 6.1)

For Petitioner : Mr. Ashutosh Mishra

For Opp. Parties : Mr. Samir Kumar Mishra, Sr. Adv.
& Mr. J. Pradhan

JUDGMENT Date of Judgment : 24.07.2023

K.R. MOHAPATRA,J.

1. This matter is taken up through hybrid mode.

2. Order dated 2nd December, 2022 (Annexure-1) passed by learned Judge Family Court, Jharsuguda in GP Case No.5 of 2003 of 2015/2021 is under challenge in this writ petition, whereby an application filed by the Petitioner under Order VII Rule 14 CPC to produce certain documents relating to his property and assets, has been rejected.

3. Mr. Mishra, learned counsel for the Petitioner submits that the proceeding has been filed for custody of the minor child and to declare him as the guardian of the child. It is his submission that the minor child is his natural son, who was born out of the wedlock of the Petitioner and one Lipika Padhee @ Nanda, who is dead. Even after death of his wife, the child (son) was staying with the Petitioner. But Opposite Parties forcibly took the custody of the child. Since then, minor son of the Petitioner is staying with the Opposite Parties. The Petitioner is staying in a joint family along with his parents and other family members. He has sufficient means to maintain the child. Petitioner is the natural guardian of the child and has the capacity to maintain the child. During cross-examination of his witnesses, the Petitioner filed an application under Order VII Rule 14 CPC to produce certain documents relating to his property and assets. The said application was rejected on hyper-technical ground. Hence, this writ petition has been filed.

3.1 It is submitted that provisions of the Civil Procedure Code and Evidence Act are not strictly applicable to the case at hand. Learned Judge, Family Court should always keep in mind that hyper-technicalities in adjudicating applications as well as proceedings should not be adhered to. Learned Judge, Family Court rejected the application on the ground that the Petitioner did not file the documents along with the plaint sought to be produced at a belated stage. Further, after examination of PW-2, the Petitioner got an impetus to file such an application, which does not disclose the nature and description of documents to be filed. It accordingly, rejected the application.

3.2 It is his submission that evidence of the Petitioner has not yet been closed and the documents in support of his assets and property will assist the Court to determine the financial as well as social status of the Petitioner to determine as to whether the Petitioner is entitled to the custody of the child or not. He, therefore, prays for setting aside the impugned order and to permit the Petitioner to file the documents relating to his property and assets.

4. Mr. Mishra, learned Senior Advocate appearing on behalf of the contesting Opposite Parties submits that the Petitioner was thoroughly negligent in maintaining the minor child. From his childhood, the minor is staying with the Opposite parties, who are none other than his maternal uncle and maternal grandparents. The child is with them after death of the wife of the Petitioner. It is his submission that Opposite Parties had earlier moved this Court in CMP No.1599 of 2018 against the order passed by learned District Judge allowing an application filed by the present Petitioner to take custody of his son and directing the Opposite Parties to hand over the custody of the child to the Petitioner. While disposing of the said application, vide order dated 15th October, 2020, this Court observed and directed as under :-

> *"7. On perusal of the petition filed under Section 6 of the Act (Annexure-1) by the opposite party no.1, it reveals that although there are averments to the effect that the opposite party no.1 is staying in a joint family with his parents, brother, his wife and cousins, the same is not sufficient for consideration of his prayer for taking custody of the child in absence of any averment with regard to welfare of the child. Thus, the contention of Mr. Ragada to the effect that the opposite party no.1 has discharged the initial burden of proof, is not sustainable.*
>
> *8. In view of the discussions made above, the impugned order under Annexure-2 is set aside and the matter is remitted back to the learned District Judge, Jharsuguda to consider the matter afresh in accordance with law and pass a reasoned order giving opportunity of hearing to the parties concerned within a period of six months from the date of first appearance of the parties. Parties may, if so advised, move learned District Judge for filing pleadings/additional pleadings as well as to adduce further evidence. In that event, learned District Judge, Jharsuguda shall do well to consider the same and pass necessary orders in accordance with law.*
>
> *9. With the aforesaid observation and direction, this CMP is disposed of."*

4.1. In view of the direction as quoted above, the Petitioner should have taken adequate steps to see that the proceeding is disposed of within a period of six

months. Instead of cooperating with learned Judge, Family Court, the present application has been filed to linger the proceeding. The application filed for production of documents is misconceived, inasmuch as the details of the documents sought to be produced has not been mentioned. Further, the relevancy of those documents has also not been stated. The only ground on which the application was filed was that due to inadvertence and communication gap, the documents could not be filed. Learned Judge,Family Court considering the matter in its proper perspective held that the prayer made by the Petitioner does not come under the special and exceptional circumstances.Hence, the petition was rightly rejected which warrants no interference.

5. Considering the submissions of learned counsel for the parties and keeping in mind the provisions under Section 10 of the Family Courts Act, 1984 (for short, 'the Act'), it is clear that provisions of the Civil Procedure Code shall apply to the suits and proceedings before the Family Court and for the purposes of the said provisions of the Code, the Family Court shall be deemed to be a Civil Court. However, Sub-section (3) of Section 10 makes it clear that nothing in Sub-section (1) and (2) of the Act shall prevent the Family Court laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or find out the truth of the facts alleged by the one party and denied by the other. Section-14 of the Act clearly stipulates that the provisions of the Evidence Act are not strictly applicable to the proceedings before the Family Court. Section-20 of the Act clearly stipulates that the Act has an overriding effect on all other legislations for the time being in force. In that view of the matter, the Family Court, while dealing with an application filed by a party, should adopt a pragmatic approach to see that the truth is revealed. In the instant case, the Petitioner seeks to file certain documents in support of his case to show that he has sufficient means to maintain the child. In fact, the petition filed under Order VII Rule 14 CPC does not disclose the details of the description of the documents sought to be filed by the Petitioner. But that should not be sacrosanct to reject the petition at the threshold. Since the proceeding before the Family Court is distinct from a proceeding before a Civil Court, the Court should adhere to the procedure laid down under the Family Courts Act to reveal the truth and not to find out the fault with a party.

5.1 In that view of the matter, this Court is of the considered opinion that learned Family Court should have adopted a pragmatic approach in allowing such application by awarding adequate cost for the loss/prejudice, if any, caused to the adversary.

6. Since the Petitioner is intending to produce the documents in support of his assets and property to show his affluence to take care and maintain the child, he should have been given an opportunity to do so.

6.1. Accordingly, the impugned order under Snnexure-1 is set aside and the petition filed for production of documents relating to assets and property is allowed.

The Petitioner is allowed to produce documentary evidence in support of his plea within a period of two weeks hence following due procedure, which shall be subject to payment of cost of Rs.5,000/- (rupees five thousand only) to the Opposite Parties for the prejudice caused to them.

7. With the aforesaid observation and direction, the writ petition is allowed to the aforesaid extent.

8. Learned Judge, Family Court shall also make all endeavour to see that the proceeding is concluded and disposed of at an early date. Parties are directed to cooperate learned Judge, Family Court, Jharsuguda in the regard.

—— o ——

2023 (III) ILR-CUT-158

K.R. MOHAPATRA, J.

CMP NO. 778 OF 2023

ANAND KUMAR AGARWAL & ANR. ……Petitioners

.V

RAJABALA AGARWAL …….Opp.Party

CODE OF CIVIL PROCEDURE, 1908 – Order XVIII Rule 4 r/w Order XXVI Rule 4-A – The defendant/petitioner No. 1 is not in a position to confirm that the evidence in affidavit has been prepared as per his instruction and he has put his signature on it – Whether the affidavit could be considered as part of the evidence? – Held, No – Reason indicated with reference to case laws.

Case Laws Relied on and Referred to :-

1. 2001 SCC Online AP 1322 : Somagutta Sivasankara Reddy & Ors. Vs. Palapandla Chinna Gangappa & Ors.
2. 2017 SCC Online Cal 20416 : Bhaswati Ray Vs. Smt. Tapasee Chowdhury & Anr.
3. 2015 SCC Online Cal 6445 : Srikumar Mukherjee Vs.Abhijit Mukherjee & Ors.
4. AIR 2004 SC 355 : Ameer Trading Corporation Ltd. Vs.Shapoorji Data Processing Ltd.,
5. 2005 (1) OLR 589 : M/s. Tarachand Sawarmal Modi Vs.Sheo Prakash Muraka.
6. AIR 2004 Orissa 171 : Shyam Sundar Rout Vs. Braja Kishore Pradhan.

For Petitioners : Mr. Kalinga Keshari Mohapatra

For Opp. Party : Mr. A.K. Tripathy

ORDER Date of Order : 17.08.2023

K.R. MOHAPATRA ,J.

1. This matter is taken up through hybrid mode.

2**.** Order dated 8th February, 2023 (Annexure-1) passed by learned 2nd Additional Senior Civil Judge, Cuttack in C.S. No. 418 of 2011 is under challenge in this CMP, whereby the evidence in affidavit filed by the Defendant-Petitioner No.1, namely, Anand Kumar Agarwal, has been expunged.

3. Mr. Mohapatra, learned counsel submits that the Defendant-Petitioner No.1 filed his evidence in affidavit in terms of Order XVIII Rule 4 C.P.C. Due to his ill health,he could not make himself available for cross-examination.There is no provision under the Code of Civil Procedure to expunge the evidence of a party. In the event the witness does not make itself available for cross-examination because of its death, ill health or for any other cause, then the evidentiary value of its deposition shall be considered at the time of argument of the suit. Without considering this material aspect, learned trial Court expunged the evidence in affidavit of Defendant-Petitioner No.1. Hence, this CMP has been filed.

4. In support of his case, Mr. Mohapatra, learned counsel for the Petitioners relied upon the decision in the case of ***Somagutta Sivasankara Reddy and others –v- Palapandla Chinna Gangappa and others***, reported in 2001 SCC Online AP 1322, wherein it is held at paragraph-9 as under:

> "*9. ……..The evidence of a witness who could not be subjected to cross-examination due to his death before he could be cross-examined, is admissible in evidence, though the evidentiary value will depend upon the facts and circumstances of case. [Food Inspector v. James N.T.,1998 Cri.L.J. 3494, 3497 (Ker)]. If the examination is substantially complete and the witness is prevented by death, sickness or other causes (mentioned in s 33) from finishing his testimony, it ought not to be rejected entirely. But if not so far advanced as to be substantially complete, it must be rejected [Diwan v. R, A, 1933 L 561]. Deposition of a witness whose cross-examination became impossible can be treated as evidence and the court should carefully see whether there are indications that by a completed cross-examination the testimony was likely to be seriously shaken or his good faith to be successfully impeached [Horil v. Rajab, A1936 P 34] ……..."*

4.1 He also relied upon the decision of Calcutta High Court in the case of ***Bhaswati Ray –v- Smt. Tapasee Chowdhury and another***, reported in 2017 SCC Online Cal 20416, wherein it is held at paragraph-23 as under:

> *"23. As such the well-settled principle, that the evidence of a witness will not be expunged but its evidentiary value considered at the time of hearing, despite cross-examination of such witness having not been completed, holds good ground even in the context of non-party witnesses.Therefore, the interpretation of Order XVII Rule 2, coupled with Rule3, as sought to be argued by the Opposite Party No.1, is not tenable in the eye of law."*

4.2 He also relied upon another decision of Calcutta High Court in the case of ***Srikumar Mukherjee –v- Abhijit Mukherjee and others,*** reported in 2015 SCC Online Cal 6445, which lays down as under:

> ***"13.*** *The Division Bench of this Court in case of Ashis Bose (supra) held:*
>
> *"In support of his contention relating to value of evidence who was not cross-examined Mr. Banerjee, the learned Advocate for the appellants cited two decisions. In Chatoo Kurmi v. Rajaram Tewari, reported in 11 CLJ 124, it was held by a Full Bench of this Court that it is the right of every litigant in a suit, unless he waives it, to have an opportunity of cross-examining witnesses whose testimony is to be used against him. In MT. Horil Kuer v. Rajab Ali, reported in AIR 1936 Patna 34, it was held that, the deposition of a witness who has been examined-in-chief but has not been cross-examined on account of certain circumstances which made the cross-examination impossible, need not be ignored and can be treated as evidence on the record. The weigh to be attached to such evidence depends on the circumstances and the Court should look at the evidence carefully to see whether there are indications that by a completed cross-examination the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached. These two decisions in our opinion do not help the appellants. It is clear from the Lower Court Record that in spite of having opportunity, the then defendants waived their right of cross-examination of P.W. 7 to P.W. 9 and accordingly evidence of those witnesses cannot be totally discarded and Court has to consider such evidence along with other evidence and materials on record to come to a conclusive decision."*

He, therefore, submits that the evidence in affidavit filed by Defendant-Petitioner No.1 could not have been expunged by learned trial Court.

5. Mr. Tripathy, learned counsel for Opposite Party submits that previously the evidence of Defendant was closed as he could not make himself available to adduce evidence. Ultimately, pursuant to the direction of this Court in CMP No.1028 of 2022 disposed of on 29th November, 2022, prayer of Defendant to be examined through a pleader commissioner was allowed with the following direction.

> *"5. In the result, the impugned order is set aside. This Court directs the Petitioner to take steps for issuance of Pleader Commission before learned trial Court forthwith. This Court also reiterates that since the suit is of the year, 2011 endeavour should be made for early disposal of the same giving opportunity of hearing to the parties concerned".*

6. When the Pleader Commissioner went to the residence of the Petitioner No.1 to administer oath and confirm the statement made in his evidence in affidavit, he could not even utter a single word or respond to the query of the Pleader Commissioner. Accordingly, the Pleader Commissioner submitted a report to the learned trial Court.

7. In view of the aforesaid facts and circumstances, the Opposite Party filed an application to expunge the evidence in affidavit of the Petitioner. Learned trial Court taking into consideration the facts and circumstances of the case and that the statement made in the evidence affidavit filed by the Defendant-Petitioner No.1 has not been confirmed, directed to expunge his evidence. It is his submission that unless the witness enters the witness box and confirms the statement made in the evidence-in-affidavit and admits his signature on the same, it cannot be treated as

evidence. He further submits that the said principle is also applicable to a person who is being examined by a pleader commissioner under Order XXVI Rule 4-A C.P.C. In the instant case, the Defendant-Petitioner No.1 is not in a position to confirm the statement made in the evidence affidavit. As such, learned trial Court has committed no error in expunging the evidence-in-affidavit filed by the Defendant-Petitioner No.1. In support of his submission, Mr. Tripathy, learned counsel for the Opposite Party relied upon the decision in the case of ***Ameer Trading Corporation Ltd. –v- Shapoorji Data Processing Ltd***., reported in AIR 2004 SC 355, in which it is held that in all appealable cases, though the examination-in-chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be ordered to form part of the evidence unless the deponent thereof enters the witness box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature and the statement being made on oath is to be recorded by following the procedure prescribed under Rule 5. He also relied upon the decision of this Court in ***M/s. Tarachand Sawarmal Modi –v- Sheo Prakash Muraka***, reported in 2005 (1) OLR 589, wherein this Court relying upon the ratio in ***Ameer Trading Corporation Ltd.*** (supra) reiterates the principles as above. He also relied upon the decision in ***Shyam Sundar Rout –v- Braja Kishore Pradhan,*** reported in AIR 2004 Orissa 171, wherein this Court reiterates the principles of ***Ameer Trading Corporation Ltd.*** (supra). He, therefore, submits that when the Defendant-Petitioner No.1 is not in a position to confirm the statement made in the affidavit and affirm that the affidavit has been prepared as per his instruction and he has signed the same, the evidence in affidavit cannot form part of the record. Hence, learned trial Court has committed no error in expunging the evidence in affidavit filed by the Defendant-Petitioner No.1.

8. Considering the rival contentions of learned counsel for the parties and in view of the clear law laid down in the case of ***Ameer Trading Corporation Ltd.*** (supra), there cannot be any iota of doubt that in all appealable cases, the examination-in-chief of a witness in the form of the affidavit cannot form part of the evidence unless the deponent himself enters the witness box and confirms that the contents of the affidavit are as per his instruction and he has signed the same. The said principle is also applicable to a case where the deponent is being examined on Commission under Order XXVI Rule 4-A C.P.C.

9. In the instant case, the Defendant-Petitioner No.1 is not in a position to confirm that the evidence-in-affidavit has been prepared as per his instruction and he has put his signature on it. Thus, it cannot form part of the evidence. The case law cited by Mr. Mohapatra, learned counsel for the Petitioner will only be applicable when the evidence in affidavit forms part of the evidence in conformity with Order XVIII Rule 4 C.P.C. following the procedure laid down in the case of *Ameer* ***Trading Corporation Ltd.***(supra). In the instant case, when the evidence-in-affidavit cannot form part of the evidence, as stated above, the case law relied upon by Mr.

Mohapatra is of no assistance to him. Accordingly, I find no infirmity in the impugned order.

10. Hence, the CMP being devoid of any merit stands dismissed.

—— o ——

2023 (III) ILR-CUT-162

K.R. MOHAPATRA, J.

CMP NO.1083 OF 2016

SANDHYARANI DEBI ……Petitioner

.V.

GIRIDHARI PRADHAN & ORS. ……..Opp.Parties

(A) CODE OF CIVIL PROCEDURE, 1908 – Order IX Rule 7 – The Learned trial Court rejected the application U/o. IX rule 7 by a cryptic and non-speaking order – Whether the order of rejection is sustainable? – Held, No. – The plea taken by the petitioner in her petition has neither been discussed nor rejected – Hence the impugned order rejecting the application U/o. IX Rule 7 is not sustainable. (Para 5)

(B) CODE OF CIVIL PROCEDURE, 1908 – Order VIII Rule 9 r/w Order VI Rule 17–The petitioner /defendant No. 1(a) filed an application U/o. 8 Rule 9 to accept the additional written statement – Whether additional written statement is admissible? – Held, No – The proper procedure for the petitioner was to file an application U/o. VI Rule 17 CPC. (Para 5.1)

Case Law Relied on and Referred to :-

1. 76 (1993) CLT 655 : M/s Gannon Dunkerly and Co. Ltd. Represented through its Constituted Attorney Sri Sridhar Dubey Vs. Steel Authority of India Limited, Rourkela Steel Plant, Rourkela.

For Petitioner : Mr. Samir Kumar Mishra, Sr. Adv. & Mr. J.Pradhan

For Opp. Parties : Mr. Nirod Kumar Sahu

JUDGMENT Heard and disposed of : 21.08.2023

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Order dated 1st July, 2016 (Annexure-5) passed by learned Additional Senior Civil Judge, Pur i in CS No.298 of 2012 is under challenge in this CMP,

whereby two applications; one under Order IX Rule 7 CPC and another under Order VIII Rule 9 CPC filed by the Petitioner/Defendant No.1(a) have been rejected.

3. It is submitted by Mr. Mishra, learned Senior Advocate that the suit has been filed for specific performance of contract by declaring the sale deeds dated 31st May, 2010 executed by Defendant No.1 in favour of Defendant Nos.4 to 6 and another in favour of Defendant Nos. 2 and 3 to be illegal and void as well as for other ancillary and consequential reliefs. The Plaintiffs/ Opposite Party Nos.1 to 3 in the plaint claimed that they were Bhagchasi under Defendant No.1. Defendant No.1 filed written statement denying the pleading with regard to the allegation that the Plaintiffs were Bhagchasi under him. During pendency of the suit, Defendant No.1 died and he was substituted by his legal representatives. Subsequently, Defendant No.1(a) was set *ex-parte* and the suit proceeded. Accordingly, Defendant No.1(a) filed an application to set aside the *ex-parte* order. She also filed an application under Order VIII Rule 9 CPC to accept the additional written statement. Both the petitions were dismissed vide common impugned order under Annexure-5. Hence, this CMP has been filed.

3.1 It is submitted by Mr. Mishra, learned Senior Advocate that order of rejection of the application under Order IX Rule 7 CPC is cryptic and non-speaking one. Grounds taken by Petitioner/Defendant No.1(a) to set aside the *ex-parte* order was not discussed by learned trial Court. Hence, the order rejecting the application under Order IX Rule 7 CPC is not sustainable and liable to be set aside. He further submitted that along with the petition under Order IX Rule 7 CPC, the Petitioner/Defendant No.1(a) had also filed an application under Order VIII Rule 9 CPC to accept additional written statement stating that since the Plaintiffs were Bhagchasi under Defendant No.1 and were paying Rajbhag and are in possession over the suit property, the impletion of the substituted legal representatives of Defendant No.1 is unnecessary and the suit is not maintainable against them. Learned trial Court holding that since the original Defendant No.1 denied the plea that the Plaintiffs were Bhagchasi under him and were in possession over the suit property and the substituted legal representative, i.e., Defendant No.1(a) took an inconsistent stand to the effect that the Plaintiffs were Bhagchasi and are in possession over the suit property, the petition under Order VIII Rule 9 CPC is not maintainable and rejected the same.

3.2 It is his submission that Petitioner/Defendant No.1(a) did not take a contrary stand in the written statement. He has only reflected the case of the Plaintiffs in their additional written statement and stated that the suit is not maintainable against the substituted legal representatives of Defendant No.1 on the pleading made in the plaint. Even if it is assumed that a contrary stand is taken the same is permissible in law in respect of written statement. He, therefore prays for setting aside the impugned order under Annexure-5 and to allow both the applications.

4. Mr. Sahu, learned counsel for the purchasers/Opposite Party Nos.6 and 8 submits that learned trial Court has committed no error in rejecting both the aforesaid petitions. Since the Petitioner/Defendant No.1(a) could not show sufficient cause for her appearance on the date when the matter was called for hearing, the order setting her *ex-parte* was refused to be recalled. As such, there is no illegality in rejecting such petition.

4.1 Further, inconsistent plea in the written statement may only be introduced by filing an application under Order VI Rule 17 CPC and not otherwise. Referring to the provisions of Order VI Rule 7 CPC, it is submitted that contradictory plea can only be sought to be incorporated by seeking for amendment of the written statement. And in that event, the adversary should be given an opportunity of hearing. In support of his submission, Mr. Sahu, learned counsel for contesting Opposite Parties, placed reliance on a decision of this Court in the case of ***M/s Gannon Dunkerly and Co. Ltd. Represented through its Constituted Attorney Sri Sridhar Dubey Vs. Steel Authority of India Limited, Rourkela Steel Plant, Rourkela***, reported in 76 (1993) CLT 655, wherein at para-6, is held as follows:-

> *"6. For resolution of the controversy, reference to few relevant provisions of the Code is necessary. Order 8, Rule 9 of the Code lays down an important rule of pleading that no pleading subsequent to the written statement by a defendant other than by way of defence to a set off shall be presented except by leave of the Court. The rule requires leave of the Court before any party can make a further pleading after written statement has been filed. Where a defendant intends to file additional written statement, he must file an application showing the circumstances as to why he failed to raise the plea in the original written statement, and the other party must be given opportunity to meet the motion. In considering whether leave to file an additional written statement, should be granted or not, the delay that has taken place in raising the contention raised in the additional written statement and the reason why those contentions were not raised before have to be considered. Though the Rule invests the Court with wide discretion and enables it to accept written statement filed subsequently, same is not to be accepted where a new case or facts inconsistent with the original written statement are sought to be brought on record. In this context, reference to provisions of Order 6, Rule 7 of the Code is necessary. The said rule stipulates that a new ground of claim or allegation of fact inconsistent with the previous pleading of the party cannot be accepted except by way of amendment. Thus, Order 6, Rule 7 of the Code is subject to the Order 6, Rule 17 of the Code under which the amendments are made. Therefore, provisions of Order 6, Rule 17 of the Code are to be kept in mind while accepting fresh pleadings raising new ground of claim of containing allegations of fact inconsistent with the previous pleadings of the party. A departure takes place when in any pleadings the party deserts ground' that he had taken in his previous pleading and resorts to another and different ground. The object of Order 6, Rule 7 of the Code is to prevent such a departure."*

He, therefore, submits that since no application under Order VI Rule 17 has been filed for amendment of the pleading made by Defendant No.1 in his written statement, an inconsistent plea could not have ben taken; that too without affording an opportunity of hearing to the adversary. He, therefore, submits that learned trial Court has committed no error in rejecting both the applications.

5. Considering the rival contentions of the parties and on perusal of record, it appears that while rejecting the application under Order IX Rule 7 CPC, learned trial Court has not assigned any reason thereto. It was rejected by a cryptic and non-speaking order. The plea taken by the Petitioner in her petition under Order IX Rule 7 CPC, has neither been discussed nor rejected. Hence, the impugned order rejecting the application under Order IX Rule 7 CPC is not sustainable and is set aside.

5.1 So far as the petition to accept the additional written statement is concerned, admittedly Petitioner/Defendant No.1(a) has sought to take an inconsistent stand in the additional written statement. In the written statement filed by Defendant No.1, the plea taken by the Plaintiffs that they were Bhagchasi under him, was denied and it is also denied that they are in possession over the suit property. But in the additional written statement, it has been stated that the Plaintiffs were the Bhagchasi under Defendant No.1 and they are in possession over the suit property. This being an inconsistent plea made in the written statement filed by Defendant No.1 could not have been sought to be introduced in shape of an additional written statement. The proper procedure for the Petitioner/Defendant No.1(a) was to file an application under Order VI Rule 17 CPC in view of the ratio decided in ***M/s Gannon Dunkerly and Co. Ltd. (supra)***. Thus, learned trial Court has committed no error in rejecting such an application.

6. In view of the above, while setting aside the order in respect of rejection of an application under Order IX Rule 7 CPC, this Court confirms the order passed by learned trial Court in rejecting the petition to accept additional written statement sought to be filed by Petitioner/Defendant No.1(a).

6.1 It is further directed that learned trial Court should consider the petition under Order IX Rule 7 CPC filed by the Petitioner/Defendant No.1(a) afresh giving opportunity of hearing to the parties concerned and dispose of the same by a reasoned order.

7. With the aforesaid observation and direction, the CMP is allowed to the aforesaid extent.

8. Interim order dated 9th August, 2016 passed in Misc. Case No.1099 of 2016 shall continue till the next date.

—— o ——

2023 (III) ILR-CUT-165

B.P. ROUTRAY, J.

MACA NOS. 672 & 746 OF 2019

RANJAN MALLA …….Appellant

.V.

ABHA MITTAL & ANR. ……Respondents

MACA NO.746 OF 2019
CHOLAMANDALAM MS G.I.CO. LTD. -V- RANJAN MALLA & ANR.

MOTOR ACCIDENT CLAIM – Enhancement of compensation on the ground of permanent disability – Relevant factor to be considered – Explained. (Para 9-10)

Case Law Relied on and Referred to :-

1. 2011 (1) SCC 343: Raj Kumar Vs. Ajay Kumar.

For Appellant : Mr.K.K.Das
Mr.G.P.Dutta (in MACA 746/2019)

For Respondents : Mr.G.P.Dutta
Mr. K.K.Das (in MACA 746/2019)

JUDGMENT Date of Judgment : 17.07.2023

B.P. ROUTRAY, J.

1. Heard Mr. Das, learned counsel for the Claimant and Mr.Dutta,learned counsel for the Insurer.

2. Both the appeals arise out of the same judgment dated 14th May,2019 passed by the learned First Motor Accident Claims Tribunal, in M.A.C.No.135 of 2013, wherein compensation to tune of Rs.9,02,650/- along with interest @6% per annum has been granted from the date of filing of the claim application on account of injuries sustained by the claimant in the motor vehicular accident dated 17th September, 2012.

3. MACA No.764 of 2019 has been filed by the Insurer challenging the award and MACA No.672 of 2019 has been filed by the claimant for enhancement of the compensation amount.

4. Challange in both the appeals are entirely on the quantum of compensation.

5. Learned Tribunal has granted compensation on the following heads:

i) Loss of Income taking consideration of loss of pay for 401 days (Out of 521 days)	:	Rs.1,87,199/-
ii) Pain and sufferings	:	Rs.1,50,000/-
iii) Amenities of life & loss of comfort.	:	Rs.1,00,000/-
iv) 65 days attendant charges	:	Rs.32,500/-
v) Total Medical expenses	:	Rs.3,82,943/-
vi) Future treatment	:	Rs.50,000/-
		TOTAL – Rs.9,02,642/-

6. It is submitted on behalf of the Insurer that since the injuredclaimant is a Government employee and serving as a typist in the district court at Barbil in the district of Keonjhar, he did not sustain loss of income nor did he eligible to get any amount towards treatment expenses and he can reimburse the same. It is further submitted by Mr.Dutta on behalf of the Insurer that, the amount granted towards pain and suffering as well as future treatment expenses are on higher side.

7. Conversely, the injured claimants submits for grant of further amount of Rs.2,30,705/- towards medical bills, Rs.70,000/- towards rent amount paid during the period of treatment and physiotherapy, Rs.1,50,000/- towards future medical expenses, Rs.12,13,414/- towards loss of future earning, Rs.2,00,000/- towards compensation for permanent disablement, Rs.1,00,000/- for loss of future amenities in life, Rs.1,00,000/- for conveyance, Rs.2,28,000/- as further amount towards attendant cost, Rs.50,000/- towards food and nutrition and Rs.1,50,000/- towards pain and sufferings in his favour, which the Tribunal has failed to award. The injured-claimant thus prays for further compensation of Rs.25,60,730/- in total.

8. It is seen that, admittedly the injured – claimant was serving as Sr.Typist in the district court at Barbil and he is receiving his monthly salary continuously till date except such periods mentioned in his affidavit dated 6th March 2023, i.e. no salary from 11th April 2013 to 20th February 2014 and half salary from 16th January 2013 to 10th April 2013. The undisputed monthly income of the injured on the date of accident was Rs.16,853/- and his age was 39 years on the date of accident.

9. As per the decision of Hon'ble Supreme Court rendered in the case of ***Raj Kumar v. Ajay Kumar, 2011 (1) SCC 343***, it is held that;

> "12. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence:
>
> (i) whether the disablement is permanent or temporary;
>
> (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement,
>
> (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person.
>
> If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.
>
> 13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent ability (this is also relevant for awarding compensation under the head of loss of

amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii)whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

.. .. XX .. .. XX .. ..

16. The Tribunal should not be a silent spectator when medical evidence is tendered in regard to the injuries and their effect, in particular the extent of permanent disability. Sections 168 and 169 of the Act make it evident that the Tribunal does not function as a neutral umpire as in a civil suit, but as an active explorer and seeker of truth who is required to `hold an enquiry into the claim' for determining the `just compensation'. The Tribunal should therefore take an active role to ascertain the true and correct position so that it can assess the `just compensation'. While dealing with personal injury cases, the Tribunal should preferably equip itself with a Medical Dictionary and a Handbook for evaluation of permanent physical impairment (for example the Manual for Evaluation of Permanent Physical Impairment for Orthopedic Surgeons, prepared by American Academy of Orthopedic Surgeons or its Indian equivalent or other authorized texts) for understanding the medical evidence and assessing the physical and functional disability. The Tribunal may also keep in view the first schedule to the Workmen's Compensation Act, 1923 which gives some indication about the extent of permanent disability in different types of injuries, in the case of workmen.

17. If a Doctor giving evidence uses technical medical terms, the Tribunal should instruct him to state in addition, in simple non-medical terms, the nature and the effect of the injury. If a doctor gives evidence about the percentage of permanent disability, the Tribunal has to seek clarification as to whether such percentage of disability is the functional disability with reference to the whole body or whether it is only with reference to a limb. If the percentage of permanent disability is stated with reference to a limb, the Tribunal will have to seek the doctor's opinion as to whether it is possible to deduce the corresponding functional permanent disability with reference to the whole body and if so the percentage.

18. The Tribunal should also act with caution, if it proposed to accept the expert evidence of doctors who did not treat the injured but who give `ready to use' disability certificates, without proper medical assessment. There are several instances of unscrupulous doctors who without treating the injured, readily giving liberal disability certificates to help the claimants. But where the disability certificates are given by duly constituted Medical Boards, they may be accepted subject to evidence regarding the genuineness of such certificates. The Tribunal may invariably make it a point to require the evidence of the Doctor who treated the injured or who assessed the permanent disability. Mere production of a disability certificate or Discharge Certificate will not be proof of the extent of disability stated therein unless the Doctor who treated the claimant or who medically examined and assessed the extent of disability of claimant, is tendered for cross- examination with reference to the certificate. If the Tribunal is not satisfied with the medical evidence produced by the claimant, it can constitute a Medical Board (from a panel maintained by it in consultation with reputed local Hospitals/Medical Colleges) and refer the claimant to such Medical Board for assessment of the disability.

19. We may now summarise the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the

> percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).
>
> (iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.
>
> (iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors."

10. In the instant case, keeping in view the loss of monthly salary in terms of the affidavit furnished by the claimant, the same is computed at the rate of Rs.1,98,864/, i.e. Rs.16,853/- for 10 months & 9 days and Rs.16,853/- x 3/2. He sustained multiple injuries including compound fracture on different parts of the body and taking note of the period of treatment undergone, the amount as directed by the Tribunal to the tune of Rs.1,50,000/- towards pain and suffering is confirmed. The claimant is not entitled for any amount towards loss of amenities in life in view the facts that, he is serving as a Typist under Government and a married man aged about 39 years on the date of accident. The attendants cost for a period of 521 days, he underwent treatment as an indoor patient, is computed at Rs.1,00,000/- since the near relatives of the claimant have attended him during his treatment. A sum of Rs.6,00,000/- is granted towards medicine bills and treatment cost keeping in view the original bills submitted for the same before the Tribunal. An amount of Rs.80,000/- is granted towards future medical treatment expenses in view of the bills of treatment submitted in that respect and also taking note of the evidences adduced. A sum of Rs.50,000/- also is granted towards conveyance charges and cost of special diet. A further amount of Rs.1,00,000/- is added thereto towards cost of treatment before physiotherapy.

11. In the result, the appeals are disposed of with a direction to the Insurer to deposit enhanced compensation amount of Rs.12,78,864/-(Twelve lakh seventy eight thousand eight hundred sixty four) along with interest @6% per annum from the date of filing of the claim application within a period of two months from today; where-after the same shall be disbursed in favour of claimant on such terms and proportion to be decided by the Tribunal.

12. The statutory deposit made by the Appellant in MACA No.746 of 2019 along with accrued interest thereon be refunded to him on proper application and on production of proof of deposit of the award amount before the learned Tribunal.

—— o ——

2023 (III) ILR-CUT-170

B.P. ROUTRAY, J.

FAO NOs.130 & 219 OF 2008

GEETIGUNJAN SARANGI .....Appellant

.V.

NAGENDRANATH SARANGI & ORS. .....Respondents

FAO NO. 219 OF 2008

BIBHUTI BHUSAN SARANGI -V- GEETIGUNJAN SARANGI & ORS.

PROBATE OF WILL – Whether all the attesting witnesses are required to be examined for the purpose of probate of the will? – Held, No – Law does not require examination of all the attesting witness, the evidence of one witness is sufficient, provided the same is reliable and trustworthy. (Para-13)

For Appellant : Mr.S.K.Mishra, Sr.Adv.
Mr.A.C.Mohapatra (in FAO 219/2008)

For Respondents : Mr.A.C.Mohapatra
Mr.K.Mishra (for Intervenor)
Mr.S.K.Mishra, Sr.Adv. (in FAO 219/2008)

JUDGMENT Date of Judgment : 04.08.2023

B.P. ROUTRAY, J.

1. Both the appeals being arise out of the same judgment of the learned Civil Judge (Senior Division), Second Court, Cuttack passed in O.S.No.1 of 2005 are heard together and disposed of in this common judgment.

2. Heard Mr. S.K. Mishra, learned counsel for the Plaintiff and Mr. A.C. Mohapatra, learned counsel for Defendant No.2 as well as Mr.K.Mishra, learned counsel for Intervenor applicant.

3. Since two Intervention Applications have been filed in I.A. No.228 of 2023 and I.A.No.210 of 2023 in both the appeals respectively, the same are dealt with at the outset. These two Intervention Applications have been filed before this Court on 15th March 2023 and 10th March 2023 respectively by the applicant, namely Prahallad Sahoo.

4. It is the contention of the Intervenor applicant that he was a friend of the testator, namely Hema Chandra Sarangi and had served in the same Government Office where the Testator worked. His further contention is that, the Testator executed a Will dated 30th December 2000 in his favour in respect of such properties covered under Khata No.840 and 833, which are also the properties covered in O.S No. 1 of 2005. But the Intervenor applicant could not register said Will due to

ignorance and the same after being traced out on 25th January 2023 was registered before the Sub-Registrar, Mahanga on 2nd March 2023. As such, the Intervenor prays to array him as a party in the appeal and decide the matter in his favour accordingly.

5. Upon hearing all the parties on the Intervention Application, it is found that the present intervener (Prahallad Sahoo) did neither appear before the probate Court (The District Judge) nor did make any attempt to take step to file probate proceeding before appropriate court at any point of time. The testator–Hema Chandra Sarangi admittedly died on 29th April 2001 and till filing of the present Intervention Application, nothing has been stated about any such step taken by the Intervenor in respect of the alleged Will or the properties covered therein. Even the copies of the Intervention Applications have not been served on either party to the proceeding. No excuse or explanation has been offered by the Intervenor Applicant to explain the failure on his part to contest in the probate proceeding before learned District Judge and all of a sudden he woke up in 2023, though the paper publication of issuance of notice was made in October 2019 by this Court. It is strange to see that the alleged Will executed in favour of Prahallad Sahoo (the Intervenor) under Annexure-4, is though dated 30th December 2000, but stated to have been registered on 2nd March 2023. It is important to mention that the alleged Propounder – Prahallad Sahoo is also seen to have signed in the Will, which is quite unusual in such matters. However, this Court refrains from giving any opinion on the genuineness of the alleged Will dated 30th December 2000 executed in favour of Prahallad Sahoo. But it is made clear that this Court, by dealing with the prayer of the Intervenor to be arrayed as a party in the present appeals, is of the opinion that his prayer to intervene in the appeals at this belated stage and under suspicious circumstance is not found entertainable. As such, the prayer for intervention is rejected.

6. Next coming to the merits of the challenge in both the appeals, it needs to mention here the family relationship between the parties. Udaynath, Nagendranath (Defendant No.1) and Hema Chandra (Testator) are three sons of Banchhanidhi. Hema Chandra, the testator, was a bachelor. Udaynath had two sons, namely Bibhutibhusan (Defendant No.2) and Sashibhusan and one daughter namely Kalpalata (Defendant No.4). Sashibhushan was predeceased leaving behind his widow Manorama (Defendant No.3) and son Geetigunjan (Plaintiff).

7. As per the Plaintiff, Hema Chandra executed two Wills dated 24th November, 2000 and 18th April 2001 in favour of the Plaintiff under Ext. 22 and 23 respectively. Ext. 22 is a registered Will in respect of self-acquired properties of Hema Chandra and Ext. 23 is an unregistered Will in respect of the properties fall to the share of Hema Chandra out of the joint family properties having common ancestor Banchhanidhi. The probate proceeding was in respect of both the registered and unregistered Wills.

8. The learned Probate Court upon adjudication held the registered Will under Ext. 22 as genuine and directed for probate of the same, whereas the unregistered Will under Ext. 23 was disbelieved and the prayer of the Plaintiff was rejected in that respect consequently.

9. FAO No.130 of 2008 has been filed by the Plaintiff challenging the rejection of his prayer by the Probate Court in respect of unregistered Will under Ext.23. FAO No.219 of 2008 has been filed by Defendant No.2 in respect of grant of probate under the registered Will under Ext. 22.

10. Mr. S.K Mishra, learned Senior Counsel submits for the Plaintiff that rejection of the prayer for probate in respect of the unregistered Will while granting the probate in respect of Ext. 22 holding the same as genuine is contrary to own finding of the learned District Judge and further, the grounds stated to disbelieve execution of unregistered Will are erroneous and without valid reasons. He further submits that when both the Wills are holographic, no reason is there to disbelieve the authenticity and genuineness of Ext.23 for the mere reason of unregistering the same.

11. Mr. A.C. Mohapatra, learned counsel, on the other hand submits for Defendant No.2 that the execution of both the Wills under Exts.22 and 23 are doubtful and the learned District Judge though had disbelieved Ext.23 rightly, but failed to appreciate the evidences in respect of Ext.22. He further submits that, when the Will was executed at Salepur, the registration of the same at Cuttack is something unusual and secondly, P.W.2, one of the attesting witnesses, is an interested witness for the Plaintiff and therefore his evidence should not have been believed.

12. It is seen from record that two witnesses Viz. P.W.1 and 2 were examined by the Plaintiff. P.W.1 is the Plaintiff himself and P.W.2, namely, Jayanta Kumar Nanda is one of the attesting witnesses to the Will, who is also the maternal uncle of the Plaintiff. D.W.1 is Defendant No.2 himself, D.W.2 is an independent witness and a co-villager examined on behalf of Defendant No.2. D.W.3 is Defendant No.3 and the mother of the Plaintiff. D.W.4 is an independent witness examined on behalf of Defendant No.1. Defendant No.4 did not come to contest the case and remained ex-parte.

13. Admittedly, all the parties are the members of one family having their common ancestor Banchhanidhi. The Testator is the brother of the father-in-law of Manorama and, as such having a grandfatherly relationship with the Propounder (plaintiff). As per the evidences brought through P.W.1, P.W.2, D.W.3 and other witnesses also, the Testator was residing in the same cluster of house in the village where other parties were also residing. It is brought through evidence that the relationship between the Testator with Nagendranath was not good and a partition suit in T.S No. 58 of 1996 was filed by Hema Chandra in the Court of Civil Judge

(Sr.Division), Second Court, Cuttack, which was finally abated upon death of Hema Chandra.

The most important thing to be examined in a probate proceeding is that, whether the Will in question has been executed in a sound state of mind and is free from all suspicious circumstances. In the instant case, the family relationship between the Testator and the Propounder is admitted. The filial affection of the Testator towards the Propounder has been brought through evidence in the mouth of all such witnesses Viz. P.W.1, 2 and D.W.3 and others as well. It is also seen from evidence that Hema Chandra was leading a lonely life after his retirement and residing in the ancestral house at the village where the Testator and his mother were also residing. The relationship with Bibhutibhusan (Defendant No.2), the brother of deceased father of the Testator, was not good with the Testator and it is quite visible from the statements of the witnesses that Manorama and his son were taking care of the testator, who was leading a lonely life after his retirement.Therefore, it is obvious on the part of the Testator to gain some sympathy towards Manorama and his son (Plaintiff), which might have laid the ground for executing special benefit to him. The Wills under Ext. 22 and 23 are admittedly in the handwriting of the Testator. The filing of a partition suit and one F.I.R. in P.S Case No. 296/97 justify the circumstances to suggest that he did not have a good term with Defendant No.1 and 2. Only for the reason that P.W.2 is the maternal uncle of the Testator he cannot be termed as an interested witness when the evidences are clear to the effect that the Plaintiff and his mother are well acquainted with the day-to-day life of the Testator and his handwriting also. Law does not require examination of both attesting witness and for the purpose of the same, the evidence of one witness is sufficient provided the same is reliable and trustworthy. Having gone through the evidences of P.W.2 and the corroborating factors coupled with his statements made in the cross-examination, the same do not bring out any such circumstance to doubt his veracity or interestedness in the Will in favour of the Plaintiff. The other ground urged by Defendant No.2 that the registration of the Will at Cuttack instead of Salepur is a suspicious circumstance, has no merit at all. The Testator was a Government servant and he served as a Head Clerk in the veterinary office. The Testator is a matriculate knowing Odia and English well. Therefore, the visit of the Testator to Cuttack, which is at a short distance from his place of residence, is very usual and in absence of any material to doubt the conduct on that score, no reason is left to suspect execution of the Will. Therefore, the finding of the Probate Court regarding genuineness of the registered Will under Ext. 22 is seen without any infirmity and is confirmed by this Court.

14. So far as the unregistered Will is concerned, it is not understood in the circumstances as to why the same was left unregistered though the other one was registered shortly before that.Ext.22 was registered on 24th November 2000, i.e. on the same day of its execution. Leaving Ext. 23 unregistered creates a doubt in the

mind of the Court that the same was not finalized. The admitted fact remains that the Testator died on 29.04.2001, i.e. after 11 days of alleged execution of Ext.23. If the status of the Testator is considered as a retired Government servant and the fact remains that he registered the other Will on the date of its execution, then the inference is clear that the Will prepared under Ext.23 was not finalized and is at the draft stage only.The further doubt created in the mind of the Court that when the Testator chose to execute the earlier Will on 24.11.2000 then he would have executed the second Will also on the same date or he could have covered both self-acquired and joint family properties in the same Will without waiting for a second Will, had he made up his mind in respect of those joint family properties covered under Ext 23. Therefore, the doubt raised by the trial court in respect of Ext.23 that the same is not final, is found substantiated and supported by the circumstances. Accordingly, this Court does not find any infirmity in such finding of the Probate Court, which is confirmed accordingly.

15. In the result, both the appeals are dismissed being found without merit. The Original LCR be returned to the Probate Court without delay.

—— o ——

2023 (III) ILR-CUT-174

Dr. S.K. PANIGRAHI, J.

W.P.(C) NO. 22195 OF 2022

SOURABHA, N.G.O., KHURDA …….Petitioner

.V.

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

CONSTITUTION OF INDIA, 1950 – Article 226 – Maintainability of writ application – The work agreement has an arbitration clause – Clause 8 of the agreement deals with the dispute settlement mechanism through arbitration – Whether the writ is maintainable when there is a provision for settlement through arbitration? – Held, No – The extra ordinary Jurisdiction of this court under Article 226 cannot be invoked. (Para-26)

Case Law Relied on and Referred to :-

1. 2007 (5) SCC 388 :Commissioner of Central Excise, Bangalore Vs. Brindavan Beverage (P) Ltd. & Ors.
2. 2011(1) SCC 109 : Commissioner of Central Excise, Chandigarh Vs. Shital International.
3. 2006 (7) SCC 592 :Commissioner of Customs, Mumbai Vs.Toyo Engineering India Ltd.

For Petitioner : Mr. Prafulla Kumar Rath

For Opp. Parties : Mr. A.K.Parija, AG
Mr. T.K. Pattanayak, ASC
Mr. B.K. Sharma (for caveator)

JUDGMENT Date of Hearing :19.07.2023 : Date of Judgment: 25.07.2023

Dr. S.K. PANIGRAHI, J.

1. The Petitioner, in this Writ Petition, has made a prayer to set aside the order No.2873 dated 23.08.2022 passed by the Joint Secretary to Government, S.T. and S.C. Development Department and Programme Director, PMU, OPELIP terminating the existing agreement in respect of two OPELIP Projects i.e. to work in the programme area of KKDA, Belghar in the district of Kandhamal and in the programme area of PBDA, Khuntagaon in the district of Sundargarh.

I. FACTS OF THE CASE:

2. The fact of the case is that the Petitioner is a Non-Government Organization (NGO) registered under the Societies Registration Act, 1860 and working on different projects of Social Development, eradication of poverty, livelihood programme for PVTG vulnerable group etc. in Odisha and for implementation of various awareness programmes in rural areas. Now, the Petitioner is working in OPELIP Project assisted by IFAD under Poudi Bhuyan Development Agency (PBDA), Khuntagaon, Lahunipada, Sundargarh and under Kutia Kandha Development Agency (KKDA), Belghar, Kandhamal.

3. The IFAD (International Fund for Agricultural Development), Union of India and Government of Odisha decided to implement OPELIP (Odisha PVTG Empowering and Livelihoods Empowerment Programme) for Primitive Vulnerable Tribal Group people launched in 2017 to be worked out through Non-Government Organisations assisted by IFAD and the Union of India and the State Government. The intention of the Government for mobilization and giving awareness among the Primitive vulnerable tribal group people and their development. Accordingly, the Government of Odisha divided those areas into 17 Micro Projects and selected 15 numbers of NGOs for facilitating the same. It was also decided that the Entry Point Activities (EPA) would be for one year i.e. from 2017-18 and if it would be successful, in that event, the NGOs would continue their activities for the next term and to work in programme areas. An operational Guideline was also framed for Entry Point Activities for OPELIP.

4. Although the duration of the programme is seven years, but it was decided that the Entry Point Activities of the NGOs will be reviewed after one year. If the performance was found satisfactory, the said NGO would proceed for another six years. Accordingly, the Petitioner was selected as one of the facilitating NGOs by the Committee headed by Opposite Party No.1 with due procedure to work in two

Micro Project Programmes areas named Khuntagaon in Sundargarh district and Belghar in Kandhamal district by executing an Agreement with Petitioner on 31.05.2017 and Engagement Letter dated 17.06.2017 was issued to the Petitioner.

5. Upon execution of Agreement, the Petitioner by deputing its 79 number of employees to the Programme areas had started its work as per Guidelines in June, 2017 under direct supervision of Opposite Party Nos.5 and 6 and completed the same within 10 months (from June, 2017 to March, 2018) successfully. In fact, it was too difficult to work by the Government Official because of all the Micro Project areas are covered by Mao Militants. While the Petitioner was working in programme areas, the Opposite Party No.4/ Programme Director vide his letter dated 21.02.2018 directed the Special Officer to call for the records of Petitioner for verification. Prior to the said letter, the Petitioner had submitted the Report on 15.02.2018 before the Special Officer for verification. Upon verification of the report, the Special Officer vide letter dated 15.02.2018 informed the Programme Director that the report of the Petitioner was satisfactory. By reviewing the report of the Petitioner and other NGOs, since the Opposite Party No.4/ Programme Director found the Entry Point Programme of previous year was satisfactory vide office order dated 23.03.2018, the Petitioner was directed to sign on the contract for renewal of the Agreement to be held on 31.03.2018. The Petitioner had signed the renewal Agreement on 31.03.2018 and the Programme Director vide letters dated 02.04.2018 and 04.04.2018 informed all the Special Officers of Micro Project Agencies that the contract of the Petitioner along with other NGOs had been renewed from 01.04.2018 to 31.03.2024.

6. When the matter stood thus, the Petitioner continued the work in the Schedule villages engaging its 79 employees and about 10,000 households to be covered, as per the direction of the Opposite PartyNo.4 to achieve the time line given by the Programme Director, OPELIP on 21.04.2018 for implementation of the E.P.As for the year 2018-19. During continuance of the work in Programme villages, the new Programme Director joined on 1st May, 2018 and called for a Review Meeting of the officials of Government engaged in OPELIP on 07.05.2018, 08.05.2018 and on 09.05.2018 without calling the Chief Functionaries of NGOs to the Review Meeting and issued show cause notice to all the NGOs working under OPELIP including the Petitioner regarding supply of utensil sets and MGNREGS KIT for distribution in the Programme areas. The Petitioner was issued with the show cause notice on 09.05.2018. The Petitioner submitted his reply on 13.05.2018 contending therein that the decision for distribution of utensils and MGNREGS KIT was not the unique decision of the Petitioner. Rather, it was the decision of the members of Village Development Agencies (VDAs) and the local Government Officers including the Collector of the concerned District, who was Chairman, OPELIP of the said Districts and the Petitioner being the facilitating Agency of Entry Point Activities of OPELIP had only to obey the direction of Government

functionaries, after consulting with the local officers. Since it is a need of the community as per the Guideline, the Petitioner had provided the materials to fulfill their demand. The people of the (PVTG) in Tribal areas are malnourished and suffers from several diseases causing food poisoning because of their poor system in food preparation and preservation of food. One of the factors is that the food cooked in non-metallic utensils and inadequate utensils/ carriers and it has been one of the criteria in OPELIP regarding health and nutrition. The Petitioner in his show-cause has described all the facts about distribution of MGNREGS KIT for generation of man days. The Programme Director in his letter No.1033 dated 19.05.2018 directed for termination of Contract with the Petitioner as facilitating NGO under OPELIP Programme areas by 17th June, 2018 which smacks arbitrariness and illegalities.

7. The Petitioner is working in the area under OPELIP through its number of employees and households for Entry Point Activities and the contract between the Government and the Petitioner has already been renewed since 31.03.2018 till 2024. After renewal of the contract the termination of contract within one month without any meaningful cause is unsustainable in law.

8. The Petitioner has distributed the MGNREGS KIT, Utensils in presence of MPA, local Officers and Public Representatives (PRI Members) and PMU Director, representatives of NRM Officer. In the Show-Cause, the Petitioner has conveyed to the Opposite Party No.4 and the contract with the Petitioner has been renewed till 2024 after the work of OPELIP found satisfactory. But, at this stage, the Petitioner was made inconvenienced by terminating the Contract.

9. The Petitioner after renewal of Agreement has deployed about 79 numbers of employees in Khuntagaon and Belghar for facilitating EPA in the OPELIP Programme catering to 10,000 Households. Due to termination of Contract, those employees will lose their job by which their family will be on the road and the beneficiaries will be deprived of the benefits from the Government as well as the Petitioner will fail to recover the money invested in Programme Area.

10. Challenging the earlier Termination order dated 19.05.2018, the Petitioner had approached this Court in W.P(C) No.9559 of 2018 and the same was disposed of on 31.08.2021 with the following orders:

> *"This matter is taken up through Video Conferencing Mode.*
>
> *Heard Mr. J. K. Khuntia, learned Counsel for the petitioner, Mr. Ashok Parija, learned Advocate General and Mr. B.K. Sharma, learned Counsel for Opposite Party No.4.*
>
> *Mr. Parija submits that since the main grievance of the petitioner is that the impugned order dated 19.05.2018 under Annexure-12 has been passed without considering the show cause filed by the petitioner, thereby violating the principles of natural justice; the authorities more particularly opposite party No.4 is now prepared to give the petitioner a fresh opportunity of hearing vis-à-vis the show cause filed by it and accordingly, prays that the matter be disposed of.*

Considering such submissions, the impugned order dated 19.05.2018 under Annexure-12 is set aside and the petitioner is directed to appear before the Programme Director, Odisha ParticularlyVulnerable Tribal Groups Empowerment & Livelihood Improvement Programme, SC & ST Development Department (opposite Party No.4) either physically or through Video Conferencing Mode on 6.9.2021, who in turn is directed to fix a date for giving personal hearing to the petitioner vis- à-vis show cause. Upon completion of such hearing, opposite Party No.4 is directed to pass the final order in accordance with law.

The Writ Application is accordingly disposed of.

Issue urgent certified copy of this order on proper application."

11. The Petitioner was noticed to appear before the Programme Director, OPELIP on different dates. The Petitioner entered appearance and complied with the requirements as required on different dates of hearing. The Project Director has passed the impugned order mechanically without considering reply given in the Show-Cause Reply and without applying the mind as to the grounds taken in the Show-Cause Reply to the effect that the allegations in the show-cause notice do not form part of Entry Point Activities (EPA) at all. Hence, this Writ Petition.

II. SUBMISSIONS ADVANCED ON BEHALF OF THE PETITIONER:

12. Learned counsel for the Petitioner had brought forward the following submissions:-

(i) As per Operational Guidelines, guiding principle for EPA is provided that Entry Point Activities will include inter alia: *"works based on urgent needs of the local communities such as rehabilitation of community shrines, drinking water, water harvesting, supply of solar lantern, supply of MGNREGS implements etc."*

(ii) A set of Guidelines called "Programme Implementation Manual" was issued by laying down different Guidelines. The Programme Implementation Manual provides as follows:

"16. The Programme will implement one or more Entry Point Activity in order to gain the confidence of the community. This will be the training ground for the community to plan for implementation of various activities. The programme has made an allocation of INR 175,000 to each village. The village will be facilitated to plan for these activities. The activities will be chosen in the VDA and, as far as possible, will create or repair assets of common use, especially targeting women, such as drinking water facilities, washing and bathing platforms, platforms for drying NTFPs/ crops etc".

(iii) In order to carry out Entry Point Activities, a contract initially was executed. The initial contract to carry out EPA and implementation of the programme was for a period from 01.06.2017 till 31.03.2018 which is in terms of Clause-2.4 of Special Conditions of Contract of Contract Agreement for Consultant Services between the Parties.

(iv) The Petitioner upon entering into the Contract successfully carried out the Entry Point Activities. Review and verifications were conducted by the specified authorities like Special Officer, KKDA. The Special Officer, KKDA vide letter dated 15.02.2018 has specially found that the performance of FNGO- SOURABHA in respect of Belghar is satisfactory, meaning thereby the Entry Point Activities in the shape of distribution of

MGNREGS Kits in KKDA, Belghar found to be satisfactory. After completion of first year period as aforesaid, the contract for KKDA and PBDA was executed for a period of 5-years i.e. from 01.04.2018 to 31.03.2024.

(v) The Petitioner worked in different areas of the State mostly dominated by Maoists having executed the aforesaid contracts. From time to time, the performance of the Petitioner was reviewed was held on 07.05.2018 and 08.05.2018. No wrong was pointed out by the Project Officials against the Petitioner for distribution of MGNREGS Kits as Entry Point Activities. On the other hand, the Authorities in their wisdom having found that the Petitioner has diligently worked regarding distribution of MGNREGS Kits as Entry Point Activities during the initial period of one year. Subsequently, the contract was executed for a period of 5 years. However, being estopped under law to raise the issue as to distribution of MGNREGS Kits as Entry Point Activities, suddenly a Notice dated 09.05.2018 was issued calling upon the Petitioner as to termination of the contract. The Petitioner Organization submitted a detailed show-cause on 23.05.2018 specifically indicating creation of 2725 Mandays, conducting 43 numbers of Palli Sabha, facilitating 22 numbers of Palli Sabha, organizing village-level meeting with farmers, selecting 5 numbers of progressive farmers and with details of achievements in a Tabular form. Such a reply is exhaustive and specific points have been raised in the show cause.

(vi) Considering all such show-cause notices and without complying with clause-2.8 of the Contract which is a clause governing the element of natural justice as a sine qua non before passing an order, the disengagement order dated 19.05.2018 was passed.

(vii) The Petitioner had challenged the said order under Annexure14 in W.P.(C) No.9559 of 2018. At the stage of argument, the learned Advocate General appearing for the State conceded that there has been non-consideration of the show-cause filed by the Petitioner, thereby there is violation of principles of natural justice. As a consequence thereof, the disengagement order dated 19.05.2018 was set aside. Direction was given to the Director, OPELIP to fix the date of hearing giving opportunity of hearing to the Petitioner vis-à-vis its show cause. The Opposite Party No.4 was directed to pass final order in accordance with law.

(viii) The order of dis-engagement has been passed by the Programme Director, OPELIP. Clause-2.8.1 of the contract is the relevant clause which empowers the client to terminate the contract. Clause- 2.8.1 of the contract is reproduced herein below for ready reference:

*"**2.8.1. By the Client**.*

The Client may, by not less than thirty (30) days' notice written notice of termination to the Consultants (except in the event listed in paragraph (below, for which there shall be a written notice of not less than sixty (60 days). such notice to be given after the concurrence of any of the events specified in paragraphs (a) through (g) of this Clause GCC 2.8.1, terminate this Contract.

In terms of Clause-2.8.1, it further provides that if the consultants fail to remedy a failure in the performance of their obligations hereunder, as specified in a notice of suspension pursuant to Clause-2.8 hereinabove, within thirty (30 days) of receipt of such notice of suspension or within such further period as the Client may have subsequently approved in writing. The Client can terminate the contract only thereafter.

Clause-2.7 of the Contract at Page-81 is the relevant clause as to suspension of a contract which has to take place prior to issuance of Termination Notice."

(ix) The impugned order of termination does not show that the Opposite Parties/ Authorities have adhere to Clause-2.8 of the Contract, which itself is an incidence of violation of natural justice. The order also does not show issuance of 30 days or 60 days notice as the case may be. In view of the above, the impugned order is in violation of principles of natural justice. In other words, there has been non- compliance of principles of natural justice as:

(a) The Show-Cause Notice never demonstrates any single word as to the grounds on which the termination has taken place i.e. finding fault in supplying MGNREGS Kits as Entry Point Activities. On the other hand, the Show-Cause Notice was issued for the limited purpose of explaining how many mandays in fact on distribution of MHNREGS Kits is created and how it has worked on capacity building and how it has approached sustainable Livelihood Development etc, which has been replied by the petitioner in detail in its show-cause i.e. at Page-252 of the Writ Petition dated 23.06.2018 giving in details about the number of Mandays, how it has lead to empowerment of targeted communities, but the Opposite Party No.4 without whispering a single words on the merits involved in the show-cause, has straightway found fault and defects with the petitioner for distribution of MGNREGS Kits itself.

(b) The petitioner herein contends that by adopting such a project, the Opposite Party No.4 has passed order on reasoning's which is not subject matter of the Show-Cause Notice.

(x) The Petitioner placed reliance on the judgments passed by the Supreme Court in the cases of ***Commissioner of Central Excise, Bangalore v. Brindavan Beverage (P) Ltd. & others***[1] ***, Commissioner of Central Excise, Chandigarh v. Shital International***[2] ***and Commissioner of Customs, Mumbai v. Toyo Engineering India Ltd.***[3] wherein the adherence to the principle of natural justice has been prominently focused.

(xi) There has been non-consideration of show-cause in the impugned order. The Opposite Party No.4 has not dealt with nor has applied its mind on the detailed show-cause nor even has considered the same by giving reasons. In the instant case, this Court while setting aside the initial order of termination dated 31.08.2021 had also directed the Opposite Party No.4 to pass an order as per law meaning thereby in all the elements of natural justice as embodied with the contract are also to be complied with. This Court in the earlier order had never dispensed with compliance of the specific terms of the contract which embodied the principles of natural justice itself. Hence, the arguments of the learned Advocate General that giving opportunity of personal hearing as taken is incorrect.

(xii) While passing the impugned order, Clause- 2.7 of the contract has never been followed. The Notice of 30 days or 60 days as the case may be has never been given to the Petitioner. Non-giving of such a Notice by the Opposite Party No.4 is fatal to the action like straightway termination. Hence, there is again violation of principles of natural justice by the Opposite Party No.4.

(xiii) Law is well settled that even if the scope of litigation remains within the realm of a contract, but action like termination of the contract involving the State and its undertaking has to follow the decree the fairness must be with strict complying of natural justice and with all transparency. Where the Court exercising power under

1. 2007 (5) SCC-388, **2**. 2011(1) SCC 109, **3.** 2006 (7) SCC-592

Article 226 finds that there is violation of principles of natural justice, it would be justified to strike down the action under Article 226 instead of relegating parties to a civil remedy.

(xiv) Similar order of termination was passed in respect of Six FNGOs with self-same allegations and contract of Four FNGOs have been restored. However, the Petitioner FNGO has been discriminated. The FNGOS restored are:

1. DKDA, Chatikona,
2. DKDA, Parsali,
3. HK & MDA, Jashipur,
4. PBDA, Jamardihi,
5. PBDA, Rugudakudar, and
6. S.D.A, Chandragiri.

(xv) In view of the aforesaid, there being clear non-compliance of principles of natural justice, which is established here, the impugned action is liable to be quashed.

III. SUBMISSIONS ON BEHALF OF OPPOSITE PARTIES 1, 2 AND 3/ STATE:

13. On the other hand, learned counsel for the Opposite Parties/ State has brought forward the following submissions:

(i) The Writ Petition is not maintainable in view of the fact that the Agreement has an arbitration clause. Clause-8 of the Agreement deals with the dispute settlement mechanism through the arbitration. It is settled law that if there is an arbitration agreement for resolution of the dispute, the parties must be referred to arbitration. In contractual matters where disputed question of facts are involved, the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of Indian cannot be invoked. The Petitioner is praying for issuance of a restraining order from this Court preventing the authority to take action as per the terms and conditions of the agreement. Moreover, the contract/agreement if confers a particular action to be taken by the employer, he cannot be prevented from doing so and his action may be subject matter of challenge, but there cannot be any prohibition.

(ii) Thus, the present Writ Petition in this view is not maintainable. Further, Section-14 of Specific Relief Act, 1963 provides that a contract which in its nature determinable cannot be specifically enforced. Further, Section 41 of the said Act, provides an injunction cannot be granted to prevent breach of a contract, the performance of which would not be specifically enforced. The present contract between the parties being determinable in nature cannot be specifically enforced and the contract being determinable in nature, in view of Section 41(e) of the Specific Relief Act, 1963, an injunction cannot be granted to prevent the breach of a contract, the performance of which could not be specifically enforced.

(iii) It is well settled that ordinarily, the remedy available for a party complaining of breach of contract lies for seeking damages. The party will be entitled to the relief of specific performance, if the contract is capable of being specifically enforced in law. The remedies for a breach of contract being purely in the realm of contract are dealt with by civil courts. The public law remedy, by way of a Writ Petition under Article 226 of the Constitution of India, is not available to seek damages for breach of contract or

specific performance of contract. In contractual matters, the decision-making process is subject to judicial review and not the decision itself. In the present case, the decision-making process is within the realm of legal principles and this being the position, the Writ Petition ought not to be entertained by this Court.

(iv) The goal of Odisha PVTG Empowerment and Livelihood Improvement Programme (OPELIP) is to achieve enhanced living conditions and reduced poverty of the Particularly Vulnerable Tribal Group (PVTG) and other poor communities. This is sought to be achieved through realizing the development objective of enabling improved livelihoods and food and nutrition security primarily for a total of 62,356 households (comprising 32,090 PVTGs, 13,970 other Scheduled Tribes (STS) households, 5486 Scheduled Castes (SCs) households and 10,810 others) would directly benefit from the programme. ST and SC Development Department, Government of Odisha is the Nodal Department at State Level responsible for the functions relating to planning, fund flow, monitoring, evaluation, knowledge management etc.

(v) One of the key initial activities of OPELIP is the engagement of Facilitating NGOs like the Petitioner in the present case, whose main role at the grass root level consists of intensive handholding support to the PVTGs which translates into capacity building and awareness creation of delivery of services related to livelihood empowerment etc.

(vi) Accordingly, the Petitioner's NGO got an opportunity to work in the field facilitating weaker/ PVTG, Backward Community in the village planning. The present scheme OPELIP is being implemented by the State which is financed by International Fund for Agriculture Development (IFAD'), an international organisation.

(vii) In this process, the NGOs are to organize Village Development Associations (VDA) and are to seek opinion of the Village Development Associations (VDA) about the deficiencies and facilities that requires for the purpose of their mobilization and programme implementation. The NGO will submit the shortlisted potential Entry Point Activity (EPA) to Special Officer/ Project Manager of Micro Project Agency (MPA) for final approval which the Special Officer will approve based on technical, social and financial consideration of the Entry Point Activity (EPA).

(viii) The Petitioner's NGO was entrusted to look after and work in KKDA, Belghar under Kandhamal District and in PBDA, Khuntagan under Sundargarh district. Accordingly, an agreement was executed between the Programme Director (Opposite Party No.4) and the Petitioner for 10 months and then subsequently, for a period of 6 years on 19.03.2018.

(ix) Considering the Entry Point Activity (EPA) and its objectives, the Opposite Party No.4 agency vide show cause notice dated 09.05.2018 sought for an explanation from the Petitioner against the proposed disengagement from being a facilitating NGO, on the premise that the petitioner had made huge expenditure towards procurement and distribution of MGNREGA kits, kitchen utensils etc. as well as expenditure of Unique Activity under Entry Point Activity (EPA) without being able to create sufficient mandays which would have uplifted the living conditions of the PVTGA.

(x) Accordingly, a show cause reply was given by the Petitioner to the Programme Director (Opposite Party No.4) on 13.05.2018. The reply given by the Petitioner was not satisfactory and, accordingly, letter dated 19.05.2018 was issued by the Opposite Party No.4 terminating the contract with the Petitioner NGO within a period of 30 days i.e. 17.06.2018 as per Clause-2.8. Thereafter, the Petitioner had approached this Court

challenging the termination order dated 19.05.2018 in W.P. (C) No.9559 of 2018 which was disposed of on 31.08.2021 with a direction to *"the Petitioner to appear before the Programme Director, OPELIP, ST & SC Development Department (Opposite Party No-4) either physically or through Video Conferencing mode on 06.09.2021, who in turn is directed to fix a date for giving personal hearing to the Petitioner vis-à-vis show cause. Upon completion of such hearing, the Opposite Party No-4 is directed to pass the final order in accordance with law".*

(xi) Accordingly, the Programme Director (Opposite. Party No.4) directed the Petitioner to appear before the Opposite Party No.4 either physically or Video Conference mode on 06.09.2021 so as to fix a date for personal hearing. The Petitioner did not appear. Subsequently, the Petitioner, on 23.09.2021, replied to the Show Cause Notice No.920 dated 09.05.2018 of the Programme Director (Opposite Party No.4) explaining the reasons for taking up Entry Point Activity (EPA) in PBDA, Khuntagaon, Sundargarh District and KKDA, Belghar, Kandhamal District.

(xii) As the reply of the Petitioner was not satisfactory, the Opposite Party No.4 offered opportunity for personal hearing on 07.10.2021. Accordingly, the Petitioner along with NGO President Shri Dhaneswar Sahu attended the personal hearing. During the course of hearing, they failed to explain whether any substantial improvement in generating man days have occurred under MGNREGA by supplying MGNREGA kits in the programme areas. It was evident that 5 man days had been generated per beneficiary which was way below the expected outcome under MGNREGA.

(xiii) Further, on the request of Petitioner and NGO President, they were given another opportunity to appear on 10.02.2022 so as to produce evidence relating to distribution of MGNREGA kits, kitchen utensils and unique activities under Entry Point Activity (EPA) during 2017-18. During the course of hearing, they agreed to submit (1) GPS Photographs relating to infrastructure (2) GPS photographs of distribution of solar light systems and (3) GPS photographs of processing units and their present functional status for KKDA, Belghar and PBDA, Khuntagaon for the year 2017-18. The Petitioner could not provide the entire GPS photographs of Entry Point Activity (EPA) taken up in two Micro Project Agencies during the year 2017-18. They submitted photographs of 08 villages under KKDA, Belghar and few activity photographs of 09 Village Development Communities (VDCs) under PBDA, Khuntagaon. Though taking GPS photographs is mandatory as per operational guidelines of Entry Point Activity (EPA), the Petitioner could not provide the evidentiary proof in the form of photographs in implementing the schemes.

(xiv) After personal hearing granted on different dates and examining the relevant documents, records received from both Special Officers of PBDA, Khuntagaon and KKDA Belghar, reply received from the Petitioner to the Show Cause Notice dated 09.05.2018, subsequent information and photographs received etc., the Programme Director (Opposite Party No.4) keeping in mind the greater interest of the PVTG Community and the timely execution of remaining works, decided to terminate the contract and consequently, disengage the Petitioner's organization with immediate effect.

(xv) In view of the facts and submission made above, the prayer made in the Writ Petition is devoid of merit and hence, liable to be dismissed, submitted by the learned Advocate General.

IV. SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTY NO.4:

14. Learned counsel for the Opposite Party No.4 reiterated the submissions as has been submitted by the learned counsel for the Opposite Party Nos.1, 2 and 3/State. In Addition, he further submitted that:

(i) The present Writ Petition is not maintainable in law. The agreement between parties has an arbitration clause. Clause-8 of the agreement deals with the dispute settlement mechanism through the arbitration. It is settled law that if there is an arbitration agreement for resolution of the dispute the parties must be referred to arbitration. In contractual matters where disputed question of facts are involved the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India cannot be invoked. The present Writ Petition is in the form of seeking a restrained order from this Court preventing the authority to take action as per the terms and conditions of the agreement. Moreover, the contract/agreement if confers a particular action to be taken by the employer, he cannot be prevented from doing so and his action may be subject matter of challenge, but there cannot be any prohibition. Thus, the present Writ Petition in this view is not maintainable. Further, Section 14 of Specific Relief Act, 1963 provides that a contract which in its nature determinable cannot be specifically enforced. Further, Section 41 of the said Act provides an injunction cannot be granted to prevent breach of a contract the performance of which would not be specifically enforced. The present contract between the parties being determinable in nature cannot be specifically enforced and the contract being determinable in view if section 41(e) of the Specific Relief Act, 1963, an injunction cannot be granted to prevent the breach of a contract, the performance of which could not be specifically enforced. Further, it is proved that the opposite parties have broken the contract of the Petitioner and the Petitioner has suffered any breach he is entitled to compensation for any loss or damaged caused to him as per Section 73 of the Indian Contract Act, 1872.

(ii) Further, the termination of agreement have been made after personal hearing on different dates, assessing all relevant documents produced/ submitted, records received from two MPAs, information and photographs of Entry Point Activity (EPA) verified there after such decision have been taken for greater interest of PVTG Community and smooth execution of remaining work. Moreover, the reasons for termination of contract have already been spelt out in the order dated 23.08.2022 wherein the show cause notice dated 09.05.2018 have been considered. The Petitioner's organization has been given adequate opportunities in the last 4 years.

(iii) The Opposite No.4 is not bound to abide under Clause 2.8.1 in the present context. Such termination order has been made by the Opposite Party No.4 based on the order dated 31.08.2021 passed by this Court in W.P.(C) No.9559 of 2018 directing the Opposite Party No.4 to hear either physically or through Video Conferencing mode for giving personal hearing to Petitioner vis-à-vis show cause. Upon completion of such hearing, Opposite Party No.4 was directed to pass final order in accordance with law. Accordingly, the Programme Director (Opposite Party No.4) has passed the order of termination of contract. Hence, the allegation of the Petitioner that the OPELIP authority has not given 30 days prior notice as per Clause 2.8.1 is not justified.

(iv) Allegation of the Petitioner that the Show Cause Notice in the Writ Petition do not hit the requirement of operational guidelines of Entry Point Activity (EPA) issued by the Programme Implementation Agency (PLA) and hence could not form the basis of

termination of the agreement is totally misconstrued. The main objectives of the Entry Point Activity (EPA) are (i) Community Mobilisation for effective and participatory project implementation (ii) gaining confidence of the targeted community on the project and their management skills (iii) endowing tangible assets to the targeted communities and (iv) providing short term financial benefits and incentives to the villagers (wages). Based on these broad objectives, the show cause notice was issued seeking reply on (i) how the Entry Point Activity (EPA) taken up in the financial year 2017-18 led in empowering the targeted communities (ii) the effect of Entry Point Activity (EPA) work made on capacity building to the targeted community (iii) Whether the Entry Point Activity (EPA) works taken up led to sustainable livelihoods development and (iv) number of man days generated after distribution of MGNREGS kits under Entry Point Activity (EPA). These are very vital and fitting questions which have been part of the show cause notice seeking explanation from the Petitioner. Hence, the show cause notice clearly corroborates the operational guidelines of the Entry Point Activity (EPA). Therefore, the allegation of the Petitioner is totally unjustified.

(v) Further, an agreement has been executed between Programme Director (Opposite Party No.4) and the Petitioner for implementation of OPELIP Programme. As per agreement Opposite Party No.4 has to assess the performance of the Petitioner. Though the Special Officer may review the performance of the Petitioner and report to the Programme Director (Opposite Party No.4) but the report of the Special Officer is not final. The decision of the Programme Director on the performance of the Petitioner is final and binding. After assessment of Entry Point Activity (EPA) taken up by the Petitioner, on 09.05.2018 the Programme Director issued the Show Cause Notice which clearly indicates that the performance of the Petitioner was not satisfactory. Hence, the Petitioner citing performance report submitted by Special Officer is not justified.

(vi) The decision for signing the contract renewal was intimated to all facilitating NGOs working for OPELIP areas based on the communication received from IFAD ICO, New Delhi, the donor agency during the IFAD Implementation Support Mission held from 12.12.2017 to 20.12.2017. Hence, all the NGOs have renewed the contract agreement from 01.04.2018 to 31.03.2024, not due to the satisfactory performance of the Petitioner. However, by renewing the contract agreement of the Petitioner there is no bar to access the performance of the Entry Point Activity (EPA) Activities by the Opposite Party No.4 and issue Show Cause Notice. Hence, the Petitioner's claim of renewal of contract due to satisfactory performance on Entry Point Activity (EPA) is misconstrued.

(vii) The Programme Director's letter dated 21.04.2018 was issued to all Special Officers of MPAS with a copy to all Chief Functionaries FNGOS for implementation of Entry Point Activity (EPA) in 2018-19, wherein due emphasis has been given for minimum 60% to civil construction work basing on the instruction received from IFAD, the donor agency during the verification of documents of Entry Point Activity (EPA) work of 2017-18. Hence, the Petitioner's claim of continuation of work in scheduled villages does not concur due to the letter dated 21.04.2018 of Opposite Party No.4.

(viii) The Petitioner's allegation of calling review meeting of the officials of Government engaged in OPELIP on 07.05.2018, 08.05.2018 and 09.05.2018 without calling the Chief Functionaries, illegally issuing show cause notice to all NGOs working under OPELIP including the Petitioner regarding supplying utensil sets & MGNREGA kits for distribution in the programme areas is totally fallacious and without fact. The

communication for attending the review meeting was issued by the Programme Director, Opposite Party No.4 vide letter No.866 dated 03.05.2018 addressing to all Special Officers, Micro Project Agencies with a copy to the Chief Functionaries of facilitating NGOs. In that letter, it has clearly been mentioned that all Special Officers and Team Leader of the facilitating NGOs to make presentation in the given format. The Team Leader of FNGO the key functionary for implementation of OPELIP work on behalf of FNGO attended the review meeting. The review of progress of work on the mentioned date was also in the knowledge of Chief Functionary. Whatever progress reports presented in the prescribed format must be with the knowledge of Chief Functionaries, FNGOs. Hence, the Petitioner's plea that he was not called for the review meeting is totally mischievous.

(ix) As per office records, there was no review meeting held on 09.05.2018 and the Petitioner's claim of holding review meeting by the Opposite Party No.4 on 09.05.2018 has no basis. Review meeting was held on 07.05.2018 and 08.05.2018 and, accordingly, the proceedings of the review meeting have been communicated to the Chief Functionaries of FNGOs of the Writ Petition. In the proceedings, the Programme Director expressed displeasure on poor progress of work for financial year 2017- 18 and distribution of utensil sets, MGNREGA Kits to the communities by facilitating NGO and instructed in the concluding remarks that the Special Officers and NGOS to ensure transparency at all level and work wholeheartedly.

(x) Further, show Cause Notices were issued to 9 numbers of NGOs on improper implementation of Entry Point Activity (EPA) work during 2017-18. Hence, it is submitted that out of 15 FNGOs working 17 Micro Project Agencies only 9 NGOs including the Petitioner have been issued show cause notice and not all NGOS.

(xi) The Petitioner's claim of the decision for distribution of Utensils and MGNREGS kit was not the unique decision of the Petitioner, rather, it was the decision of the members of the Village Development Agencies (VDAs) and the local Government Officers including the Collector of the concerned District and the Petitioner being the facilitating Agency of Entry Point Activity (EPA) of OPELIP has only to obey their direction is totally unbecoming. The main role of facilitating NGOs is to guide, mobilize, provide handholding support, capacitate & strengthen the communities as per mandate of the Programme. The Village Development Associations (VDAs) and Village Development Communities (VDCs) are from the PVTG Communities and are illiterate and unaware of the guidelines of the programme. That is the reason why facilitating NGOS have been assigned for. Unless proper capacity building with right guidance given, their demand cannot become sole reason of such expenditure by providing utensils and MGNREGA kits. The Petitioner has been equipped with professionals who are supposed to guide the Community towards right decision making even if the villagers demand for it. In this case, the Petitioner has failed in doing so by hiding behind with a plea that the Village Development Association (VDA) demanded. It was the responsibilities of the FNGO to identify community based activities under Entry Point Activity (EPA) and guide them properly before getting approval or consent from the local Government Official. Citing the approval of EPA activities by VDA or by the Government Officials does not condone NGO's misdeeds.

(xii) Further, there are no such empirical study reports/ finding in the programme areas that the PVTG communities are malnourished and suffer from several diseases due to their poor system in food preparation and preservation of food because of non-

metallic and inadequate utensils/carriers. This is purely imaginary and own creation of the Petitioner. In order to justify its wrong activities under Entry Point Activity (EPA), the petitioner has expressed such opinion.

(xiii) The Petitioner has claimed that the Programme Director illegally and arbitrarily on 19.05.2018 directed for termination of contract with the Petitioner as facilitating NGO under OPELIP areas by 17th June, 2018 is totally false. The NGO was terminated as per Letter No.1033 dated 19.05.2018 with effect from 17th June, 2018 as per Clause-2.8 i.e. termination by giving 30 days notice. So the termination of contract issued by Opposite Party No.4 is as per agreement signed with the Petitioner.

(xiv) The allegation of the Petitioner that on identical set of allegation, 6 numbers of NGO (for 8 MPAs) were noticed by the Programme Director. Out of the 8 MPAs, 03 NGOs covering 05 MPAS approached this Court. The Programme Director for obvious reason has permitted them to continue sitting on the Show Cause Notice assigned and without passing any order on the same. Further, the Petitioner alleges that the Programme Director vindictively passed order of termination from the existing contract due to his approach to this Court is purely f ictitious and out of context. The fact of the matter is that the Show Cause Notices were issued to 9 numbers of FNGOs (for 11 MPAs) out of which 06 NGOS (for 08 MPAs) were disengaged. Out of the 06 NGOs, 03 NGOs (for 5 MPAs) approached this Court. As per letter dated 03.07.2018 attached as Annexure- 18 of Writ Petition, the Special Officer were intimated that the disengaged NGO should continue to work for carrying out pending works during the peak MGNREGS season till finalization of selection new agency or till further orders whichever is earlier. It is not true that the allegation of Petitioner citing that the Programme Director vindictively passed order to terminate the Petitioner from the existing contract because the Petitioner approached this Court which is discriminatory and violative of Article 14 of Constitution of India. On this count, it is submitted that 03 NGOs (05 MPAs) including the Petitioner's organization had approached this Court out of which two NGOs were allowed to continue as facilitating NGO based on their Show Cause reply, personal hearing, justification of their EPA work, production of evidence etc. Hence, it is fallacious to allege the termination of the contract is discriminatory and violative of Article 14 of the Constitution of India.

(xv) In view of the facts submissions made above, the prayer of the Petitioner is liable to be dismissed being devoid of merit. Consequently, the Writ Petition may be dismissed.

V. COURT'S ANALYSIS AND REASONING:

15. As per Operational Guidelines, guiding principle for EPA is provided that Entry Point Activities will include out of all others *"works based on urgent needs of the local communities such as rehabilitation of community shrines, drinking water, water harvesting, supply of solar lantern, supply of MGNREGS implements etc."*

16. A set of Guidelines called "Programme Implementation Manual" was issued laying down different Guidelines. The Programme Implementation Manual provides as follows:

> *"16. The Programme will implement one or more Entry Point Activity in order to gain the confidence of the community. This will be the training ground for the community to plan for implementation of various activities. The programme has made an allocation of*

INR 175,000 to each village. The village will be facilitated to plan for these activities. The activities will be chosen in the VDA and, as far as possible, will create or repair assets of common use, especially targeting women, such as drinking water facilities, washing and bathing platforms, platforms for drying NTFPs/ crops etc".

17. In order to carry out Entry Point Activities, a contract initially was executed. The initial contract to carry out EPA and implementation of the programme was for a period from 01.06.2017 till 31.03.2018 which is in terms of Clause-2.4 of Special Conditions of Contract of Contract Agreement for Consultant Services between the Parties.

18. Considering the Entry Point Activity (EPA) and its objectives, the Opposite Party No.4 agency vide show cause notice dated 09.05.2018 sought for an explanation from the Petitioner against the proposed disengagement from being a facilitating NGO, on the premise that the petitioner had made huge expenditure towards procurement and distribution of MGNREGA kits, kitchen utensils etc. as well as expenditure of Unique Activity under Entry Point Activity (EPA) without being able to create sufficient mandays which would have uplifted the living conditions of the PVTGA.

19. Accordingly, a show case reply was given by the Petitioner to the Programme Director (Opposite Party No.4) on 13.05.2018. The reply given by the Petitioner was not satisfactory and, accordingly, letter dated 19.05.2018 was issued by the Opposite Party No.4 terminating the contract with the Petitioner NGO within a period of 30 days i.e. 17.06.2018 as per Clause-2.8. Thereafter, the Petitioner had approached this Court challenging the termination order dated 19.05.2018 in W.P. (C) No.9559 of 2018 which was disposed of on 31.08.2021 with a direction to *"the Petitioner to appear before the Programme Director, OPELIP, ST & SC Development Department (Opposite Party No-4) either physically or through Video Conferencing mode on 06.09.2021, who in turn is directed to fix a date for giving personal hearing to the Petitioner vis-à-vis show cause. Upon completion of such hearing, the Opposite Party No-4 is directed to pass the final order in accordance with law"*.

20. Learned Counsel for the petitioner has contended that while passing the impugned order, Clause- 2.7 of the contract has never been followed. The Notice of 30 days or 60 days as the case may be has never been given to the Petitioner. Non-giving of such a Notice by the Opposite Party No.4 is fatal to the action like straightway termination. Hence, there is again violation of principles of natural justice by the Opposite Party No.4.

21. Learned Counsel for the Opposite Parties has clarified that with due regard to the order dated 19.05.2018 in W.P. (C) No.9559 of 2018, the Programme Director (Opposite. Party No.4) directed the Petitioner to appear before the Opposite Party No.4 either physically or Video Conference mode on 06.09.2021 so as to fix a date for personal hearing. The Petitioner did not appear. Subsequently, the Petitioner, on

23.09.2021, replied to the Show Cause Notice No.920 dated 09.05.2018 of the Programme Director (Opposite Party No.4) explaining the reasons for taking up Entry Point Activity (EPA) in PBDA, Khuntagaon, Sundargarh District and KKDA, Belghar, Kandhamal District.

22. As the reply of the Petitioner was not satisfactory, the Opposite Party No.4 offered opportunity for personal hearing on 07.10.2021. Accordingly, the Petitioner along with NGO President Shri Dhaneswar Sahu attended the personal hearing. During the course of hearing, they failed to explain whether any substantial improvement in generating man days have occurred under MGNREGA by supplying MGNREGA kits in the programme areas. It was evident that 5 man days had been generated per beneficiary which was way below the expected outcome under MGNREGA.

23. Further, on the request of Petitioner and NGO President, they were given another opportunity to appear on 10.02.2022 so as to produce evidence relating to distribution of MGNREGA kits, kitchen utensils and unique activities under Entry Point Activity (EPA) during 2017-18. During the course of hearing, they agreed to submit (1) GPS Photographs relating to infrastructure (2) GPS photographs of distribution of solar light systems and (3) GPS photographs of processing units and their present functional status for KKDA, Belghar and PBDA, Khuntagaon for the year 2017-18. The Petitioner could not provide the entire GPS photographs of Entry Point Activity (EPA) taken up in two Micro Project Agencies during the year 2017-18. They submitted photographs of 08 villages under KKDA, Belghar and few activity photographs of 09 Village Development Communities (VDCs) under PBDA, Khuntagaon. Though taking GPS photographs is mandatory as per operational guidelines of Entry Point Activity (EPA), the Petitioner could not provide the evidentiary proof in the form of photographs in implementing the schemes.

24. After personal hearing granted on different dates and examining the relevant documents, records received from both Special Officers of PBDA, Khuntagaon and KKDA Belghar, reply received from the Petitioner to the Show Cause Notice dated 09.05.2018, subsequent information and photographs received etc., the Programme Director (Opposite Party No.4) keeping in mind the greater interest of the PVTG Community and the timely execution of remaining works, decided to terminate the contract and consequently, disengage the Petitioner's organization with immediate effect. Therefore, this Court is of the opinion that there has been no violation of the principle of natural justice as the petitioner was provided with sufficient opportunities.

25. Moreover, the allegation of the Petitioner that the Show Cause Notice in the Writ Petition do not hit the requirement of operational guidelines of Entry Point Activity (EPA) issued by the Programme Implementation Agency (PLA) and hence

could not form the basis of termination of the agreement is totally misconstrued. The main objectives of the Entry Point Activity (EPA) are (i) Community Mobilisation for effective and participatory project implementation (ii) gaining confidence of the targeted community on the project and their management skills (iii) endowing tangible assets to the targeted communities and (iv) providing short term financial benefits and incentives to the villagers (wages). Based on these broad objectives, the show cause notice was issued seeking reply on (i) how the Entry Point Activity (EPA) taken up in the financial year 2017-18 led in empowering the targeted communities (ii) the effect of Entry Point Activity (EPA) work made on capacity building to the targeted community (iii) Whether the Entry Point Activity (EPA) works taken up led to sustainable livelihoods development and (iv) number of man days generated after distribution of MGNREGS kits under Entry Point Activity (EPA). These are very vital and fitting questions which have been part of the show cause notice seeking explanation from the Petitioner. Hence, the show cause notice clearly corroborates the operational guidelines of the Entry Point Activity (EPA). Therefore, the allegation of the Petitioner is totally unjustified.

26. Additionally, the Writ Petition is not maintainable in view of the fact that the Agreement has an arbitration clause. Clause-8 of the Agreement deals with the dispute settlement mechanism through the arbitration. It is settled law that if there is an arbitration agreement for resolution of the dispute, the parties must be referred to arbitration. In contractual matters where disputed question of facts are involved, the extra ordinary jurisdiction of this Court under Article 226 of the Constitution of Indian cannot be invoked. The Petitioner is praying for issuance of a restraining order from this Court preventing the authority to take action as per the terms and conditions of the agreement. Moreover, the contract/agreement if confers a particular action to be taken by the employer, he cannot be prevented from doing so and his action may be subject matter of challenge, but there cannot be any prohibition.

27. In light of the aforesaid discussion and cases cited herein, this Court is of the opinion that the contentions of the Petitioner is devoid of merit and, therefore, cannot be entertained. Therefore, the Writ Petition is hereby dismissed.

The Odia version of the Judgment alongwith the Head Note are as follows:-

ନ୍ୟାୟମୂର୍ତ୍ତି ଡକ୍ଟର ଏସ. କେ. ପାଣିଗ୍ରାହୀ

ରିଟ୍ ଆବେଦନ (ଦେୱାନୀ) ସଂଖ୍ୟା ୨୨୧୯୫/୨୦୨୨

ସୌରଭ, ଏନ. ଜି. ଓ., ଖୋର୍ଦ୍ଧା .....ଆବେଦନକାରୀ

- ବନାମ -

ଓଡିଶା ରାଜ୍ୟ ଏବଂ ଅନ୍ୟମାନେ .....ପ୍ରତିବାଦୀମାନେ

ଭାରତୀୟ ସମ୍ବିଧାନ,୧୯୫୦ – ଅନୁଚ୍ଛେଦ ୨୨୬ – ଗ୍ରହଣ ଯୋଗ୍ୟତା – କାର୍ଯ୍ୟ ରାଜିନାମା ଚୁକ୍ତିର ଖଣ୍ଡ -୮ ମଧ୍ୟସ୍ଥତା ମାଧ୍ୟମରେ ବିବାଦର ସମାଧାନ ବ୍ୟବସ୍ଥା ଅଛି – କୌଣସି ଚୁକ୍ତିରେ ମଧ୍ୟସ୍ଥତା ମାଧ୍ୟମରେ ସମାଧାନ ର ବ୍ୟବସ୍ଥା ଖଣ୍ଡ ଥିବାବେଳେ ରିଟ୍ ଆବେଦନ ଗ୍ରହଣ ଯୋଗ୍ୟ କି ? ରାୟ – ନାଁ। (ପାରା ୨୬)

<u>ଆଧାର ହୋଇଥିବା ପୂର୍ବ ରାୟ</u>

୧. ୨୦୦୬(୫)ଏସସିସି -୩୫୮ : କେନ୍ଦ୍ରୀୟ ଅବକାରୀ ଆୟୁକ୍ତ, ବାଙ୍ଗାଲୋର ବନାମ ବୃନ୍ଦାବନ ବିଭରେଜ (ପି) ଲିମିଟେଡ ଏବଂ ଅନ୍ୟମାନେ

୨. ୨୦୧୧(୧)ଏସସିସି-୧୦୯ : କେନ୍ଦ୍ରୀୟ ଅବକାରୀ ଆୟୁକ୍ତ,ଚଣ୍ଡିଗଡ ବନାମ ଶିତଲ ଇଣ୍ଟରନାସନାଲ

୩. ୨୦୦୬(୭)ଏସସିସି -୫୯୨ : ସୀମା ଶୁଳ୍କ ଆୟୁକ୍ତ, ମୁମ୍ବାଇ ବନାମ ଟୋକିଓ ଇଞ୍ଜିନିୟରିଂ ଇଣ୍ଡିଆ ଲିମିଟେଡ

ଆବେଦନକାରୀଙ୍କ ପାଇଁ : ଶ୍ରୀ ପ୍ରଫୁଲ୍ଲ କୁମାର ରଥ

ପ୍ରତିବାଦୀ ମାନଙ୍କ ପାଇଁ : ଶ୍ରୀଯୁକ୍ତ ଏ.କେ.ପରିଜା, ମହାଧିବକ୍ତା,
ଶ୍ରୀଯୁକ୍ତ ଟି.କେ.ପଟ୍ଟନାୟକ, ଅତିରିକ୍ତ ସରକାରୀ ଓକିଲ,
ଶ୍ରୀଯୁକ୍ତ ବି.କେ.ଶର୍ମା (ସତର୍କକାରୀଙ୍କ ପାଇଁ)

ରାୟ ଶୁଣାଣୀ ତାରିଖ:୧୯.୦୭.୨୦୨୩: ରାୟ ତାରିଖ :୨୫.୦୭.୨୦୨୩

ଡକ୍ଟର ଏସ. କେ. ପାଣିଗ୍ରାହୀ, ନ୍ୟାୟମୂର୍ତ୍ତି ।

୧. ଦୁଇ ଓପିଇଏଲଆଇପି ପ୍ରକଳ୍ପ ଅର୍ଥାତ୍ କନ୍ଧମାଳ ଜିଲ୍ଲାର କେକେଡିଏ, ବେଲଘର କାର୍ଯ୍ୟକ୍ରମ କ୍ଷେତ୍ର ଏବଂ ସୁନ୍ଦରଗଡ ଜିଲ୍ଲାର ପିବିଡିଏ, ଖୁଣ୍ଟଗାଁ କାର୍ଯ୍ୟକ୍ରମ କ୍ଷେତ୍ରରେ କାର୍ଯ୍ୟ କରିବା ସମ୍ବନ୍ଧରେ ପ୍ରଚଳିତ ଥିବା ଚୁକ୍ତିକୁ ସମାପ୍ତ କରି ସରକାରଙ୍କ ଯୁଗ୍ମ ସଚିବ, ଅନୁସୂଚିତ ଜନଜାତି ଏବଂ ଅନୁସୂଚିତ ଜାତି ଉନ୍ନୟନ ବିଭାଗ ଏବଂ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ, ପିଏମୟୁ, ଓପିଇଏଲଆଇପିଙ୍କ ଦ୍ୱାରା ତା ୨୩.୦୮.୨୦୨୨ ରିଖରେ ପାରିତ ପତ୍ର ସଂଖ୍ୟା ୨୮୭୩ କୁ ରଦ୍ଦ କରିବା ପାଇଁ ଆବେଦନକାରୀ ଏହି ରିଟ୍ ଆବେଦନରେ ପ୍ରାର୍ଥନା କରିଛନ୍ତି ।

I. ମାମଲାର ତଥ୍ୟ:

୨. ମାମଲାର ତଥ୍ୟ ଏହା ଯେ ଆବେଦନକାରୀ ଏକ ବେସରକାରୀ ସଂଗଠନ *(ଏନ୍ ଜି ଓ)* ଯାହା ସମିତି ପଞ୍ଜୀକରଣ ଅଧିନିୟମ, ୧୮୬୦ ଅଧୀନରେ ପଞ୍ଜୀକୃତ ହୋଇଛି ଏବଂ ଓଡ଼ିଶାରେ ସାମାଜିକ ବିକାଶ, ଦାରିଦ୍ର୍ୟ ଦୂରୀକରଣ, ପିଭିଟିଜି ଦୁର୍ବଳ ଗୋଷ୍ଠୀ ପାଇଁ ଜୀବିକା କାର୍ଯ୍ୟକ୍ରମ ଇତ୍ୟାଦି ବିଭିନ୍ନ ପ୍ରକଳ୍ପ ଏବଂ ଗ୍ରାମାଞ୍ଚଳମାନଙ୍କରେ ବିଭିନ୍ନ ସଚେତନତା କାର୍ଯ୍ୟକ୍ରମ ଅନୁପାଳନ କରିବା ଉଦ୍ଦେଶ୍ୟରେ କାର୍ଯ୍ୟ କରୁଛି । ବର୍ତ୍ତମାନ, ଆବେଦନକାରୀ ଆଇଏଫଏଡି ସହାୟତାରେ ଓପିଇଏଲଆଇପି ପ୍ରକଳ୍ପରେ ପୌଦି ଭୂୟାଁ ଉନ୍ନୟନ ସଂସ୍ଥା (ପିବିଡିଏ), ଖୁଣ୍ଟଗାଁ, ଲହୁଣିପଡ଼ା, ସୁନ୍ଦରଗଡ ଏବଂ କୁଟିଆ କନ୍ଧ ଉନ୍ନୟନ ସଂସ୍ଥା (କେକେଡିଏ), ବେଲଘର, କନ୍ଧମାଳ ଅଧୀନରେ କାର୍ଯ୍ୟ କରୁଛନ୍ତି ।

୩. ଆଇଏଫ୍ଏଡି (କୃଷି ବିକାଶ ପାଇଁ ଅନ୍ତର୍ଜାତୀୟ ପାଣ୍ଠି), ଭାରତ ସଂଘ ସରକାର ଏବଂ ଓଡ଼ିଶା ସରକାର ୨୦୧୭ ମସିହାରେ ଆରମ୍ଭ ହୋଇଥିବା ଆଦିମ ଦୁର୍ବଳ ଜନଜାତି ଗୋଷ୍ଠୀ ଲୋକମାନଙ୍କ ପାଇଁ ଆଇଏଫ୍ଏଡି, ଭାରତ ସଂଘ ସରକାର ଏବଂ ରାଜ୍ୟ ସରକାରଙ୍କ ସହାୟତାରେ ଅଣ-ସରକାରୀ ସଙ୍ଗଠନଗୁଡ଼ିକ

ଜରିଆରେ ଓପିଇଏଲ୍‌ଆଇପି (ଓଡ଼ିଶା ପିଭିଟିଜି ସଶକ୍ତିକରଣ ଏବଂ ଜୀବିକା ସଶକ୍ତିକରଣ କାର୍ଯ୍ୟକ୍ରମ) କାର୍ଯ୍ୟକାରୀ କରିବା ଲାଗି ନିଷ୍ପତ୍ତି ନେଇଥିଲେ । ଆଦିମ ଦୁର୍ବଳ ଆଦିବାସୀ ଗୋଷ୍ଠୀ ଏବଂ ସେମାନଙ୍କର ବିକାଶ ମଧ୍ୟରେ ଗତିଶୀଳତା ଏବଂ ସଚେତନତା ସୃଷ୍ଟି କରିବା ସରକାରଙ୍କ ଉଦ୍ଦେଶ୍ୟ । ତଦନୁସାରେ, ଓଡ଼ିଶା ସରକାର ସେହି ଅଞ୍ଚଳକୁ ୧୭ ଟି ସୂକ୍ଷ୍ମ ପ୍ରକଳ୍ପରେ ବିଭକ୍ତ କରିଥିଲେ ଏବଂ ତାହାକୁ କାର୍ଯ୍ୟକାରୀ କରିବାକୁ ୧୫ ଟି ଏନଜିଓ ର ଚୟନ କରିଥିଲେ । ଏହା ମଧ୍ୟ ନିଷ୍ପତ୍ତି ନିଆଯାଇଥିଲା ଯେ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ଏକ ବର୍ଷ ପାଇଁ ଅର୍ଥାତ ୨୦୧୭-୧୮ ଠାରୁ ହେବ ଏବଂ ଯଦି ଏହା ସଫଳ ହୁଏ, ସେହି କ୍ଷେତ୍ରରେ ଏନଜିଓ ଗୁଡ଼ିକ ପରବର୍ତ୍ତୀ କାର୍ଯ୍ୟକାଳ ପାଇଁ ସେମାନଙ୍କ କାର୍ଯ୍ୟକଳାପ ଜାରି ରଖିବେ ଏବଂ କାର୍ଯ୍ୟକ୍ରମ କ୍ଷେତ୍ରରେ କାର୍ଯ୍ୟ କରିବେ । ଓପିଇଏଲଆଇପି ପାଇଁ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ ନିମନ୍ତେ ଏକ କାର୍ଯ୍ୟ ସମ୍ପାଦନ ନିର୍ଦ୍ଦେଶାବଳୀ ମଧ୍ୟ ପ୍ରସ୍ତୁତ କରାଯାଇଥିଲା ।

୪. ଯଦିଓ ଏହି କାର୍ଯ୍ୟକ୍ରମର ଅବଧି ସାତ ବର୍ଷ, କିନ୍ତୁ ଏକ ବର୍ଷ ପରେ ଏନଜିଓ ଗୁଡ଼ିକର ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପର ସମୀକ୍ଷା କରାଯିବ ବୋଲି ନିଷ୍ପତ୍ତି ନିଆଯାଇଥିଲା । ଯଦି ପ୍ରଦର୍ଶନ ସନ୍ତୋଷଜନକ ବୋଲି ଜଣାପଡ଼େ, ତେବେ ଉକ୍ତ ଏନଜିଓ ଆଉ ଛଅ ବର୍ଷ ପାଇଁ କାର୍ଯ୍ୟ କରିବ । ତଦନୁସାରେ, ତା ୩୧.୦୫.୨୦୧୭ ରିଖରେ ଆବେଦନକାରୀଙ୍କ ସହ ଏକ ଚୁକ୍ତିନାମା କାର୍ଯ୍ୟକାରୀ ଦ୍ୱାରା ଆବେଦନକାରୀଙ୍କୁ ସୁନ୍ଦରଗଡ ଜିଲ୍ଲାର ଖୁଣ୍ଟଗାଁ ଏବଂ କନ୍ଧମାଳ ଜିଲ୍ଲାର ବେଲଘର ନାମକ ଦୁଇଟି ସୂକ୍ଷ୍ମ ପ୍ରକଳ୍ପ କାର୍ଯ୍ୟକ୍ରମ ଅଞ୍ଚଳରେ କାର୍ଯ୍ୟ କରିବା ପାଇଁ ଉପଯୁକ୍ତ ପ୍ରକ୍ରିୟା ସହିତ ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୧ ଙ୍କ ନେତୃତ୍ୱରେ କମିଟି ଦ୍ୱାରା ସୁବିଧାପ୍ରଦାନକାରୀ ଏନଜିଓ ମଧ୍ୟରୁ ଗୋଟିଏ ଭାବରେ ଚୟନ କରାଯାଇଥିଲା ଏବଂ ତା ୧୭.୦୬.୨୦୧୭ ରିଖର ଯୋଗଦାନ ପତ୍ର ଆବେଦନକାରୀଙ୍କୁ ଜାରି କରାଯାଇଥିଲା ।

୫. ରାଜିନାମା କାର୍ଯ୍ୟକାରୀ ହେବା ପରେ, ଆବେଦନକାରୀ ନିଜର ୭୯ ଜଣ କର୍ମଚାରୀଙ୍କୁ କାର୍ଯ୍ୟକ୍ରମ କ୍ଷେତ୍ରରେ ନିୟୋଜିତ କରି ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୫ଏବଂ ୬ ଙ୍କ ପ୍ରତ୍ୟକ୍ଷ ତତ୍ତ୍ୱାବଧାନରେ ଜୁନ୍, ୨୦୧୭ ରେ ନିର୍ଦ୍ଦେଶାବଳୀ ଅନୁଯାୟୀ କାର୍ଯ୍ୟ ଆରମ୍ଭ କରିଥିଲେ ଏବଂ ୧୦ ମାସ ମଧ୍ୟରେ *(*ଜୁନ୍, ୨୦୧୭ ରୁ ମାର୍ଚ୍ଚ, ୨୦୧୮ ପର୍ଯ୍ୟନ୍ତ*)* ଏହାକୁ ସଫଳତାର ସହ ସମାପ୍ତ କରିଥିଲେ । ବାସ୍ତବରେ, ସରକାରୀ ଅଧିକାରୀଙ୍କ ଦ୍ୱାରା କାର୍ଯ୍ୟ କରିବା ଅତ୍ୟନ୍ତ କଷ୍ଟକର ଥିଲା କାରଣ ସମସ୍ତ ସୂକ୍ଷ୍ମ ପ୍ରକଳ୍ପ ଅଞ୍ଚଳ ମାଓ ଆତଙ୍କବାଦୀଙ୍କ ଦ୍ୱାରା ଅଧିକୃତ | ଆବେଦନକାରୀ କାର୍ଯ୍ୟକ୍ରମ କ୍ଷେତ୍ରରେ କାର୍ଯ୍ୟ କରୁଥିବା ସମୟରେ, ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪/କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ ତାଙ୍କ ତା ୨୧.୦୨.୨୦୧୮ ରିଖ ର ଚିଠି ମାଧ୍ୟମରେ ଯାଞ୍ଚ ପାଇଁ ଆବେଦନକାରୀଙ୍କ ନଥି ମଗାଇବାକୁ ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀଙ୍କୁ ନିର୍ଦ୍ଦେଶ ଦେଇଥିଲେ । ଉକ୍ତ ଚିଠି ପୂର୍ବରୁ, ଆବେଦନକାରୀ ଯାଞ୍ଚ ପାଇଁ ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀଙ୍କ ସମ୍ମୁଖରେ ତା ୧୫.୦୨.୨୦୧୮ ରିଖରେ ବିବୃତି ଦାଖଲ କରିଥିଲେ । ବିବୃତିର ଯାଞ୍ଚ ପରେ, ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀ ତା ୧୫.୦୨.୨୦୧୮ ରିଖର ଚିଠି ମାଧ୍ୟମରେ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକଙ୍କୁ ସୂଚନା ଦେଇଥିଲେ ଯେ ଆବେଦନକାରୀଙ୍କ ବିବୃତି ସନ୍ତୋଷଜନକ ଥିଲା । ଆବେଦନକାରୀ ଏବଂ ଅନ୍ୟ ଏନଜିଓ ମାନଙ୍କ ବିବୃତି ସମୀକ୍ଷା କରି ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪/କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ ତା ୨୩.୦୩.୨୦୧୮ ରିଖର କାର୍ଯ୍ୟାଳୟ ଆଦେଶ ଅନୁଯାୟୀ ପୂର୍ବ ବର୍ଷର ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକ୍ରମ ସନ୍ତୋଷଜନକ ବୋଲି ଜାଣିବାକୁ ପାଇଥିବା କାରଣରୁ, ଆବେଦନକାରୀଙ୍କୁ ତା

୩୧.୦୩.୨୦୧୮ ରିଖରେ ହେବାକୁ ଥିବା ଚୁକ୍ତିର ନବୀକରଣ ପାଇଁ ଚୁକ୍ତିନାମା ଉପରେ ଦସ୍ତଖତ କରିବାକୁ ନିର୍ଦ୍ଦେଶ ଦିଆଯାଇଥିଲା । ଆବେଦନକାରୀ ତା ୩୧.୦୩.୨୦୧୮ ରିଖରେ ନବୀକରଣ ରାଜିନାମାରେ ସ୍ୱାକ୍ଷର କରିଥିଲେ ଏବଂ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ ତା ୦୨.୦୪.୨୦୧୮ ରିଖ ଏବଂ ତା ୦୪.୦୪.୨୦୧୮ ରିଖର ଚିଠି ମାଧ୍ୟମରେ ସୂକ୍ଷ୍ମ ପ୍ରକଳ୍ପ ସଂସ୍ଥାର ସମସ୍ତ ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀଙ୍କୁ ସୂଚନା ଦେଇଥିଲେ ଯେ ଅନ୍ୟ ଏନଜିଓ ସହିତ ଆବେଦନକାରୀଙ୍କ ଚୁକ୍ତିନାମା ତା ୦୧.୦୪.୨୦୧୮ ରିଖରୁ ତା ୩୧.୦୩.୨୦୨୪ ରିଖ ପର୍ଯ୍ୟନ୍ତ ନବୀକରଣ କରାଯାଇଛି ।

୬. ଏଭଳି ସ୍ଥିତିରେ, ୨୦୧୮-୧୯ ବର୍ଷ ପାଇଁ ଇ.ପି.ଏ. ଗୁଡିକର କାର୍ଯ୍ୟକାରୀତା ପାଇଁ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ, ଓପିଇଏଲଆଇପି ଙ୍କ ଦ୍ୱାରା ତା ୨୧.୦୪.୨୦୧୮ ରିଖରେ ଦିଆଯାଇଥିବା ସମୟ ସୀମାକୁ ହାସଲ କରିବାକୁ ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଙ୍କ ନିର୍ଦ୍ଦେଶ ଅନୁଯାୟୀ ଆବେଦନକାରୀ ଏହାର ୭୯ ଜଣ କର୍ମଚାରୀଙ୍କୁ ନିୟୋଜିତ କରି ଏବଂ ପ୍ରାୟ ୧୦,୦୦୦ ପରିବାରକୁ ଅନ୍ତର୍ଭୁକ୍ତ କରି ଅନୁସୂଚିତ ଗ୍ରାମରେ କାର୍ଯ୍ୟ ଜାରି ରଖିଥିଲେ । ଆୟୋଜିତ ଗ୍ରାମାଞ୍ଚଳରେ କାର୍ଯ୍ୟ ଜାରି ରହିଥିବା ସମୟରେ, ନୂତନ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ ୧ ମେ, ୨୦୧୮ ରେ ଯୋଗ ଦେଇଥିଲେ ଏବଂ ସମୀକ୍ଷା ବୈଠକକୁ ଏନଜିଓ ଗୁଡ଼ିକର ମୁଖ୍ୟ କାର୍ଯ୍ୟକର୍ତ୍ତା ମାନଙ୍କୁ ନ ଡାକି ତା ୦୭.୦୫.୨୦୧୮ ରିଖ, ତା ୦୮.୦୫.୨୦୧୮ ରିଖ ଏବଂ ତା ୦୯.୦୫.୨୦୧୮ ରିଖରେ ଓପିଇଏଲଆଇପି ରେ ନିୟୋଜିତ ସରକାରୀ ଅଧିକାରୀମାନଙ୍କର ଏକ ସମୀକ୍ଷା ବୈଠକ ଡାକିଥିଲେ ଏବଂ ଆବେଦନକାରୀଙ୍କ ସହିତ ଓପିଇଏଲଆଇପି ଅଧୀନରେ କାର୍ଯ୍ୟ କରୁଥିବା ସମସ୍ତ ଏନଜିଓ ଗୁଡ଼ିକୁ କାର୍ଯ୍ୟକ୍ରମ କ୍ଷେତ୍ରମାନଙ୍କରେ ବଣ୍ଟନ ନିମିତ୍ତ ବାସନ କୁସନ ଉପକରଣ ଏବଂ ମନରେଗା ଉପକରଣ ଯୋଗାଇବା ସମ୍ବନ୍ଧରେ କାରଣ ଦର୍ଶାଅ ନୋଟିସ୍ ଜାରି କରିଥିଲେ । ଆବେଦନକାରୀଙ୍କୁ ତା ୦୯.୦୫.୨୦୧୮ ରିଖରେ କାରଣ ଦର୍ଶାଅ ନୋଟିସ୍ ଜାରି କରାଯାଇଥିଲା । ଆବେଦନକାରୀ ତା ୧୩.୦୫.୨୦୧୮ ରିଖରେ ତାଙ୍କର ଉତ୍ତର ଦାଖଲ କରି ଯୁକ୍ତି ରଖିଥିଲେ ଯେ ବାସନକୁସନ ଏବଂ ମନରେଗା ସରଞ୍ଜାମ ବଣ୍ଟନ ନିର୍ଣ୍ଣୟ ଆବେଦନକାରୀଙ୍କ ଅନନ୍ୟ ନିର୍ଣ୍ଣୟ ନଥିଲା ।ବରଂ, ଗ୍ରାମ୍ୟ ଉନ୍ନୟନ ସଂସ୍ଥା *(ଭିଡିଏ)* ର ସଦସ୍ୟ ଏବଂ ସ୍ଥାନୀୟ ସରକାରୀ ଅଧିକାରୀଙ୍କ ସହିତ ସମ୍ପୃକ୍ତ ଜିଲ୍ଲାର ଜିଲ୍ଲାପାଳ, ଯିଏ ଉକ୍ତ ଜିଲ୍ଲାର ଓପିଇଏଲଆଇପି ର ଅଧକ୍ଷ ଥିଲେ ଏବଂ ଓପିଇଏଲଆଇପି ର ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପର ସୁବିଧା ପ୍ରଦାନକାରୀ ସଂସ୍ଥା ଥାଇ ଆବେଦନକାରୀଙ୍କୁ ସ୍ଥାନୀୟ ଅଧିକାରୀଙ୍କ ସହ ପରାମର୍ଶ କରିବା ପରେ କେବଳ ସରକାରୀ କାର୍ଯ୍ୟକର୍ତ୍ତାଙ୍କ ନିର୍ଦ୍ଦେଶ ପାଳନ କରିବାର ନିର୍ଦ୍ଦେଶ ଥିଲା । ଯେହେତୁ ନିର୍ଦ୍ଦେଶାବଳୀ ଅନୁଯାୟୀ ଏହା ସମ୍ପ୍ରଦାୟର ଏକ ଆବଶ୍ୟକତା ଅଟେ,ଆବେଦନକାରୀ ସେମାନଙ୍କର ଦାବି ପୂରଣ କରିବା ପାଇଁ ସାମଗ୍ରୀ ପ୍ରଦାନ କରିଥିଲେ । ଆଦିବାସୀ ଅଞ୍ଚଳରେ *(ପିଭିଟିଜି)* ଲୋକମାନେ କୁପୋଷଣର ଶିକାର ହୁଅନ୍ତି ଏବଂ ଖାଦ୍ୟ ପ୍ରସ୍ତୁତି ଏବଂ ଖାଦ୍ୟ ସଂରକ୍ଷଣରେ ସେମାନଙ୍କର କୁବ୍ୟବସ୍ଥା ହେତୁ ଖାଦ୍ୟ ବିଷକ୍ରିୟା ସୃଷ୍ଟି କରୁଥିବା ଅନେକ ରୋଗରେ ପୀଡିତ ।ଅନ୍ୟସବୁ କାରଣ ମଧ୍ୟରୁ ଏକ କାରଣ ହେଉଛି ଅଣ-ଧାତବ ବାସନ ଏବଂ ଅପର୍ଯ୍ୟାପ୍ତ ବାସନ/ପାତ୍ରରେ ରନ୍ଧା ଯାଉଥିବା ଖାଦ୍ୟ ଏବଂ ଏହା ସ୍ୱାସ୍ଥ୍ୟ ଏବଂ ପୁଷ୍ଟିସାଧନ ସମ୍ବନ୍ଧରେ ଓ ପି ଇ ଏଲ୍ ଆଇ ପି ର ମାନଦଣ୍ଡ ମଧ୍ୟରୁ ଅନ୍ୟତମ । ଆବେଦନକାରୀ ତାଙ୍କ କାରଣ ଦର୍ଶାଇବାରେ ଶ୍ରମ ଦିବସ ସୃଷ୍ଟି ପାଇଁ ଏମ ଜି ଏନ ଆର ଇ ଜି ଏସ ସରଞ୍ଜାମ ବଣ୍ଟନ ସମ୍ବନ୍ଧୀୟ ସମସ୍ତ ତଥ୍ୟ ବର୍ଣ୍ଣନା କରିଛନ୍ତି ।କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ ତାଙ୍କ ତା ୧୯.୦୫.୨୦୧୮ ରିଖର ଚିଠି ସଂଖ୍ୟା ୧୦୩୩ ରେ ୧୭ ଜୁନ୍, ୨୦୧୮ ସୁଦ୍ଧା ଓପିଇଏଲଆଇପି କାର୍ଯ୍ୟକ୍ରମ କ୍ଷେତ୍ର ଅଧୀନରେ ସୁବିଧା ପ୍ରଦାନକାରୀ ଏନଜିଓ ଭାବେ ଆବେଦନକାରୀଙ୍କ ସହିତ ଚୁକ୍ତିନାମା ସମାପ୍ତ କରିବାକୁ ନିର୍ଦ୍ଦେଶ ଦେଇଥିଲେ, ଯାହା ସ୍ୱେଚ୍ଛାଚାରିତା ଏବଂ ବେଆଇନତାକୁ ଶକ୍ତ ଧକ୍କା ଦିଏ ।

୭. ଆବେଦନକାରୀ ଓପିଇଏଲ୍‌ଆଇପି ଅଧୀନରେ ନିଜର କିଛି ସଂଖ୍ୟକ କର୍ମଚାରୀ ଏବଂ ପରିବାର ମାଧ୍ୟମରେ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ ପାଇଁ କାମ କରୁଛନ୍ତି ଏବଂ ସରକାର ଏବଂ ଆବେଦନକାରୀଙ୍କ ମଧ୍ୟରେ ଚୁକ୍ତିନାମା ତା ୩୧.୦୩.୨୦୧୮ ରିଖଠାରୁ ୨୦୨୪ ପର୍ଯ୍ୟନ୍ତ ନବୀକରଣ ହୋଇସାରିଛି । ଚୁକ୍ତିର ନବୀକରଣ ପରେ କୌଣସି ଅର୍ଥପୂର୍ଣ୍ଣ କାରଣ ବିନା ଏକ ମାସ ମଧ୍ୟରେ ଚୁକ୍ତିର ସମାପ୍ତି ଆଇନରେ ଗ୍ରହଣୀୟ ନୁହେଁ ।

୮. ଆବେଦନକାରୀ ଏମପିଏ, ସ୍ଥାନୀୟ ଅଧିକାରୀ ଏବଂ ଲୋକ ପ୍ରତିନିଧି (ପିଆରଆଇ ସଦସ୍ୟ) ଏବଂ ପିଏମୟୁ ନିର୍ଦ୍ଦେଶକ, ଏନଆରଏମ ଅଧିକାରୀଙ୍କ ପ୍ରତିନିଧିଙ୍କ ଉପସ୍ଥିତିରେ ଏମଜିଏନଆରଇଜିଏସ ସରଞ୍ଜାମ, ବାସନକୁସନ ବଣ୍ଟନ କରିଛନ୍ତି । କାରଣ ଦର୍ଶାଇବାରେ ଆବେଦନକାରୀ ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଙ୍କୁ ଅବଗତ କରାଇଛନ୍ତି ଯେ ଓପିଇଏଲଆଇପି ର କାର୍ଯ୍ୟ ସନ୍ତୋଷଜନକ ପାଇବା ପରେ ଆବେଦନକାରୀଙ୍କ ସହିତ ଚୁକ୍ତିକୁ ୨୦୨୪ ପର୍ଯ୍ୟନ୍ତ ନବୀକରଣ କରାଯାଇଛି । କିନ୍ତୁ, ଏହି ପର୍ଯ୍ୟାୟରେ, ଚୁକ୍ତିନାମାକୁ ସମାପ୍ତ କରି ଆବେଦନକାରୀଙ୍କୁ ଅସୁବିଧାରେ ପକାଯାଇଥିଲା ।

୯. ଚୁକ୍ତିର ନବୀକରଣ ପରେ ଆବେଦନକାରୀ ଖୁଣ୍ଟଗାଁ ଏବଂ ବେଲଘରରେ ପ୍ରାୟ ୭୯ ଜଣ କର୍ମଚାରୀଙ୍କୁ ନିୟୋଜିତ କରିଛନ୍ତି ଯାହା ୧୦,୦୦୦ ପରିବାରକୁ ଓପିଇଏଲଆଇପି କାର୍ଯ୍ୟକ୍ରମରେ ଇପିଏ ର ସୁବିଧା ପ୍ରଦାନ କରୁଛି । ଚୁକ୍ତିନାମା ସମାପ୍ତ ହେବା କାରଣରୁ ସେହି କର୍ମଚାରୀମାନେ ଚାକିରି ହରାଇବେ ଯାହା ଦ୍ୱାରା ସେମାନଙ୍କ ପରିବାର ରାସ୍ତାକୁ ଆସିଯିବେ ଏବଂ ହିତାଧିକାରୀମାନେ ସରକାରଙ୍କଠାରୁ ଲାଭରୁ ବଞ୍ଚିତ ହେବେ ଏବଂ ଆବେଦନକାରୀ କାର୍ଯ୍ୟକ୍ରମ କ୍ଷେତ୍ରରେ ବିନିଯୋଗ ହୋଇଥିବା ଅର୍ଥ ପୁନରୁଦ୍ଧାର କରିବାରେ ବିଫଳ ହେବେ ।

୧୦. ତା ୧୯.୦୫.୨୦୧୮ ରିଖର ପୂର୍ବ ସମାପ୍ତି ଆଦେଶକୁ ଆହ୍ୱାନ କରି ଆବେଦନକାରୀ ରିଟ୍ ଆବେଦନ ସଂଖ୍ୟା ୯୫୫୯/୨୦୧୮ ରେ ଏହି ନ୍ୟାୟାଳୟଙ୍କ ନିକଟକୁ ଆସିଥିଲେ ଏବଂ ନିମ୍ନଲିଖିତ ଆଦେଶ ସହିତ ତା ୩୧.୦୮.୨୦୨୧ ରିଖ ରେ ଏହାର ଫଇସଲା କରାଯାଇଥିଲା:

> *"ଏହି ମାମଲାକୁ ଆଭାସୀ ମାଧ୍ୟମରେ ବିଚାର କରାଯାଉଛି ।*
>
> *ଆବେଦନକାରୀଙ୍କ ତରଫରୁ ବିଦ୍ୱାନ ଓକିଲ ଶ୍ରୀଯୁକ୍ତ ଜେ. କେ. ଖୁଣ୍ଟିଆ, ବିଦ୍ୱାନ ମହାଧିବକ୍ତା ଶ୍ରୀଯୁକ୍ତ ଅଶୋକ ପରିଜା ଏବଂ ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ପାଇଁ ବିଦ୍ୱାନ ଓକିଲ ଶ୍ରୀଯୁକ୍ତ ବି. କେ. ଶର୍ମା ଙ୍କୁ ଶୁଣିଲୁ ।*
>
> *ଶ୍ରୀଯୁକ୍ତ ପରିଜା ଉପସ୍ଥାପନ କରିଛନ୍ତି ଯେ ଯେହେତୁ ଆବେଦନକାରୀଙ୍କର ମୁଖ୍ୟ ଅଭିଯୋଗ ହେଉଛି ଯେ ଅନୁଲଗ୍ନକ-୧୨ ଅଧୀନସ୍ଥ ତା ୧୯.୦୫.୨୦୧୮ ରିଖର ବିବାଦୀୟ ଆଦେଶ ଆବେଦନକାରୀଙ୍କ ଦ୍ୱାରା ଦାଖଲ ହୋଇଥିବା କାରଣ ଦର୍ଶାଇବାକୁ ବିବେଚନା ନକରି ପାରିତ ହୋଇଛି, ଯାହା ଦ୍ୱାରା ପ୍ରାକୃତିକ ନ୍ୟାୟର ନୀତି ଉଲ୍ଲଂଘନ ହୋଇଛି; କର୍ତ୍ତୃପକ୍ଷ ବିଶେଷ କରି ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ବର୍ତ୍ତମାନ ଆବେଦନକାରୀଙ୍କୁ ତାଙ୍କ ଦ୍ୱାରା ଦାଖଲ ହୋଇଥିବା କାରଣ ଦର୍ଶାଇବାକୁ ଏକ ନୂତନ ସୁଯୋଗ ଦେବାକୁ ପ୍ରସ୍ତୁତ ଅଛନ୍ତି ଏବଂ ସେହି ଅନୁଯାୟୀ ମାମଲାର ଫଇସଲା କରିବାକୁ ପ୍ରାର୍ଥନା କରନ୍ତି । ଏହିପରି ନିବେଦନକୁ ବିଚାରକୁ ନେଇ, ଅନୁଲଗ୍ନକ-୧୨ ଅଧୀନସ୍ଥ ତା ୧୯.୦୫.୨୦୧୮ ରିଖର ବିବାଦୀୟ ଆଦେଶକୁ ଅଗ୍ରାହ୍ୟ କରିଦିଆଯାଇଛି ଏବଂ ଆବେଦନକାରୀଙ୍କୁ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ, ଓଡ଼ିଶା, ବିଶେଷ କରି ଦୁର୍ବଳ ଆଦିବାସୀ ଗୋଷ୍ଠୀ ସଶକ୍ତିକରଣ ଏବଂ ଜୀବିକା ଉନ୍ନତି କାର୍ଯ୍ୟକ୍ରମ, ଅନୁସୂଚିତ ଜାତି ଏବଂ ଅନୁସୂଚିତ ଜନଜାତି ବିକାଶ ବିଭାଗ (ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪), ଙ୍କ ସମ୍ମୁଖରେ ଶାରୀରିକ ଭାବରେ କିମ୍ବା ଆଭାସୀ ମାଧ୍ୟମରେ ହାଜର ହେବାକୁ ନିର୍ଦ୍ଦେଶ ଦିଆଯାଇଛି, ଯାହାଙ୍କୁ ଆବେଦନକାରୀଙ୍କୁ କାରଣ ଦର୍ଶାଇବା ସହିତ ବ୍ୟକ୍ତିଗତ ଶୁଣାଣି ଦେବା*

ପାଇଁ ଏକ ତାରିଖ ସ୍ଥିର କରିବାକୁ ନିର୍ଦ୍ଦେଶ ଦିଆଯାଇଛି । ଏପରି ଶୁଣାଣି ସମାପ୍ତ ହେବା ପରେ, ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଙ୍କୁ ଆଇନ ଅନୁଯାୟୀ ଚୂଡ଼ାନ୍ତ ଆଦେଶ ପାରିତ କରିବାକୁ ନିର୍ଦ୍ଦେଶ ଦିଆଯାଇଛି ।
ସେହି ଅନୁଯାୟୀ ରିଟ୍ ଆବେଦନକୁ ଫଇସଲା କରାଯାଇଛି ।

ଉପଯୁକ୍ତ ଦରଖାସ୍ତ ଉପରେ ଏହି ଆଦେଶର ଜରୁରୀ ପ୍ରମାଣିତ ପ୍ରତିଲିପି ପ୍ରଦାନ କରନ୍ତୁ ।"

୧୧. ଆବେଦନକାରୀଙ୍କୁ ବିଭିନ୍ନ ତାରିଖରେ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ, ଓପିଇଏଲଆଇପି ଙ୍କ ସମ୍ମୁଖରେ ହାଜର ହେବାକୁ ନୋଟିସ ଜାରି କରାଯାଇଥିଲା । ଆବେଦନକାରୀ ହାଜର ହୋଇଥିଲେ ଏବଂ ଶୁଣାଣିର ବିଭିନ୍ନ ତାରିଖରେ ଆବଶ୍ୟକତା ଅନୁଯାୟୀ ଅନୁପାଳନ କରିଥିଲେ । କାରଣ ଦର୍ଶାଅ ଉତ୍ତରରେ ଦିଆଯାଇଥିବା ଉତ୍ତରକୁ ବିଚାର ନକରି ଏବଂ କାରଣ ଦର୍ଶାଅ ନୋଟିସରେ ଥିବା ଅଭିଯୋଗ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ର ଅଂଶବିଶେଷ ନୁହେଁ ବୋଲି ବିବେଚନା କରି କାରଣ ଦର୍ଶାଅ ଉତ୍ତରରେ ନିଆଯାଇଥିବା କାରଣକୁ ଧ୍ୟାନରେ ନରଖି ପ୍ରକଳ୍ପ ନିର୍ଦ୍ଦେଶକ ନିର୍ବୋଧ ଭାବେ ଏହି ଆକ୍ଷେପିତ ଆଦେଶ ପାରିତ କରିଛନ୍ତି । ତେଣୁ ଏହି ରିଟ୍ ଆବେଦନ ।

II. ଆବେଦନକାରୀଙ୍କ ତରଫରୁ କରାଯାଇଥିବା ଉପସ୍ଥାପନା*:*

୧୨. ଆବେଦନକାରୀଙ୍କ ପାଇଁ ବିଦ୍ୱାନ ଓକିଲ ନିମ୍ନଲିଖିତ ଉପସ୍ଥାପନ ଗୁଡ଼ିକୁ ରଖିଥିଲେ*:--*

(i) ପରିଚାଳନା ନିର୍ଦ୍ଦେଶାବଳୀ ଅନୁଯାୟୀ, ଇପିଏ ଉଦ୍ଦେଶ୍ୟରେ ଥିବା ମାର୍ଗଦର୍ଶୀ ନୀତି ପ୍ରଦାନ କରେ ଯେ ଅନ୍ୟାନ୍ୟ ବିଷୟ ମଧ୍ୟରେ "ସ୍ଥାନୀୟ ସମ୍ପ୍ରଦାୟ ମାନଙ୍କର ଜରୁରୀ ଆବଶ୍ୟକତା ଉପରେ ଆଧାରିତ କାର୍ଯ୍ୟ ଯେପରିକି ଗୋଷ୍ଠୀ ମନ୍ଦିର ଗୁଡିକର ପୁନର୍ବାସ, ପାନୀୟ ଜଳ, ଜଳ ଅମଳ, ସୌର ଲଣ୍ଠନ ଯୋଗାଣ, ମନରେଗା ଉପକରଣ ଯୋଗାଣ ଇତ୍ୟାଦି"କୁ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ ଅନ୍ତର୍ଭୁକ୍ତ କରିବ ।

(ii) ବିଭିନ୍ନ ନିର୍ଦ୍ଦେଶାବଳୀ ନିର୍ଦ୍ଧାରିତ କରି "କାର୍ଯ୍ୟକ୍ରମ ରୂପାୟନ ମାର୍ଗଦର୍ଶିକା" ନାମକ ଏକ ନିର୍ଦ୍ଦେଶାବଳୀ ସମୁଦାୟ ଜାରି କରାଯାଇଥିଲା । କାର୍ଯ୍ୟକ୍ରମ ରୂପାୟନ ମାର୍ଗଦର୍ଶିକା ନିମ୍ନମତେ ବ୍ୟବସ୍ଥା କରିଥାଏ*:*

"୧୬. ଏହି କାର୍ଯ୍ୟକ୍ରମ ସମ୍ପ୍ରଦାୟର ବିଶ୍ୱାସ ହାସଲ କରିବା ପାଇଁ ଏକ କିମ୍ବା ଅଧିକ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ କାର୍ଯ୍ୟକାରୀ କରିବ ।ବିଭିନ୍ନ କାର୍ଯ୍ୟକଳାପକୁ କାର୍ଯ୍ୟକାରୀ କରିବାକୁ ଯୋଜନା ପ୍ରସ୍ତୁତ କରିବା ପାଇଁ ଏହା ସମ୍ପ୍ରଦାୟ ପାଇଁ ପ୍ରଶିକ୍ଷଣ କ୍ଷେତ୍ର ହେବ । ଏହି କାର୍ଯ୍ୟକ୍ରମ ପ୍ରତ୍ୟେକ ଗ୍ରାମ ପାଇଁ ଭାରତୀୟ ମୁଦ୍ରାରେ ୧,୭୫,୦୦୦ ଟଙ୍କା ଆବଣ୍ଟନ କରିଛି । ଏହି କାର୍ଯ୍ୟକଳାପ ଗୁଡ଼ିକ ପାଇଁ ଯୋଜନା ପ୍ରସ୍ତୁତ କରିବାକୁ ଗ୍ରାମକୁ ସୁବିଧା ଦିଆଯିବ । ଏହି କାର୍ଯ୍ୟକଳାପ ଗୁଡ଼ିକ ଭିଡିଏ ରେ ଚୟନ କରାଯିବ ଏବଂ ଯଥାସମ୍ଭବ, ବିଶେଷ କରି ମହିଳାମାନଙ୍କୁ ଲକ୍ଷ୍ୟ କରି, ଯେପରିକି ପାନୀୟ ଜଳ ସୁବିଧା, ପ୍ରକ୍ଷାଳନ ଏବଂ ସ୍ନାନ ଚଉତରା, ଏନଟିଏଫପି/ଫସଲ ଶୁଖାଇବା ପାଇଁ ଚଉତରା ଇତ୍ୟାଦି, ସାଧାରଣ ଉପଯୋଗର ସାମଗ୍ରୀ ନିର୍ମାଣ କିମ୍ବା ମରାମତି କରିବ" ।

(iii) ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ ପାଳନ କରିବା ପାଇଁ ପ୍ରଥମେ ଏକ ଚୁକ୍ତିନାମା କାର୍ଯ୍ୟକାରୀ କରାଯାଇଥିଲା । ପକ୍ଷ ମାନଙ୍କ ମଧ୍ୟରେ ପରାମର୍ଶଦାତା ସେବା ପାଇଁ ଚୁକ୍ତି ରାଜିନାମାର ଚୁକ୍ତିର ସ୍ୱତନ୍ତ୍ର ସର୍ତ୍ତାବଳୀର ଖଣ୍ଡ ୨.୪ ଅନୁଯାୟୀ ଇପିଏ କାର୍ଯ୍ୟକାରୀ କରିବା ଏବଂ କାର୍ଯ୍ୟକ୍ରମର ରୂପାୟନ ପାଇଁ ପ୍ରାରମ୍ଭିକ ଚୁକ୍ତିର ଅବଧି ତା ୦୧.୦୬.୨୦୧୭ ରିଖରୁ ତା ୩୧.୦୩.୨୦୧୮ ରିଖ ପର୍ଯ୍ୟନ୍ତ ଥିଲା ।

(iv) ଆବେଦନକାରୀ ଚୁକ୍ତିନାମା ସ୍ୱାକ୍ଷର କରିବା ପରେ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପକୁ ସଫଳତାର ସହ କାର୍ଯ୍ୟକାରୀ କରିଥିଲେ । ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀ, କେକେଡିଏ ଭଳି ନିର୍ଦ୍ଦିଷ୍ଟ କର୍ତ୍ତୃପକ୍ଷଙ୍କ ଦ୍ୱାରା ସମୀକ୍ଷା ଏବଂ ଯାଞ୍ଚ କରାଯାଇଥିଲା । କେକେଡିଏ ର ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀ ତା ୧୫.୦୨.୨୦୧୮ ରିଖର ଚିଠି ମାଧ୍ୟମରେ ବିଶେଷ ଭାବେ ଜାଣିବାକୁ ପାଇଛନ୍ତି

ଯେ ବେଲଘର ସମ୍ବନ୍ଧରେ ଏଫଏନଜିଓ - ସୌରଭର କାର୍ଯ୍ୟଦକ୍ଷତା ସନ୍ତୋଷଜନକ, ଅର୍ଥାତ୍ ବେଲଘର କେକେଡିଏ ରେ ମନରେଗା ଉପକରଣ ବଣ୍ଟନ ଆକାରରେ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ ସନ୍ତୋଷଜନକ ବୋଲି ଜଣାପଡ଼ିଛି । ଉପରୋକ୍ତ ପ୍ରଥମ ବର୍ଷର ଅବଧି ସମାପ୍ତ ହେବା ପରେ, କେକେଡିଏ ଏବଂ ପିବିଡିଏ ପାଇଁ ଚୁକ୍ତିନାମା ୫ ବର୍ଷର ଅବଧି ପାଇଁ ଅର୍ଥାତ୍ ତା ୦୧.୦୪.୨୦୧୮ ରିଖରୁ ତା ୩୧.୦୩.୨୦୨୪ ରିଖ ପର୍ଯ୍ୟନ୍ତ କାର୍ଯ୍ୟକାରୀ କରାଯାଇଥିଲା ।

(v) ଉପରୋକ୍ତ ଚୁକ୍ତିନାମାକୁ କାର୍ଯ୍ୟକାରୀ କରି ଆବେଦନକାରୀ ବହୁଳ ଭାବରେ ମାଓବାଦୀଙ୍କ ଆଧିପତ୍ୟ ଥିବା ରାଜ୍ୟର ବିଭିନ୍ନ ଅଞ୍ଚଳରେ କାର୍ଯ୍ୟ କରିଥିଲେ । ସମୟ ସମୟରେ, ଆବେଦନକାରୀଙ୍କ ପ୍ରଦର୍ଶନର ସମୀକ୍ଷା ତା ୦୭.୦୫.୨୦୧୮ ରିଖ ଏବଂ ତା ୦୮.୦୫.୨୦୧୮ ରିଖରେ କରାଯାଇଥିଲା । ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ ଭାବେ ଏମଜିଏନଆରଇଜିଏସ ଉପକରଣ ଗୁଡିକୁ ବଣ୍ଟନ କରିବା ନେଇ ଆବେଦନକାରୀଙ୍କ ବିରୋଧରେ ପ୍ରକଳ୍ପ ଅଧିକାରୀମାନେ କୌଣସି ଭୁଲ୍ ଦର୍ଶାଇନଥିଲେ । ଅନ୍ୟ ପକ୍ଷରେ, କର୍ତ୍ତୃପକ୍ଷମାନେ ସେମାନଙ୍କ ବୁଦ୍ଧିମତ୍ତା ଅନୁସାରେ ଜାଣିବାକୁ ପାଇଛନ୍ତି ଯେ ଆବେଦନକାରୀ ଏକ ବର୍ଷର ପ୍ରାଥମିକ ଅବସ୍ଥାରେ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ ଭାବେ ଏମଜିଏନଆରଜିଏସ ଉପକରଣ ଗୁଡ଼ିକୁ ବଣ୍ଟନ କରିବା ଦିଗରେ ନିଷ୍ଠାର ସହ କାର୍ଯ୍ୟ କରିଛନ୍ତି । ପରବର୍ତ୍ତୀ ସମୟରେ, ଏହି ଚୁକ୍ତିକୁ ୫ ବର୍ଷ ପାଇଁ ନିଷ୍ପାଦନ କରାଯାଇଥିଲା । ତେବେ, ଏମଜିଏନଆରଇଜିଏସ ଉପକରଣ ଗୁଡ଼ିକୁ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ ଭାବେ ବଣ୍ଟନ କରିବା ପ୍ରସଙ୍ଗ ଉଠାଇବାକୁ ଆଇନ ଅନୁଯାୟୀ ପ୍ରତିବନ୍ଧ ସତ୍ତ୍ୱେ, ହଠାତ୍ ଆବେଦନକାରୀଙ୍କୁ ଚୁକ୍ତିର ସମାପ୍ତି ସମ୍ବନ୍ଧରେ ଦର୍ଶାଇ ତା ୦୯.୦୫.୨୦୧୮ ରିଖରେ ଏକ ନୋଟିସ ଜାରି କରାଯାଇଥିଲା । ଆବେଦନକାରୀ ସଙ୍ଗଠନ ବିଶେଷ ଭାବେ ୨୭୨୫ ଟି ଶ୍ରମ ଦିବସ ସୃଷ୍ଟି କରିଥିବା, ୪୩ ଟି ପଲ୍ଲୀ ସଭା ଆୟୋଜନ କରିଥିବା, ୨୨ ଟି ପଲ୍ଲୀ ସଭା କରାଯାଇଥିବା, କୃଷକମାନଙ୍କ ସହ ଗ୍ରାମ୍ୟ ସ୍ତରୀୟ ବୈଠକ ଆୟୋଜନ କରିଥିବା, ୫ ଜଣ ପ୍ରଗତିଶୀଳ କୃଷକଙ୍କୁ ଚୟନ କରିବା ଏକ ସାରଣୀ ଆକାରରେ ସଫଳତାର ବିବରଣୀ ପ୍ରଦାନ କରାଯାଇଥିବା ସମ୍ବନ୍ଧରେ ସୂଚାଇ ତା ୨୩.୦୫.୨୦୧୮ ରିଖରେ ଏକ ବିସ୍ତୃତ କାରଣ ଦର୍ଶାଅ ଦାଖଲ କରିଥିଲା । ଏପରି ଉତ୍ତର ସମ୍ପୂର୍ଣ୍ଣ ଅଟେ ଏବଂ କାରଣ ଦର୍ଶାଇବାରେ ନିର୍ଦ୍ଦିଷ୍ଟ ପ୍ରସଙ୍ଗଗୁଡିକୁ ଉତ୍ଥାପନ କରାଯାଇଛି ।

(vi) ଏପରି ସମସ୍ତ କାରଣ ଦର୍ଶାଅ ନୋଟିସକୁ ବିଚାରକୁ ନେଇ ଏବଂ ଚୁକ୍ତିର ଖଣ୍ଡ -୨.୮ କୁ ପାଳନ ନକରି, ଯାହା ଆଦେଶ ପ୍ରଦାନ କରିବା ପୂର୍ବରୁ ପ୍ରାକୃତିକ ନ୍ୟାୟର ମୌଳିକ ବସ୍ତୁକୁ ପରିଚାଳନା କରିବାକୁ ଏକାନ୍ତ ପ୍ରୟୋଜନୀୟ ଏକ ଖଣ୍ଡ ଅଟେ, ତା ୧୯.୦୫.୨୦୧୮ ରିଖରେ କାର୍ଯ୍ୟ ନିବୃତ ଆଦେଶ ପାରିତ କରାଯାଇଥିଲା ।

(vii) ଆବେଦନକାରୀ ଡବ୍ଲୁ.ପି.*(ସି)* ସଂଖ୍ୟା ୯୫୫୯/୨୦୧୮ ର ଅନୁଲଗ୍ନକ - ୧୪ ଅଧୀନରେ ଉକ୍ତ ଆଦେଶକୁ ଆପତ୍ତି କରିଥିଲେ । ତର୍କ ପର୍ଯ୍ୟାୟରେ, ରାଜ୍ୟ ତରଫରୁ ହାଜର ହୋଇଥିବା ବିଦ୍ୱାନ ମହାଧିବକ୍ତା ସ୍ୱୀକାର କରିଛନ୍ତି ଯେ ଆବେଦନକାରୀଙ୍କ ଦ୍ୱାରା ଦାଖଲ ହୋଇଥିବା କାରଣ-ଦର୍ଶାଅକୁ ବିଚାର କରାଯାଇ ନାହିଁ, ଯାହା ଦ୍ୱାରା ପ୍ରାକୃତିକ ନ୍ୟାୟ ସିଦ୍ଧାନ୍ତର ଉଲ୍ଲଂଘନ ହୋଇଛି । ପରିଣାମ ସ୍ୱରୂପ, ତା ୧୯.୦୫.୨୦୧୮ ରିଖର କାର୍ଯ୍ୟନିବୃତ ଆଦେଶକୁ ରଦ୍ଦ କରାଯାଇଥିଲା । ଆବେଦନକାରୀଙ୍କୁ ଏହାର କାରଣ ଦର୍ଶାଇବା ସାଙ୍ଗରେ ଶୁଣାଣିର ସୁଯୋଗ ଦେଇ ଶୁଣାଣି ତାରିଖ ସ୍ଥିର କରିବାକୁ ଓପିଇଏଲଆଇପି ନିର୍ଦ୍ଦେଶକଙ୍କୁ ନିର୍ଦ୍ଦେଶ ଦିଆଯାଇଥିଲା । ଆଇନ ଅନୁଯାୟୀ ଚୂଡ଼ାନ୍ତ ଆଦେଶ ପାରିତ କରିବାକୁ ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ କୁ ନିର୍ଦ୍ଦେଶ ଦିଆଯାଇଥିଲା ।

(viii) ଓପିଇଏଲଆଇପି ର କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକଙ୍କ ଦ୍ୱାରା ଏହି କାର୍ଯ୍ୟନିବୃତ ଆଦେଶ ପାରିତ ହୋଇଛି । ଚୁକ୍ତିର ଖଣ୍ଡ ୨.୮.୧ ଏକ ପ୍ରାସଙ୍ଗିକ ଖଣ୍ଡ ଯାହା ମହକିଲଙ୍କୁ ଚୁକ୍ତି ସମାପ୍ତ କରିବାକୁ କ୍ଷମତା ପ୍ରଦାନ କରିଥାଏ | ଚୁକ୍ତିର ଖଣ୍ଡ - ୨.୮.୧ କୁ ସଦ୍ୟ ବିଚାରାର୍ଥେ ନିମ୍ନରେ ପୁନଃ ପ୍ରସ୍ତୁତ କରାଯାଇଛି:

"୨.୮.୧. ମହକିଲଙ୍କ ଦ୍ୱାରା ।

ମହକିଲ, ଅତିକମରେ ତିରିଶ (୩୦) ଦିନ ପର୍ଯ୍ୟନ୍ତ ପରାମର୍ଶଦାତାମାନଙ୍କୁ ସମାପ୍ତି ସମ୍ବନ୍ଧୀୟ ଲିଖିତ ନୋଟିସ ଦେଇପାରିବେ (ଅନୁଚ୍ଛେଦରେ ତାଲିକାଭୁକ୍ତ ଘଟଣା ବ୍ୟତୀତ, ଯାହା ପାଇଁ ଅତିକମରେ ଷାଠିଏ (୬୦ଦିନ) ଦିନର ଲିଖିତ ନୋଟିସ ରହିବ) । ଏହି ଖଣ୍ଡ ଜିସିସି ୨.୮.୧ ର ଅନୁଚ୍ଛେଦ କ ରୁ ଛ ଜରିଆରେ କୌଣସି ନିର୍ଦ୍ଦିଷ୍ଟ ଘଟଣାର ଏକତ୍ର ଦୃଶ୍ୟମାନ ପରେ ଚୁକ୍ତିର ଅବସାନ ପାଇଁ ଏପରି ନୋଟିସ ଦିଆଯିବ ।

ଖଣ୍ଡ-୨.୮.୧. ଅନୁଯାୟୀ ଏହା ଆହୁରି ମଧ୍ୟ ବ୍ୟବସ୍ଥା କରେ ଯେ ଯଦି ପରାମର୍ଶଦାତାମାନେ ନିମ୍ନରେ ସେମାନଙ୍କ ଦାୟିତ୍ୱ ନିର୍ବାହନ ସମୟରେ ବିଫଳତାର ପ୍ରତିକାର କରିବାରେ ବିଫଳ ହୁଅନ୍ତି, ଯାହା ଉପରେ ଖଣ୍ଡ-୨.୮ ଅନୁଯାୟୀ ନିଲମ୍ବନ ବିଜ୍ଞପ୍ତିରେ ନିର୍ଦ୍ଦିଷ୍ଟ ହୋଇଛି, ଏହିପରି ନିଲମ୍ବନ ନୋଟିସ ପ୍ରାପ୍ତିର ତିରିଶ (୩୦ ଦିନ) ମଧ୍ୟରେ କିମ୍ବା ଏହିପରି ପରବର୍ତ୍ତୀ ଅବଧି ମଧ୍ୟରେ ଯାହା ମହକିଲ ପରବର୍ତ୍ତୀ ସମୟରେ ଲିଖିତ ଭାବରେ ଅନୁମୋଦନ କରିଥିବେ । ଏହା ପରେ ହିଁ ମହକିଲ ଏହି ଚୁକ୍ତିକୁ ସମାପ୍ତ କରିପାରିବେ

ପୃଷ୍ଠା-୮୧ ରେ ଥିବା ଚୁକ୍ତିର ଖଣ୍ଡ - ୨.୭ ହେଉଛି ଏକ ଚୁକ୍ତିର ନିଲମ୍ବନ ସମ୍ବନ୍ଧୀୟ ପ୍ରାସଙ୍ଗିକ ଖଣ୍ଡ ଯାହା ସମାପନ ନୋଟିସ ଜାରିହେବା ପୂର୍ବରୁ ହେବା କଥା ।"

(ix) ସମାପନର ଆକ୍ଷେପିତ ଆଦେଶ ପ୍ରତିବାଦୀମାନେ / ପ୍ରାଧିକାରୀମାନେ ଚୁକ୍ତିର ଖଣ୍ଡ ୨.୮ କୁ ଅନୁସରଣ କରୁଥିବା ବିଷୟରେ ଦର୍ଶାଉନାହିଁ, ଯାହାକି ପ୍ରାକୃତିକ ନ୍ୟାୟ ଉଲ୍ଲଂଘନର ଏକ ଘଟଣା ଅଟେ । ଏହି ଆଦେଶରେ ୩୦ ଦିନ କିମ୍ବା ୬୦ ଦିନର ନୋଟିସ ଜାରି ବିଷୟରେ କିଛି କୁହାଯାଇନାହିଁ । ଉପରୋକ୍ତ ବିଷୟ ଦୃଷ୍ଟିରେ ଏହି ଆକ୍ଷେପିତ ଆଦେଶ ପ୍ରାକୃତିକ ନ୍ୟାୟ ନୀତିର ଉଲ୍ଲଂଘନ କରୁଛି । ଅନ୍ୟ ଅର୍ଥରେ, ପ୍ରାକୃତିକ ନ୍ୟାୟ ସିଦ୍ଧାନ୍ତର ଅନୁପାଳନ ହୋଇନାହିଁ, ଯେପରିକି:

(କ) *କାରଣ ଦର୍ଶାଅ ବିଜ୍ଞପ୍ତିରେ ସମାପନ ହୋଇଥିବାର ଆଧାର ବିଷୟରେ କୌଣସି ଗୋଟିଏ ଶବ୍ଦର ପ୍ରଦର୍ଶନ କଦାପି କରାଯାଇନାହିଁ ଯଥା ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟ ପାଇଁ ଏମଜିଏନଆରଇଜିଏସ ଉପକରଣ ଯୋଗାଣରେ ଭୁଲ୍ ଖୋଜିବା । ଅନ୍ୟପକ୍ଷରେ, ଏମଏଚଏନଆରଇଜିଏସ ଉପକରଣ ବଣ୍ଟନ ଉପରେ ପ୍ରକୃତରେ କେତେ ଶ୍ରମ ଦିବସ ସୃଷ୍ଟି ହୋଇଛି ଏବଂ ଏହା କିପରି କ୍ଷମତା ନିର୍ମାଣ ଉପରେ କାର୍ଯ୍ୟ କରିଛି ଏବଂ ଏହା କିପରି ସ୍ଥାୟୀ ଜୀବିକା ବିକାଶ ଇତ୍ୟାଦି ଆଡ଼କୁ ଗତି କରିଛି ତାହା ବ୍ୟାଖ୍ୟା କରିବାର ସୀମିତ ଉଦ୍ଦେଶ୍ୟ ପାଇଁ କାରଣ ଦର୍ଶାଅ ନୋଟିସ୍ ଜାରି କରାଯାଇଥିଲା, ଯାହାର ସବିଶେଷ ଉତ୍ତର ବାଦୀଙ୍କ ଦ୍ୱାରା ରିଟ୍ ଆବେଦନର ପୃଷ୍ଠା ୨୫୨ ରେ ତା ୨୩. ୦୬. ୨୦୧୮ ରିଖ କାରଣ ଦର୍ଶାଅରେ କେତେ ସଂଖ୍ୟକ ଶ୍ରମ ଦିବସ ବିଷୟରେ ବିସ୍ତୃତ ଭାବରେ ବର୍ଣ୍ଣନା କରାଯାଇଛି, ଏହା କିପରି ଲକ୍ଷ୍ୟଭୁକ୍ତ ସମ୍ପ୍ରଦାୟର ସଶକ୍ତିକରଣ ଦିଗରେ ଅଗ୍ରସର ହୋଇଛି ଉଲ୍ଲେଖ ଅଛି, କିନ୍ତୁ ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ କାରଣ ଦର୍ଶାଅ ସହିତ ଜଡ଼ିତ ଗୁଣବତ୍ତା ଉପରେ ଗୋଟିଏ ଶବ୍ଦ ନକହି ଆବେଦନକାରୀଙ୍କ ଏମଜିଏନଆରଇଜିଏସ ର ଉପକରଣ ବଣ୍ଟନ ପାଇଁ ସିଧା ସଳଖ ଭାବେ ଭୁଲ୍ ଏବଂ ତ୍ରୁଟି ବାହାର କରିଛନ୍ତି ।*

(ଖ) ଆବେଦନକାରୀ ଏଠାରେ ଯୁକ୍ତି କରିଛନ୍ତି ଯେ ଏପରି ଏକ ପ୍ରକଳ୍ପକୁ ଗ୍ରହଣ କରି, ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ତର୍କ ପ୍ରକ୍ରିୟାରେ ଆଦେଶ ପାରିତ କରିଛନ୍ତି ଯାହା କାରଣ ଦର୍ଶାଅ ବିଜ୍ଞପ୍ତିର ବିଷୟ ବସ୍ତୁ ନୁହେଁ ।

(x) ଆବେଦନକାରୀ **କେନ୍ଦ୍ରୀୟ ଅବକାରୀ ଆୟୁକ୍ତ, ବାଙ୍ଗାଲୋର ବନାମ ବୃନ୍ଦାବନ ବିଭରେଜ (ପି) ଲିମିଟେଡ ଏବଂ ଅନ୍ୟମାନେ[1], କେନ୍ଦ୍ରୀୟ ଅବକାରୀ ଆୟୁକ୍ତ, ଚଣ୍ଡିଗଡ ବନାମ ଶିତଲ ଇଣ୍ଟରନାସନାଲ[2] ଏବଂ ସୀମା ଶୁଳ୍କ ଆୟୁକ୍ତ, ମୁମ୍ବାଇ ବନାମ ଟୋକିଓ ଇଞ୍ଜିନିୟରିଂ ଇଣ୍ଡିଆ ଲିମିଟେଡ[3]** ମାମଲାରେ ପ୍ରଦାନ କରାଯାଇଥିବା ସର୍ବୋଚ୍ଚ ନ୍ୟାୟାଳୟଙ୍କ ରାୟ ଗୁଡିକ ଉପରେ ଭରସା କରିଛନ୍ତି ଯେଉଁଠାରେ ପ୍ରାକୃତିକ ନ୍ୟାୟର ସିଦ୍ଧାନ୍ତର ଦୃଢୋକ୍ତି ଉପରେ ସ୍ପଷ୍ଟ ଭାବରେ ଧ୍ୟାନ ଦିଆଯାଇଛି ।

୧. ୨୦୦୭(୫)ଏସସିସି -୩୫୮, ୨. ୨୦୧୧(୧)ଏସସିସି-୧୦୯, ୩. ୨୦୦୬(୭)ଏସସିସି -୫୯୨

(xi) ଆକ୍ଷେପିତ ଆଦେଶରେ କାରଣ ଦର୍ଶାଇବା ଉପରେ ବିଚାର କରାଯାଇନାହିଁ । ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ବିସ୍ତୃତ କାରଣ ଦର୍ଶାଇବା ଉପରେ ନିଜ ବୁଦ୍ଧିମତ୍ତା ପ୍ରୟୋଗ କରି ନାହାନ୍ତି କିମ୍ବା କାରଣ ଦର୍ଶାଇ ତାହା ବିଚାର କରି ନାହାଁନ୍ତି। ଏହି ମାମଲାରେ, ଏହି ନ୍ୟାୟାଳୟ ତା ୩୧.୦୮.୨୦୨୧ ରିଖରେ ସମାପ୍ତ କରିଥିବା ପ୍ରାରମ୍ଭିକ ଆଦେଶକୁ ଖାରଜ କରି ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ କୁ ଆଇନ ଅନୁଯାୟୀ ଏକ ଆଦେଶ ପାରିତ କରିବାକୁ ନିର୍ଦ୍ଦେଶ ଦେଇଥିଲେ, ଯାହାର ଅର୍ଥ ହେଉଛି ଚୁକ୍ତି ସହିତ ଜଡିତ ପ୍ରାକୃତିକ ନ୍ୟାୟର ମୌଳିକ ତତ୍ତ୍ୱକୁ ମଧ୍ୟ ପାଳନ କରିବାକୁ ପଡିବ । ଏହି ନ୍ୟାୟାଳୟ ତାଙ୍କ ପୂର୍ବ ଆଦେଶରେ ଚୁକ୍ତିର ନିର୍ଦ୍ଦିଷ୍ଟ ସର୍ତ୍ତାବଳୀର ଅନୁପାଳନକୁ କେବେ ପରିହାର କରିନାହାଁନ୍ତି ଯାହା ପ୍ରାକୃତିକ ନ୍ୟାୟ ସିଦ୍ଧାନ୍ତରେ ଉଲ୍ଲେଖ କରାଯାଇଛି । ତେଣୁ, ବିଦ୍ୱାନ ମହାଧିବକ୍ତାଙ୍କ ବ୍ୟକ୍ତିଗତ ଶୁଣାଣିର ସୁଯୋଗ ଦେବା ଯୁକ୍ତି ସଠିକ ନୁହେଁ ।

(xii) ଆକ୍ଷେପିତ ଆଦେଶ ପାରିତ ସମୟରେ ଚୁକ୍ତିର ଖଣ୍ଡ - ୨.୬ କୁ କଦାପି ଅନୁସରଣ କରାଯାଇନାହିଁ । ବିଷୟବସ୍ତୁ ଯାହା ହେଉନା କାହିଁକି ଆବେଦନକାରୀଙ୍କୁ ୩୦ ଦିନ କିମ୍ବା ୬୦ ଦିନର ନୋଟିସ କେବେ ବି ଦିଆଯାଇ ନାହିଁ । ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଏହି ନୋଟିସ ପ୍ରଦାନ ନକରି ସିଧା ସଳଖ ଭାବେ ସମାପ୍ତ କରିବାଟା ଏକ ସାଂଘାତିକ କାର୍ଯ୍ୟ ଅଟେ । ତେଣୁ, ପୁଣି ଥରେ ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଦ୍ୱାରା ପ୍ରାକୃତିକ ନ୍ୟାୟ ସିଦ୍ଧାନ୍ତର ଉଲ୍ଲଙ୍ଘନ ହୋଇଛି ।

(xiii) ଆଇନ ଭଲ ଭାବରେ ସ୍ଥିର ହୋଇଛି ଯେ ଯଦିଓ ମକଦ୍ଦମାର ପରିସର ଏକ ଚୁକ୍ତିର ପ୍ରଭୁତା ମଧ୍ୟରେ ରହିଥାଏ, କିନ୍ତୁ ଏହିପରି ଚୁକ୍ତିର ଅବସାନ କାର୍ଯ୍ୟରେ ଜଡ଼ିତ ଥିବା ରାଜ୍ୟ ଏବଂ ଏହାର ରାଜିନାମାକୁ ଆଇନଗତ ଆଦେଶରେ ଔଚିତ୍ୟ ଭାବରେ ଏବଂ ସ୍ୱଚ୍ଛତାର ସହିତ ଅନୁସରଣ ପୂର୍ବକ ପ୍ରାକୃତିକ ନ୍ୟାୟକୁ କଡାକଡି ଅନୁପାଳନ କରିବାକୁ ପଡିବ । ଯେଉଁଠାରେ ନ୍ୟାୟାଳୟ ଅନୁଚ୍ଛେଦ ୨୨୬ ଅନୁଯାୟୀ କ୍ଷମତା ପ୍ରୟୋଗ କରି ଅନୁଭବ କରନ୍ତି ଯେ ପ୍ରାକୃତିକ ନ୍ୟାୟ ସିଦ୍ଧାନ୍ତର ଉଲ୍ଲଂଘନ ହୋଇଛି, ପକ୍ଷମାନଙ୍କୁ ଦେୱାନୀ ପ୍ରତିକାର ନ୍ୟସ୍ତ କରିବା ପରିବର୍ତ୍ତେ ଧାରା ୨୨୬ ଅନୁଯାୟୀ କରାଯାଇଥିବା କାର୍ଯ୍ୟାନୁଷ୍ଠାନକୁ ରଦ୍ଦ କରିବା ନ୍ୟାୟସଙ୍ଗତ ହେବ ।

(xiv) ଏକ ପ୍ରକାର ଅଭିଯୋଗ ଥିବା ଛଅଟି ଏଫ୍‌ଏନଜିଓ ସମ୍ବନ୍ଧରେ ସମାନ ସମାପ୍ତ ଆଦେଶ ପାରିତ କରାଯାଇଥିଲା ଏବଂ ଚାରୋଟି ଏଫ୍‌ଏନଜିଓ ର ଚୁକ୍ତିକୁ ପୁନରୁଦ୍ଧାର କରାଯାଇଛି । ତେବେ ଆବେଦନକାରୀ ଏଫ୍‌ଏନଜିଓ ଙ୍କ ପ୍ରତି ଭେଦଭାବ କରାଯାଇଛି । ପୁନରୁଦ୍ଧାର କରାଯାଇଥିବା ଏଫ୍‌ଏନଜିଓଏସ ଗୁଡ଼ିକ ହେଲା:

୧. ଡିଜେଡିଏ, ଚାଟିକୋଣା,
୨. ଡିଜେଡିଏ, ପରସାଲି,
୩. ଏଚକେ ଏବଂ ଏମଡିଏ, ଯଶିପୁର,
୪. ପିବିଡିଏ, ଜମାରଡ଼ିହି ,
୫. ପିବିଡିଏ, ରୁଗୁଡାକୁଦାର, ଏବଂ
୬. ଏସଡିଏ, ଚନ୍ଦ୍ରଗିରି ।

(xv) ଉପରୋକ୍ତ ବିଷୟକୁ ଦୃଷ୍ଟିରେ ରଖି, ଏଠାରେ ପ୍ରତିଷ୍ଠିତ ହୋଇଥିବା ପ୍ରାକୃତିକ ନ୍ୟାୟ ସିଦ୍ଧାନ୍ତର ସ୍ପଷ୍ଟ ଅନୁପାଳନ ନ ହୋଇଥିବାରୁ, ଆକ୍ଷେପିତ କାର୍ଯ୍ୟାନୁଷ୍ଠାନକୁ ରଦ୍ଦ କରାଯିବାର ଆବଶ୍ୟକତା ରହିଛି ।

III. ପ୍ରତିବାଦୀ ପକ୍ଷ ୧, ୨ ଏବଂ ୩/ରାଜ୍ୟ ତରଫରୁ କରାଯାଇଥିବା ଉପସ୍ଥାପନା:

୧୩. ଅନ୍ୟପକ୍ଷରେ, ପ୍ରତିବାଦୀ/ରାଜ୍ୟ ପାଇଁ ବିଦ୍ୱାନ ଓକିଲ ନିମ୍ନଲିଖିତ ଉପସ୍ଥାପନା ଗୁଡ଼ିକୁ ପ୍ରସ୍ତୁତ କରିଛନ୍ତି:

(i) ତଥ୍ୟାତ୍ମକ ଦୃଷ୍ଟିକୋଣରୁ ରିଟ୍ ଆବେଦନ ଗ୍ରହଣୀୟ ନୁହେଁ ଯେହେତୁ ଚୁକ୍ତିରେ ଏକ ମଧ୍ୟସ୍ଥି ଖଣ୍ଡ ରହିଛି । ଚୁକ୍ତିର ଖଣ୍ଡ - ୮, ମଧ୍ୟସ୍ଥତା ମାଧ୍ୟମରେ ବିବାଦର ସମାଧାନ ବ୍ୟବସ୍ଥା ସହିତ ଜଡ଼ିତ । ଏହା ସ୍ଥିରୀକୃତ ଆଇନ ଯେ ଯଦି ବିବାଦର ମଧ୍ୟସ୍ଥତା ପାଇଁ ଏକ ମଧ୍ୟସ୍ଥତା ଚୁକ୍ତିନାମା ଅଛି, ତେବେ ପକ୍ଷମାନଙ୍କୁ ମଧ୍ୟସ୍ଥତାଙ୍କ ନିକଟକୁ ପଠାଯିବା ଆବଶ୍ୟକ । ଚୁକ୍ତିଭିତ୍ତିକ ପ୍ରସଙ୍ଗରେ ଯେଉଁଠାରେ ବିବାଦୀୟ ତଥ୍ୟ ଉପରେ ପ୍ରଶ୍ନ ଥାଏ , ଭାରତୀୟ ସମ୍ବିଧାନର ଧାରା ୨୨୬ ଅନୁଯାୟୀ ଏହି ନ୍ୟାୟାଳୟ ତାଙ୍କର ଅସାଧାରଣ ଅଧିକାରିତାର ପ୍ରୟୋଗ କରିପାରିବେ ନାହିଁ । ଚୁକ୍ତିର ନିୟମ ଏବଂ ସର୍ତ୍ତ ଅନୁଯାୟୀ ପ୍ରାଧିକାରୀଙ୍କ କାର୍ଯ୍ୟାନୁଷ୍ଠାନରୁ ବଞ୍ଚିବାପାଇଁ ଆବେଦନକାରୀ ଏହି ନ୍ୟାୟାଳୟରୁ ଏକ ପ୍ରତିବନ୍ଧକ ଆଦେଶ ଜାରି କରିବା ପାଇଁ ପ୍ରାର୍ଥନା କରୁଛନ୍ତି । ଅଧିକନ୍ତୁ, ଚୁକ୍ତିନାମା/ରାଜିନାମା ଯଦି ନିଯୁକ୍ତିଦାତାଙ୍କ ଦ୍ୱାରା କୌଣସି କାର୍ଯ୍ୟାନୁଷ୍ଠାନ ଗ୍ରହଣ କରିବାର କ୍ଷମତା ପ୍ରଦାନ କରିଥାଏ, ତେବେ ତାଙ୍କୁ ଏପରି କରିବାରୁ ଅଟକାଯାଇପାରିବ ନାହିଁ ଏବଂ ତାଙ୍କ କାର୍ଯ୍ୟାନୁଷ୍ଠାନକୁ ଆପତ୍ତି କରାଯାଇପାରେ କିନ୍ତୁ ସେଠାରେ କୌଣସି ନିଷେଧ କରାଯାଇପାରିବ ନାହିଁ ।

(ii) ତେଣୁ, ଏହି ଦୃଷ୍ଟିକୋଣରେ ବର୍ତ୍ତମାନର ରିଟ୍ ଆବେଦନ ଗ୍ରହଣୀୟ ନୁହେଁ । ଆହୁରି, ବିନିର୍ଦ୍ଦିଷ୍ଟ ପ୍ରତିକାର ଅଧିନିୟମ, ୧୯୬୩ ର ଧାରା -୧୪ ରେ କୁହାଯାଇଛି ଯେ ଏକ ଚୁକ୍ତିନାମା ଯାହା ନିଜ ସ୍ୱଭାବରେ ସ୍ଥିର କରାଯାଇପାରିବ ତାହା ନିର୍ଦ୍ଦିଷ୍ଟ ଭାବରେ ବାଧତାମୂଳକ କରାଯାଇପାରିବ ନାହିଁ । ଆହୁରି, ଉକ୍ତ ଅଧିନିୟମର ଧାରା ୪୧, କୁହେ ଯେ ଏକ ଚୁକ୍ତିନାମାର ଭଙ୍ଗକୁ ରୋକିବା ପାଇଁ ଏକ ନିଷେଧାଜ୍ଞା ମଞ୍ଜୁର କରାଯାଇପାରିବ ନାହିଁ, ଯାହାର କାର୍ଯ୍ୟକାରିତା ନିର୍ଦ୍ଦିଷ୍ଟ ଭାବରେ ବାଧତାମୂଳକ ହେବ ନାହିଁ । ବିନିର୍ଦ୍ଦିଷ୍ଟ ପ୍ରତିକାର ଅଧିନିୟମ, ୧୯୬୩ ର ଧାରା ୪୧*(ଙ)* କୁ ଦୃଷ୍ଟିରେ ରଖି ପକ୍ଷମାନଙ୍କ ମଧ୍ୟରେ ବର୍ତ୍ତମାନର ଚୁକ୍ତି ସ୍ୱତନ୍ତ୍ର ଭାବରେ କାର୍ଯ୍ୟକାରୀ ହୋଇପାରିବ ନାହିଁ ଏବଂ ଚୁକ୍ତି ସ୍ୱଭାବରେ ନିର୍ଧାରଣଯୋଗ୍ୟ ହୋଇଥିବାରୁ, ଏକ ଚୁକ୍ତିର ଭଙ୍ଗକୁ ରୋକିବା ପାଇଁ ଏକ ନିଷେଧାଜ୍ଞା ମଞ୍ଜୁର କରାଯାଇପାରିବ ନାହିଁ, ଯାହାର କାର୍ଯ୍ୟକାରିତା ନିର୍ଦ୍ଦିଷ୍ଟ ଭାବରେ ବାଧତାମୂଳକ କରାଯାଇ ପାରିବନାହିଁ ।

(iii) ଏହା ଭଲ ଭାବେ ସ୍ଥିରୀକୃତ ଯେ ସାଧାରଣତଃ, ଚୁକ୍ତି ଭଙ୍ଗ ଅଭିଯୋଗ କରୁଥିବା ପକ୍ଷଙ୍କ ପାଇଁ ଉପଲବ୍ଧ ପ୍ରତିକାର କ୍ଷତି ଦାବି କରିବା ଉପରେ ନିର୍ଭର କରେ । ପକ୍ଷ ନିର୍ଦ୍ଦିଷ୍ଟ ପ୍ରଦର୍ଶନର ପ୍ରତିକାର ପାଇବାକୁ ହକଦାର ହେବେ, ଯଦି ଚୁକ୍ତି ଆଇନରେ ନିର୍ଦ୍ଦିଷ୍ଟ ଭାବରେ ବାଧତାମୂଳକ ହେବାକୁ ସକ୍ଷମ ହୋଇଥାଏ | ଚୁକ୍ତି ଭଙ୍ଗର ପ୍ରତିକାର ସମ୍ପୂର୍ଣ୍ଣ ଭାବରେ ଚୁକ୍ତିର କ୍ଷେତ୍ରରେ ରହିଥାଏ ଯାହାକି ଦେୱାନୀ ଅଦାଲତଙ୍କ ଦ୍ୱାରା କାର୍ଯ୍ୟକାରୀ ହୋଇଥାଏ । ଭାରତର ସମ୍ବିଧାନର ଧାରା ୨୨୬ ଅନୁଯାୟୀ ଏକ ରିଟ୍ ଆବେଦନ ମାଧ୍ୟମରେ ସାର୍ବଜନିକ ଆଇନ ପ୍ରତିକାର, ଚୁକ୍ତିର ଭଙ୍ଗ କିମ୍ବା ଚୁକ୍ତିର ନିର୍ଦ୍ଦିଷ୍ଟ କାର୍ଯ୍ୟକାରିତାର କ୍ଷତିପୂରଣ ମାଗିବା ପାଇଁ ଉପଲବ୍ଧ ହୁଏ ନାହିଁ । ଚୁକ୍ତିଭିତ୍ତିକ ମାମଲାରେ, ନିଷ୍ପତ୍ତି ନିର୍ଣ୍ଣୟ ପ୍ରକ୍ରିୟା ନ୍ୟାୟିକ ସମୀକ୍ଷା ଉପରେ ନିର୍ଭର କରିଥାଏ ଏବଂ ନିଷ୍ପତ୍ତି ଉପରେ ନୁହେଁ । ବର୍ତ୍ତମାନର ମାମଲାରେ, ନିଷ୍ପତ୍ତି ନେବା ପ୍ରକ୍ରିୟା ଆଇନଗତ ସିଦ୍ଧାନ୍ତର ପରିସର ମଧ୍ୟରେ ଅଛି ଏବଂ ଏହି ସ୍ଥିତି ହେତୁ, ଏହି ଅଦାଲତ ଦ୍ୱାରା ରିଟ୍ ଆବେଦନ ଗ୍ରହଣ କରାଯିବା ଉଚିତ୍ ନୁହେଁ |

(iv) ଓଡ଼ିଶା ପିଭିଟିଜି ସଶକ୍ତିକରଣ ଏବଂ ଜୀବିକା ଉନ୍ନତି କାର୍ଯ୍ୟକ୍ରମ *(ଓପିଇଏଲଆଇପି)* ର ଲକ୍ଷ୍ୟ ହେଉଛି ବିଶେଷ କରି ଦୁର୍ବଳ ଜନଜାତି ଗୋଷ୍ଠୀ *(ପିଭିଟିଜି)* ଏବଂ ଅନ୍ୟ ଗରିବ ସମ୍ପ୍ରଦାୟର ଉନ୍ନତ ଜୀବନଧାରଣର ସ୍ଥିତି ହାସଲ କରିବା ଏବଂ ଦାରିଦ୍ର୍ୟତା ହ୍ରାସ କରିବା । ମୁଖ୍ୟତଃ ମୋଟ ୬୨,୩୫୬ ପରିବାରର *(୩୨,୦୯୦* ପିଭିଟିଜିଏସ, ୧୩,୯୭୦ ଅନ୍ୟ ଅନୁସୂଚିତ ଜନଜାତି *(ଏସଟିଏସ)* ପରିବାର, ୫୪୮୬ ଅନୁସୂଚିତ ଜାତି *(ଏସସି)* ପରିବାର ଏବଂ ୧୦,୮୧୦ ଅନ୍ୟ ପରିବାର ଅନ୍ତର୍ଭୁକ୍ତ *)* ଉନ୍ନତ ଜୀବିକା ଏବଂ ଖାଦ୍ୟ ଏବଂ ପୁଷ୍ଟିସାଧନ ସୁରକ୍ଷାକୁ ସକ୍ଷମ କରି ଏହି କାର୍ଯ୍ୟକ୍ରମରୁ ସିଧାସଳଖ ଉପକୃତ ହେବାର ଲକ୍ଷ୍ୟ ହାସଲ ଲାଗି ପ୍ରୟାସ କରାଯାଉଛି । ଯୋଜନା, ପାଣ୍ଠି ପ୍ରବାହ, ତଦାରଖ, ମୂଲ୍ୟାଙ୍କନ, ଜ୍ଞାନ ପରିଚାଳନା ଇତ୍ୟାଦି ସମ୍ବନ୍ଧୀୟ କାର୍ଯ୍ୟ ପାଇଁ ରାଜ୍ୟ ସ୍ତରରେ ନୋଡ଼ାଲ ବିଭାଗ ହିସାବରେ ଓଡ଼ିଶା ସରକାରଙ୍କ ଅନୁସୂଚିତ ଜନଜାତି ଏବଂ ଅନୁସୂଚିତ ଜାତି ଉନ୍ନୟନ ବିଭାଗ ହିଁ ଦାୟୀ ।

(v) ଓପିଇଏଲ୍‌ଆଇପି ର ପ୍ରମୁଖ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପଗୁଡ଼ିକ ମଧ୍ୟରୁ ଗୋଟିଏ ହେଉଛି ବର୍ତ୍ତମାନର ମାମଲାରେ ଆବେଦନକାରୀଙ୍କ ପରି ଏନଜିଓ ଗୁଡ଼ିକର ସୁବିଧାପୂର୍ବକ ଯୋଗଦାନ କରାଇବା, ଯାହାର ତୃଣମୂଳ ସ୍ତରରେ ମୁଖ୍ୟ ଭୂମିକା ହେଉଛି ପିଭିଟିଜି ଗୁଡ଼ିକୁ ବ୍ୟାପକ ସହାୟତା ପ୍ରଦାନ କରିବା ଯାହା କ୍ଷମତା ନିର୍ମାଣ ଏବଂ ଜୀବିକା ସଶକ୍ତିକରଣ ଇତ୍ୟାଦି ସମ୍ବନ୍ଧୀୟ ସେବା ପ୍ରଦାନ ସମ୍ପର୍କରେ ସଚେତନତା ସୃଷ୍ଟି କରିଥାଏ ।

(vi) ତଦନୁସାରେ, ଆବେଦନକାରୀଙ୍କ ଏନଜିଓକୁ ଗ୍ରାମ ଯୋଜନାରେ ଦୁର୍ବଳ/ପିଭିଟିଜି, ପଛୁଆ ସମ୍ପ୍ରଦାୟକୁ ସୁବିଧା କରାଇବା କ୍ଷେତ୍ରରେ କାର୍ଯ୍ୟ କରିବାର ସୁଯୋଗ ପାଇଥିଲା । ବର୍ତ୍ତମାନର ଯୋଜନା ଓପିଇଏଲଆଇପି ରାଜ୍ୟ ଦ୍ୱାରା କାର୍ଯ୍ୟକାରୀ ହେଉଛି, ଯାହା ଆନ୍ତର୍ଜାତୀୟ କୃଷି ଉନ୍ନୟନ ପାଣ୍ଠି *(*ଆଇଏଫ୍‌ଏଡି*)* ଏକ ଅନ୍ତର୍ଜାତୀୟ ସଂଗଠନ ଦ୍ୱାରା ଆର୍ଥିକ ସହାୟତା ପାଇଥାଏ ।

(vii) ଏହି ପ୍ରକ୍ରିୟାରେ, ଏନଜିଓ ଗୁଡ଼ିକ ଗ୍ରାମ ବିକାଶ ସଙ୍ଗଠନ *(*ଭିଡିଏ*)* ଗୁଡ଼ିକୁ ସଂଗଠିତ କରିବେ ଏବଂ ଗ୍ରାମ ବିକାଶ ସଙ୍ଗଠନ *(*ଭିଡିଏ*)* ଗୁଡ଼ିକର ଅଭାବର ସମାଧାନ ତଥା କାର୍ଯ୍ୟକ୍ରମର କାର୍ଯ୍ୟାନ୍ୱୟନ ଉଦ୍ଦେଶ୍ୟରେ ଆବଶ୍ୟକ ହେଉଥିବା ଅଭାବ ଓ ସୁବିଧା ବିଷୟରେ ମତାମତ ମାଗିବେ । ଏନଜିଓ ଚୂଡ଼ାନ୍ତ ଅନୁମୋଦନ ପାଇଁ ମାଇକ୍ରୋ ପ୍ରୋଜେକ୍ଟ ଏଜେନ୍ସି *(*ଏମପିଏ*)* ର ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀ/ପ୍ରକଳ୍ପ ପରିଚାଳକଙ୍କ ନିକଟରେ ସ୍ଥିରୀକୃତ ହୋଇଥିବା ସମ୍ଭାବ୍ୟ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟ *(*ଇପିଏ*)* ଦାଖଲ କରିବ, ଯାହାକୁ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(*ଇପିଏ*)* ର ବୈଷୟିକ, ସାମାଜିକ ଏବଂ ଆର୍ଥିକ ଅନୁମୋଦନ ଆଧାରରେ ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀ ଅନୁମୋଦନ କରିବେ ।

(viii) ଆବେଦନକାରୀଙ୍କ ଏନଜିଓ କୁ କନ୍ଧମାଳ ଜିଲ୍ଲା ଅନ୍ତର୍ଗତ ବେଲଘରସ୍ଥିତ କେକେଡିଏରେ ଏବଂ ସୁନ୍ଦରଗଡ ଜିଲ୍ଲା ଅନ୍ତର୍ଗତ ଖୁଣ୍ଟାଗାଁର ପିବିଡିଏ ରେ କାର୍ଯ୍ୟକରିବା ଏବଂ ଦେଖାଚାହାଁ କରିବାର ଦାୟିତ୍ୱ ପ୍ରଦାନ କରାଯାଇଥିଲା । ତଦନୁସାରେ, କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ *(*ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪*)* ଏବଂ ଆବେଦନକାରୀଙ୍କ ମଧ୍ୟରେ ୧୦ ମାସ ପାଇଁ ଏବଂ ତା 'ପରେ ତା ୧୯.୦୩.୨୦୧୮ ରିଖରେ ୬ ବର୍ଷର ଅବଧି ପାଇଁ ଏକ ଚୁକ୍ତିନାମା କାର୍ଯ୍ୟକାରୀ କରାଯାଇଥିଲା ।

(ix) ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(*ଇପିଏ*)* ଏବଂ ଏହାର ଉଦ୍ଦେଶ୍ୟକୁ ବିଚାରକୁ ନେଇ, ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ତା ୦୯.୦୫.୨୦୧୮ ରିଖର କାରଣ ଦର୍ଶାଅ ନୋଟିସ ଜରିଆରେ ଆବେଦନକାରୀଠାରୁ ଏକ ସୁବିଧାଜନକ ଏନଜିଓ ରୁ ପ୍ରସ୍ତାବିତ ପ୍ରତ୍ୟାହାର ବିରୋଧରେ ସ୍ପଷ୍ଟୀକରଣ ମାଗିଥିଲା, ଏହି ଆଧାରରେ ଯେ ଆବେଦନକାରୀ ଏମଜିଏନ୍‌ଆରଇଜିଏ ଉପକରଣ , ରୋଷେଇ ବାସନ ଇତ୍ୟାଦି କ୍ରୟ ଏବଂ ବିତରଣ ଦିଗରେ ବିପୁଳ ଖର୍ଚ୍ଚ କରିବା ସହିତ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟ *(*ଇପିଏ*)* ଅଧୀନରେ ସ୍ୱତନ୍ତ୍ର କାର୍ଯ୍ୟକାଳପର ଖର୍ଚ୍ଚ, ପର୍ଯ୍ୟାପ୍ତ ଶ୍ରମ ଦିବସ ସୃଷ୍ଟି କରିବାରେ ସକ୍ଷମ ହୋଇନଥିଲେ, ଯାହା ପିଭିଟିଜିଏ ର ଜୀବନଧାରଣ ସ୍ଥିତିରେ ଉନ୍ନତି ଆଣିପାରିଥାଆନ୍ତା ।

(x) ତଦନୁସାରେ, ଆବେଦନକାରୀଙ୍କ ଦ୍ୱାରା ତା ୧୩.୦୫.୨୦୧୮ ରିଖରେ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ *(*ପ୍ରତିବାଦୀ ସଂଖ୍ୟା୪*)* ଙ୍କୁ ଏକ କାରଣ ଦର୍ଶାଅ ଉତ୍ତର ପ୍ରଦାନ କରାଯାଇଥିଲା । ଆବେଦନକାରୀଙ୍କ ଦ୍ୱାରା ଦିଆଯାଇଥିବା ଉତ୍ତର ସନ୍ତୋଷଜନକ ନଥିଲା ଏବଂ ସେହି ଅନୁଯାୟୀ, ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ୩୦ ଦିନ ମଧ୍ୟରେ ଯଥା ତା ୧୭.୦୬.୨୦୧୮ ରିଖରେ ଆବେଦନକାରୀ ଏନଜିଓ ସହିତ ଚୁକ୍ତି ସମାପ୍ତ କରି ଖଣ୍ଡ ୨.୮ ଅନୁଯାୟୀ ତା ୧୯.୦୫.୨୦୧୮ ରିଖରେ ଚିଠି ଜାରି କରିଥିଲେ । ଏହା ପରେ, ଆବେଦନକାରୀ ତା ୧୯.୦୫.୨୦୧୮ ରିଖରେ ଡବ୍ଲ୍ୟୁ.ପି. *(*ସି*)* ସଂଖ୍ୟା ୯୫୫୯/୨୦୧୮ ରେ ପ୍ରଦାନ କରାଯାଇଥିବା ସମାପନ ଆଦେଶକୁ ଆପତ୍ତି କରି ଏହି ଅଦାଲତକୁ ଆସିଛନ୍ତି ଯାହା କି ତା ୩୧.୦୮.୨୦୨୧ ରିଖରେ ଏକ ନିର୍ଦ୍ଦେଶ ସହିତ ଫଇସଲା କରାଯାଇଥିଲା "ଆବେଦନକାରୀ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ, ଓପିଇଏଲଆଇପି, ଏସଟି ଏବଂ ଏସସି ଉନ୍ନୟନ ବିଭାଗଙ୍କ ପାଖରେ ବ୍ୟକ୍ତିଗତ ଭାବେ କିମ୍ବା ଆଭାସୀ ଦ୍ୱାରା ତା ୦୬.୦୯.୨୦୨୧ ରିଖ ଦିନ ହାଜର ହେବେ, ବାଦୀଙ୍କୁ ବ୍ୟକ୍ତିଗତ ଶୁଣାଣି ତଥା କାରଣ ଦର୍ଶାଇବା ପାଇଁ ଏକ ତାରିଖ ସ୍ଥିର କରିବା ପାଇଁ ତାଙ୍କୁ ନିର୍ଦ୍ଦେଶ ଦିଆଯାଇଛି । ଏହି ଶୁଣାଣିର

ପରିସମାପ୍ତି ପରେ, ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଙ୍କୁ ଆଇନ ଅନୁଯାୟୀ ଚୂଡ଼ାନ୍ତ ଆଦେଶ ପ୍ରଦାନ କରିବାଲାଗି ନିର୍ଦ୍ଦେଶ ଦିଆଯାଇଛି । ଏହିପରି ଶୁଣାଣି ସମାପ୍ତ ହେବା ପରେ, ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ କୁ ଆଇନ ଅନୁଯାୟୀ ଚୂଡ଼ାନ୍ତ ଆଦେଶ ପାରିତ କରିବାକୁ ନିର୍ଦ୍ଦେଶ ଦିଆଯାଇଛି ।

(xi) ତଦନୁସାରେ, କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ *(*ପ୍ରତିବାଦୀ ସଂଖ୍ୟା. ୪*)* ଆବେଦନକାରୀଙ୍କୁ ବ୍ୟକ୍ତିଗତ ଶୁଣାଣି ପାଇଁ ତାରିଖ ସ୍ଥିର କରିବା ପାଇଁ ୦୬.୦୯.୨୦୨୧ ରେ ବ୍ୟକ୍ତିଗତ ଭାବେ କିମ୍ବା ଆଭାସୀ ସମ୍ମିଳନୀ ମାଧ୍ୟମରେ ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ସମ୍ମୁଖରେ ହାଜର ହେବାକୁ ନିର୍ଦ୍ଦେଶ ଦେଲେ । ଆବେଦନକାରୀ ହାଜର ହୋଇନଥିଲେ । ପରବର୍ତ୍ତୀ କାଳରେ, ଆବେଦନକାରୀ, ୨୩.୦୯.୨୦୨୧ ରେ, କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ *(*ପ୍ରତିବାଦୀ ସଂଖ୍ୟା. ୪*)* ଙ୍କ ତା ୦୯.୦୫.୨୦୧୮ ରିଖର କାରଣ ଦର୍ଶାଅ ନୋଟିସ ସଂଖ୍ୟା ୯୨୦କୁ ପ୍ରତ୍ୟୁତ୍ତର ଦେଇଥିଲେ, ଯେଉଁଥିରେ ସେ, ଖୁଣ୍ଟଗାଁ', ସୁନ୍ଦରଗଡ ଜିଲ୍ଲା ଏବଂ କେ କେ ଡି ଏ, ବେଲଘର, କନ୍ଧମାଳ ଜିଲ୍ଲାରେ ପି ବି ଡି ଏ ରେ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(*ଇପିଏ*)* ଗ୍ରହଣ କରିବାର କାରଣ ସ୍ପଷ୍ଟ କରିଥିଲେ ।

(xii) ଆବେଦନକାରୀଙ୍କ ଉତ୍ତର ସନ୍ତୋଷଜନକ ନ ଥିବାରୁ, ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ବ୍ୟକ୍ତିଗତ ଶୁଣାଣି ପାଇଁ ୦୭.୧୦.୨୦୨୧ ରେ ସୁଯୋଗ ପ୍ରଦାନ କରିଥିଲେ । ତଦନୁସାରେ, ଆବେଦନକାରୀ ଏନଜିଓ ସଭାପତି ଶ୍ରୀ ଧନେଶ୍ୱର ସାହୁଙ୍କ ସହିତ ବ୍ୟକ୍ତିଗତ ଶୁଣାଣିରେ ଯୋଗ ଦେଇଥିଲେ । ଶୁଣାଣି ସମୟରେ, ସେମାନେ କାର୍ଯ୍ୟକ୍ରମ କ୍ଷେତ୍ରରେ ମନରେଗା ସରଞ୍ଜାମ ଯୋଗାଣ ଦ୍ୱାରା ମନରେଗା ଅଧୀନରେ ଶ୍ରମର ଦିବସ ସୃଷ୍ଟି କରିବାରେ କୌଣସି ଗୁରୁତ୍ୱପୂର୍ଣ୍ଣ ଉନ୍ନତି ଘଟିଛି କି ନା ତା' ଉପରେ ସ୍ପଷ୍ଟୀକରଣ ଦେବାରେ ବିଫଳ ହୋଇଥିଲେ । ଏହା ସୁସ୍ପଷ୍ଟ ଥିଲା ଯେ ପ୍ରତ୍ୟେକ ହିତାଧିକାରୀଙ୍କ ପାଇଁ ୫ ଟି ଶ୍ରମର ଦିବସ ସୃଷ୍ଟି କରାଯାଇଥିଲା, ଯାହା ମନରେଗା ଅଧୀନରେ ଆଶା କରାଯାଉଥିବା ଫଳାଫଳଠାରୁ ବହୁତ କମ୍ ଥିଲା ।

(xiii) ପୁନଶ୍ଚ, ଆବେଦନକାରୀ ଏବଂ ଏନଜିଓ ସଭାପତିଙ୍କ ଅନୁରୋଧକ୍ରମେ, ସେମାନଙ୍କୁ ୧୦.୦୨.୨୦୨୨ ରେ ଉପସ୍ଥିତ ହେବାକୁ ଆଉ ଏକ ସୁଯୋଗ ଦିଆଯାଇଥିଲା, ଯାହାଦ୍ୱାରା ବର୍ଷ ୨୦୧୭-୧୮ ଅବଧିକାଳରେ ମନରେଗା ସରଞ୍ଜାମ, ରୋଷେଇଘର ବାସନ ଏବଂ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(*ଇପିଏ*)* ଅଧୀନରେ ଅନନ୍ୟ କାର୍ଯ୍ୟକଳାପ ବଣ୍ଟନ ସମ୍ବନ୍ଧୀୟ ପ୍ରମାଣ ଉପସ୍ଥାପନ କରାଯାଇପାରିବ । ଶୁଣାଣି ସମୟରେ, ବର୍ଷ ୨୦୧୭-୧୮ ଅବଧିକାଳ ପାଇଁ ସେମାନେ *(*୧*)* ଭିତ୍ତିଭୂମି ସମ୍ବନ୍ଧୀୟ ଜିପିଏସ ଫଟୋଗ୍ରାଫ *(*୨*)* ସୌର ଆଲୋକ ବ୍ୟବସ୍ଥାର ବିତରଣ ସମ୍ବନ୍ଧୀୟ ଜିପିଏସ ଫଟୋଗ୍ରାଫ ଏବଂ *(*୩*)* ପ୍ରକ୍ରିୟାକରଣ ୟୁନିଟଗୁଡ଼ିକର ଜିପିଏସ ଫଟୋଗ୍ରାଫ ଏବଂ କେକେଡିଏ, ବେଲଘର ଏବଂ ପିବିଡିଏ, ଖୁଣ୍ଟଗାଁ' ପାଇଁ ସେମାନଙ୍କର ବର୍ତ୍ତମାନର କାର୍ଯ୍ୟ ସମ୍ବନ୍ଧୀୟ ସ୍ଥିତି ଦାଖଲ କରିବାକୁ ରାଜି ହୋଇଥିଲେ । ଆବେଦନକାରୀ ବର୍ଷ ୨୦୧୭-୧୮ ଅବଧିକାଳ ମଧ୍ୟରେ ଦୁଇଟି ସୂକ୍ଷ୍ମ ପ୍ରକଳ୍ପ ସଂସ୍ଥାରେ ନିଆଯାଇଥିବା ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(*ଇପିଏ*)* ର ସମ୍ପୂର୍ଣ୍ଣ ଜିପିଏସ ଫଟୋଗ୍ରାଫ ଯୋଗାଇ ପାରିଲେ ନାହିଁ । ସେମାନେ କେକେଡିଏ, ବେଲଘର ଅଧୀନରେ ଥିବା ୮ ଟି ଗାଁ' ର ଫଟୋ ଏବଂ ପିବିଡିଏ, ଖୁଣ୍ଟଗାଁ' ଅଧୀନରେ ଥିବା ୯ ଟି ଗ୍ରାମ୍ୟ ବିକାଶ ସମ୍ପ୍ରଦାୟ *(*ଭିଡିସି ଗୁଡିକ*)* ର କିଛି କାର୍ଯ୍ୟକଳାପ ଫଟୋ ଦାଖଲ କରିଥିଲେ । ଯଦିଓ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(*ଇପିଏ*)* ର ପରିଚାଳନା ନିର୍ଦ୍ଦେଶାବଳୀ ଅନୁଯାୟୀ ଜିପିଏସ ଫଟୋଗ୍ରାଫ ନେବା ବାଧ୍ୟତାମୂଳକ, ଆବେଦନକାରୀ ଯୋଜନାଗୁଡ଼ିକୁ କାର୍ଯ୍ୟକାରୀ କରିବାରେ ଫଟୋଗ୍ରାଫ ଆକାରରେ ସାକ୍ଷ୍ୟ ପ୍ରମାଣ ପ୍ରଦାନ କରିପାରିଲେ ନାହିଁ ।

(xiv) ଭିନ୍ନ ଭିନ୍ନ ତାରିଖରେ ମଞ୍ଜୁରି ପ୍ରଦାନପୂର୍ବକ କରାଯାଇଥିବା ବ୍ୟକ୍ତିଗତ ଶୁଣାଣି ପରେ ଏବଂ ପ୍ରାସଙ୍ଗିକ ଦଲିଲଗୁଡ଼ିକ, ଉଭୟ ପିବିଡିଏ, ଖୁଣ୍ଟଗାଁ' ର ଏବଂ କେକେଡିଏ, ବେଲଘରର ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀମାନଙ୍କଠାରୁ ପ୍ରାପ୍ତ ନଥି, ଆବେଦନକାରୀଙ୍କଠାରୁ ପ୍ରାପ୍ତ ତା ୦୯.୦୫.୨୦୧୮ ରିଖର କାରଣ ଦର୍ଶାଅ ନୋଟିସକୁ ପ୍ରତ୍ୟୁତ୍ତର, ପରବର୍ତ୍ତୀ ସୂଚନା ଏବଂ ପ୍ରାପ୍ତ ଫଟୋଗ୍ରାଫ ଇତ୍ୟାଦିର ପରୀକ୍ଷାନିରୀକ୍ଷା ପରେ, ପିଭିଟିଜି ସମ୍ପ୍ରଦାୟର ବୃହତ୍ତର ସ୍ୱାର୍ଥ ତଥା ଅବଶିଷ୍ଟ

କାର୍ଯ୍ୟଗୁଡିକର ସମୟୋଚିତ କାର୍ଯ୍ୟକାରିତାକୁ ଧ୍ୟାନରେ ରଖି, କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ (ପ୍ରତିବାଦୀ ସଂଖ୍ୟା. ୪) ଚୁକ୍ତିନାମା ସମାପ୍ତ କରିବାକୁ ନିଷ୍ପତ୍ତି ନେଇଥିଲେ ଏବଂ ଫଳସ୍ୱରୂପ, ଆବେଦନକାରୀଙ୍କ ସଂଗଠନକୁ ତୁରନ୍ତ ପରିଣାମସ୍ୱରୂପ କର୍ମବିରତ କରିଥିଲେ ।

(xv) ଉପରୋକ୍ତ ତଥ୍ୟ ଏବଂ ଉପସ୍ଥାପନକୁ ଦୃଷ୍ଟିରେ ରଖି, ରିଟ ଆବେଦନରେ କରାଯାଇଥିବା ପ୍ରାର୍ଥନା ଯୋଗ୍ୟତାବିହୀନ ଏବଂ ତେଣୁ, ବରଖାସ୍ତ ଯୋଗ୍ୟ, ଯାହା ଶ୍ରୀମାନ ମହାଧିବକ୍ତା ଉପସ୍ଥାପନ କଲେ ।

IV. ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଙ୍କ ତରଫରୁ ଉପସ୍ଥାପନ:

୧୪. ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ପକ୍ଷର ଶ୍ରୀମାନ ଓକିଲ ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୧, ୨ ଏବଂ ୩ / ରାଜ୍ୟ ପକ୍ଷର ଶ୍ରୀମାନ ଓକିଲଙ୍କର ଉପସ୍ଥାପନକୁ ବାରମ୍ବାର ଦୋହରାଇଥିଲେ । ଏଥି ସହ, ସେ ଅତିରିକ୍ତ ଉପସ୍ଥାପନ କରିଥିଲେ ଯେ:

(i) ବର୍ତ୍ତମାନର ରିଟ୍ ଆବେଦନ ଆଇନତଃ ରକ୍ଷଣୀୟ ନୁହେଁ । ପକ୍ଷମାନଙ୍କ ମଧ୍ୟରେ ହୋଇଥିବା ରାଜିନାମାର ଏକ ମଧ୍ୟସ୍ଥତା ପରିଚ୍ଛେଦ ରହିଛି । ରାଜିନାମାର ପରିଚ୍ଛେଦ – ୮ ମଧ୍ୟସ୍ଥତା ମାଧ୍ୟମରେ ବିବାଦର ସମାଧାନ କ୍ରିୟା ସହ ଜଡ଼ିତ । ଏହା ସ୍ଥିରୀକୃତ ଆଇନ ଯେ ଯଦି ବିବାଦର ସମାଧାନ ପାଇଁ ଏକ ମଧ୍ୟସ୍ଥତା ରାଜିନାମା ଥାଏ, ପକ୍ଷମାନଙ୍କୁ ମଧ୍ୟସ୍ଥତା ପାଇଁ ପ୍ରେରଣ କରିବା ଆବଶ୍ୟକ । ଚୁକ୍ତିଭିତ୍ତିକ ପ୍ରସଙ୍ଗଗୁଡିକରେ ଯେଉଁଠାରେ ବିବାଦୀୟ ତଥ୍ୟଗତ ପ୍ରଶ୍ନ ସମ୍ପୃକ୍ତ, ଭାରତୀୟ ସମ୍ବିଧାନର ଅନୁଚ୍ଛେଦ ୨୨୬ ଅନୁଯାୟୀ ଏହି ନ୍ୟାୟାଳୟର ଅସାଧାରଣ ଅଧିକାରିତାକୁ ଆବାହନ କରାଯାଇପାରିବ ନାହିଁ । ବର୍ତ୍ତମାନର ରିଟ ଆବେଦନ ଏହି ନ୍ୟାୟାଳୟରୁ ଏକ ପ୍ରତିରୋଧ ଆଦେଶ ପାଇବା ରୂପରେ ଅଛି ଯାହା କର୍ତ୍ତୃପକ୍ଷଙ୍କୁ ରାଜିନାମାର ନିୟମ ଏବଂ ସର୍ତ୍ତାନୁଯାୟୀ କାର୍ଯ୍ୟାନୁଷ୍ଠାନ ନେବାକୁ ନିବାରଣ କରେ । ଅଧିକନ୍ତୁ, ଚୁକ୍ତିନାମା/ରାଜିନାମା ଯଦି ନିଯୁକ୍ତିଦାତାଙ୍କ ଦ୍ୱାରା ଏକ ନିର୍ଦ୍ଦିଷ୍ଟ କାର୍ଯ୍ୟାନୁଷ୍ଠାନ ନିଆଯିବାକୁ ଅର୍ପଣ କରେ, ତେବେ ତାଙ୍କୁ ଏପରି କରିବାରୁ ଅଟକାଯାଇପାରିବ ନାହିଁ ଏବଂ ତାଙ୍କ କାର୍ଯ୍ୟାନୁଷ୍ଠାନ ଆପତ୍ତିର ବିଷୟବସ୍ତୁ ହୋଇପାରେ, କିନ୍ତୁ କୌଣସି ନିଷିଦ୍ଧତା ହୋଇପାରିବ ନାହିଁ । ତେଣୁ, ଏହି ଦୃଷ୍ଟିକୋଣରୁ ବର୍ତ୍ତମାନର ରିଟ୍ ଆବେଦନ ଚଳନୀୟ ନୁହେଁ । ପୁନଶ୍ଚ, ବିନିର୍ଦ୍ଦିଷ୍ଟ ପ୍ରତିକାର ଅଧିନିୟମ, ୧୯୬୩ ର ନିୟମ ୧୪ ରେ ପ୍ରଦାନ କରାଯାଇଛି ଯେ ଏକ ଚୁକ୍ତି ଯାହା ସ୍ୱଭାବତଃ ଅବଧାର୍ଯ୍ୟ ତାହା ବିନିର୍ଦ୍ଦିଷ୍ଟ ଭାବରେ ବଳବତ୍ତର ହୋଇପାରିବ ନାହିଁ । ଆହୁରି, ଉକ୍ତ ଅଧିନିୟମର ଧାରା ୪୧ ରେ କୁହାଯାଇଛି ଯେ ଏକ ଚୁକ୍ତିନାମାର ଭଙ୍ଗକୁ ରୋକିବା ପାଇଁ ଏକ ନିଷେଧାଜ୍ଞା ମଞ୍ଜୁର କରାଯାଇପାରିବ ନାହିଁ ଯାହାର କାର୍ଯ୍ୟ ପ୍ରଦର୍ଶନ ବିନିର୍ଦ୍ଦିଷ୍ଟ ଭାବରେ ବଳବତ୍ତର ହେବ ନାହିଁ । ପକ୍ଷମାନଙ୍କ ମଧ୍ୟରେ ବର୍ତ୍ତମାନର ଚୁକ୍ତି ସ୍ୱଭାବତଃ ଅବଧାର୍ଯ୍ୟ ହୋଇଥିବା କାରଣରୁ ବିନିର୍ଦ୍ଦିଷ୍ଟ ଭାବରେ ବଳବତ୍ତର ହୋଇପାରିବ ନାହିଁ ଏବଂ ବିନିର୍ଦ୍ଦିଷ୍ଟ ପ୍ରତିକାର ଅଧିନିୟମ, ୧୯୬୩ ର ନିୟମ ୪୧*(ଡ)* ଦୃଷ୍ଟିରେ ବର୍ତ୍ତମାନର ଚୁକ୍ତି ଯେହେତୁ ସ୍ୱଭାବତଃ ଅବଧାର୍ଯ୍ୟ, ଚୁକ୍ତିନାମା ଭଙ୍ଗକୁ ରୋକିବା ପାଇଁ ଏକ ନିଷେଧାଜ୍ଞା ମଞ୍ଜୁର କରାଯାଇପାରିବ ନାହିଁ ଯାହାର କାର୍ଯ୍ୟ ପ୍ରଦର୍ଶନ ବିନିର୍ଦ୍ଦିଷ୍ଟ ଭାବରେ ବଳବତ୍ତର ହୋଇପାରିବ ନାହିଁ । ପୁନଶ୍ଚ, ଏହା ପ୍ରମାଣିତ ହୋଇଛି ଯେ ପ୍ରତିବାଦୀ ଆବେଦନକାରୀଙ୍କ ଚୁକ୍ତି ଭଙ୍ଗ କରିଛନ୍ତି ଏବଂ ଭାରତୀୟ ଚୁକ୍ତିନାମା ଅଧିନିୟମ, ୧୮୭୨ ର ଧାରା ୭୩ ଅନୁଯାୟୀ ଆବେଦନକାରୀଙ୍କୁ କୌଣସି କ୍ଷତି କିମ୍ବା ଲୋକସାନ ସହିବାକୁ ହୋଇଥିଲେ ସେଥିପାଇଁ ସେ କ୍ଷତିପୂରଣ ପାଇବାକୁ ହକଦାର ।

(ii) ପୁନଶ୍ଚ, ବିଭିନ୍ନ ତାରିଖରେ ବ୍ୟକ୍ତିଗତ ଶୁଣାଣି, ଆଗତ / ଉପସ୍ଥାପିତ ସମସ୍ତ ପ୍ରାସଙ୍ଗିକ ଦଲିଲଗୁଡ଼ିକର ମୂଲ୍ୟାଙ୍କନ, ଦୁଇଜଣ ଏମପିଏ ଙ୍କ ଠାରୁ ପ୍ରାପ୍ତ ନଥି, ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ର ସୂଚନା ଏବଂ ଫଟୋଗ୍ରାଫ ଗୁଡିକର ଯାଞ୍ଚ କରାଯିବା ପରେ ହିଁ ପିଭିଟିଜି ସମ୍ପ୍ରଦାୟର ବୃହତ୍ତର ସ୍ୱାର୍ଥ ଏବଂ ଅବଶିଷ୍ଟ କାର୍ଯ୍ୟ ସୂଚାରୁରୂପେ ସମ୍ପାଦନ କରିବା ପାଇଁ ଏପରି ନିଷ୍ପତ୍ତି ନିଆଯାଇଛି । ଅଧିକନ୍ତୁ, ଚୁକ୍ତିନାମା ସମାପ୍ତ ହେବାର କାରଣ ପୂର୍ବରୁ ତା ୨୩.୦୮.୨୦୨୨ ରିଖର ଆଦେଶରେ ବର୍ଣ୍ଣିତ ହୋଇସାରିଛି ଯେଉଁଥିରେ ତା ୦୯.୦୫.୨୦୧୮ ରିଖର କାରଣ

ଦର୍ଶାଅ ନୋଟିସକୁ ବିଚାର କରାଯାଇଛି । ଆବେଦନକାରୀଙ୍କ ସଂଗଠନକୁ ଗତ ୪ ବର୍ଷ ମଧ୍ୟରେ ପର୍ଯ୍ୟାପ୍ତ ସୁଯୋଗ ଦିଆଯାଇଛି ।

(iii) ବର୍ତ୍ତମାନର ପ୍ରସଙ୍ଗରେ, ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଖଣ୍ଡ ୨.୮.୧ ଅଧୀନରେ ଅନୁପାଳନ କରିବାକୁ ବାଧ୍ୟ ନୁହେଁ । ଏହି ନ୍ୟାୟାଳୟ ଦ୍ୱାରା ଡବ୍ଲୁ.ପି.(ସି) ସଂଖ୍ୟା ୯୫୫୯/ ୨୦୧୮ ରେ ବ୍ୟକ୍ତିଗତ ଭାବେ ଉପସ୍ଥିତ ଥାଇ ବା ଆଭାସୀ ସମ୍ମିଳନୀ ମାଧ୍ୟମରେ ଆବେଦନକାରୀଙ୍କ ବ୍ୟକ୍ତିଗତ ଶୁଣାଣି ସହ ସାମନାସାମନି କାରଣ ଦର୍ଶାଅ ଉତ୍ତର ପାଇଁ ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଙ୍କୁ ନିର୍ଦ୍ଦେଶ ଦେଇ ପାରିତ ହୋଇଥିବା ତା ୩୧.୦୮.୨୦୨୧ ରିଖର ଆଦେଶ ଆଧାରରେ ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଦ୍ୱାରା ଏପରି ସମାପ୍ତି ଆଦେଶ ଦିଆଯାଇଛି । ଏପରି ଶୁଣାଣି ଶେଷ ହେବାପରେ, ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଙ୍କୁ ଆଇନ ଅନୁଯାୟୀ ଚୂଡ଼ାନ୍ତ ଆଦେଶ ପାରିତ କରିବାକୁ ନିର୍ଦ୍ଦେଶ ଦିଆଯାଇଥିଲା । ତଦନୁସାରେ, କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ *(ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪)* ଚୁକ୍ତିର ସମାପ୍ତି ଆଦେଶ ପାରିତ କରିଛନ୍ତି । ତେଣୁ, ଆବେଦନକାରୀଙ୍କ ଅଭିଯୋଗ ଯେ ଓପିଇଏଲଆଇପି କର୍ତ୍ତୃପକ୍ଷ ଖଣ୍ଡ ୨.୮.୧ ଅନୁଯାୟୀ ୩୦ ଦିନ ପୂର୍ବରୁ ନୋଟିସ ଦେଇନାହାନ୍ତି, ଏହା ଯୁକ୍ତିଯୁକ୍ତ ନୁହେଁ ।

(iv) ଆବେଦନକାରୀଙ୍କ ଅଭିଯୋଗ ଯେ ରିଟ ଆବେଦନରେ କାରଣ ଦର୍ଶାଅ ନୋଟିସ କାର୍ଯ୍ୟକ୍ରମ କାର୍ଯ୍ୟାନ୍ୱୟନ ସଂସ୍ଥା *(ପିଏଲଏ)* ଦ୍ୱାରା ଜାରି କରାଯାଇଥିବା ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ର ପରିଚାଳନା ନିର୍ଦ୍ଦେଶାବଳୀର ଆବଶ୍ୟକତାକୁ ପୂରଣ କରୁନାହିଁ ଏବଂ ତେଣୁ ରାଜିନାମା ସମାପ୍ତିର ଆଧାର ଗଠନ କରିପାରିଲା ନାହି, ଏହା ସମ୍ପୂର୍ଣ୍ଣ ଭୁଲ ଅର୍ଥରେ ବୁଝାଯାଇଛି । ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ର ମୁଖ୍ୟ ଉଦ୍ଦେଶ୍ୟ ହେଉଛି *(i)* ପ୍ରଭାବୀ ଏବଂ ଅଂଶଗ୍ରହଣକାରୀ ପ୍ରକଳ୍ପ କାର୍ଯ୍ୟାନ୍ୱୟନ ପାଇଁ ସାମ୍ପ୍ରଦାୟିକ ଗତିଶୀଳତା *(ii)* ପ୍ରକଳ୍ପ ଏବଂ ସେମାନଙ୍କ ପରିଚାଳନା ଦକ୍ଷତା ଉପରେ ଲକ୍ଷ୍ୟଭୁକ୍ତ ସମ୍ପ୍ରଦାୟର ବିଶ୍ୱାସ ହାସଲ କରିବା *(iii)* ଲକ୍ଷ୍ୟଭୁକ୍ତ ସମ୍ପ୍ରଦାୟକୁ ଭୋଗ୍ୟ ଉପକରଣ / ବାସ୍ତବ ସମ୍ପତ୍ତି ପ୍ରଦାନ କରିବା ଏବଂ *(iv)* ଗ୍ରାମବାସୀଙ୍କୁ ସ୍ୱଳ୍ପକାଳୀନ ଆର୍ଥିକ ଲାଭ ଏବଂ ପ୍ରୋତ୍ସାହନକାରୀ ଅର୍ଥ ପ୍ରଦାନ କରିବା *(ମଜୁରୀ)* । ଏହି ବ୍ୟାପକ ଉଦ୍ଦେଶ୍ୟ ଆଧାରରେ, କାରଣ ଦର୍ଶାଅ ନୋଟିସ ଜାରି କରାଯାଇଥିଲା, ଯେଉଁଥିରେ *(i)* ୨୦୧୭-୧୮ ଆର୍ଥିକ ବର୍ଷରେ ଆରମ୍ଭ କରାଯାଇଥିବା ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ଲକ୍ଷ୍ୟଭୁକ୍ତ ସମ୍ପ୍ରଦାୟଗୁଡ଼ିକୁ କିପରି ସଶକ୍ତ କରିବାକୁ ନେତୃତ୍ୱ ନେଇଥିଲା *(ii)* ଲକ୍ଷ୍ୟଭୁକ୍ତ ସମୁଦାୟଙ୍କ ପ୍ରତି କ୍ଷମତା ନିର୍ମାଣ ଉପରେ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ର କାର୍ଯ୍ୟ ପ୍ରଭାବ *(iii)* ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* କାର୍ଯ୍ୟ ଗ୍ରହଣ କରାଯିବା ଦ୍ୱାରା ସ୍ଥାୟୀ ଜୀବିକାର ବିକାଶ ହୋଇଛି କି ନାହିଁ ଏବଂ *(iv)* ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ଅଧୀନରେ ମନରେଗା ସରଞ୍ଜାମ ବଣ୍ଟନ ପରେ ସୃଷ୍ଟି ହୋଇଥିବା ଶ୍ରମର ଦିବସ ସଂଖ୍ୟା ଉପରେ ଉତ୍ତର ମଗାଯାଇଥିଲା । ଏଗୁଡ଼ିକ ଅତ୍ୟନ୍ତ ଗୁରୁତ୍ୱପୂର୍ଣ୍ଣ ଏବଂ ଉପଯୁକ୍ତ ପ୍ରଶ୍ନ ଯାହା ଆବେଦନକାରୀଙ୍କଠାରୁ ସ୍ପଷ୍ଟୀକରଣ ମାଗିଥିବା କାରଣ ଦର୍ଶାଅ ନୋଟିସର ଅଂଶବିଶେଷ । ତେଣୁ, କାରଣ ଦର୍ଶାଅ ନୋଟିସ ସ୍ପଷ୍ଟ ଭାବରେ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ର ପରିଚାଳନା ନିର୍ଦ୍ଦେଶାବଳୀକୁ ସମର୍ଥନ କରୁଛି । ତେଣୁ ଆବେଦନକାରୀଙ୍କ ଅଭିଯୋଗ ସମ୍ପୂର୍ଣ୍ଣ ରୂପେ ଅଯୌକ୍ତିକ ଅଟେ ।

(v) ପୁନଶ୍ଚ, ଓପିଇଏଲଆଇପି କାର୍ଯ୍ୟକ୍ରମର କାର୍ଯ୍ୟକାରିତା ପାଇଁ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ *(ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪)* ଏବଂ ଆବେଦନକାରୀଙ୍କ ମଧ୍ୟରେ ଏକ ରାଜିନାମା ସ୍ୱାକ୍ଷର ହୋଇଥିଲା । ନିଷ୍ପାଦିତ ରାଜିନାମା ଅନୁଯାୟୀ ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଆବେଦନକାରୀଙ୍କ କାର୍ଯ୍ୟକାରିତାର ମୂଲ୍ୟାଙ୍କନ କରିବାକୁ ପଡିବ । ଯଦିଓ ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀ ଆବେଦନକାରୀଙ୍କ କାର୍ଯ୍ୟକାରିତାର ସମୀକ୍ଷା କରିପାରନ୍ତି ଏବଂ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକଙ୍କୁ *(ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪)* ବିବୃତି ଦେଇପାରନ୍ତି, କିନ୍ତୁ ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀଙ୍କ ବିବୃତି ଚୂଡ଼ାନ୍ତ ନୁହେଁ । ଆବେଦନକାରୀଙ୍କ ପ୍ରଦର୍ଶନ ଉପରେ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକଙ୍କ ନିର୍ଣ୍ଣୟ ଚୂଡ଼ାନ୍ତ ଏବଂ ବାଧ୍ୟତାମୂଳକ । ଆବେଦନକାରୀଙ୍କ ଦ୍ୱାରା ଗ୍ରହଣ କରାଯାଇଥିବା ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ର ମୂଲ୍ୟାଙ୍କନ ପରେ, ୦୯.୦୫.୨୦୧୮ ରେ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ କାରଣ ଦର୍ଶାଅ

ନୋଟିସ ଜାରି କରିଥିଲେ ଯାହା ଆବେଦନକାରୀଙ୍କ ପ୍ରଦର୍ଶନ ସନ୍ତୋଷଜନକ ନଥିଲା ବୋଲି ସ୍ପଷ୍ଟ ଭାବେ ସୂଚିତ କରେ । ତେଣୁ, ଆବେଦନକାରୀ ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀଙ୍କ ଦ୍ୱାରା ଦାଖଲ କରାଯାଇଥିବା ପ୍ରଦର୍ଶନ ବିବୃତିକୁ ଦର୍ଶାଇବା ଯଥାର୍ଥ ନୁହେଁ ।

(vi) ୧୨.୧୨.୨୦୧୭ ରୁ ୨୦.୧୨.୨୦୧୭ ପର୍ଯ୍ୟନ୍ତ ଆୟୋଜିତ ଆଇଏଫଏଡି କାର୍ଯ୍ୟାନ୍ୱୟନ ସହାୟତା ମିଶନ ସମୟରେ ଦାତା ସଂସ୍ଥା ଆଇଏଫଏଡି ଆଇସିଓ, ନୂଆଦିଲ୍ଲୀ ଠାରୁ ପ୍ରାପ୍ତ ଯୋଗାଯୋଗ ଆଧାରରେ ଓପିଇଏଲଆଇପି କ୍ଷେତ୍ରରେ କାର୍ଯ୍ୟ କରୁଥିବା ସମସ୍ତ ସୁବିଧାଜନକ ଏନଜିଓ ମାନଙ୍କୁ ଚୁକ୍ତି ନବୀକରଣ ନିର୍ଣ୍ଣୟ ସମ୍ପର୍କରେ ଅବଗତ କରାଯାଇଥିଲା । ତେଣୁ, ଆବେଦନକାରୀଙ୍କ ସନ୍ତୋଷଜନକ ପ୍ରଦର୍ଶନ କାରଣରୁ ନୁହେଁ, ସମସ୍ତ ଏନଜିଓ ରାଜିନାମାକୁ ୦୧.୦୪.୨୦୧୮ ରୁ ୩୧.୦୩.୨୦୨୪ କୁ ନବୀକରଣ କରିଛନ୍ତି । ତଥାପି, ଆବେଦନକାରୀଙ୍କ ଚୁକ୍ତି ରାଜିନାମା ନବୀକରଣ ଦ୍ୱାରା ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଦ୍ୱାରା ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* କାର୍ଯ୍ୟକଳାପର ପ୍ରଦର୍ଶନକୁ ସମୀକ୍ଷା କରିବା ଏବଂ କାରଣ ଦର୍ଶାଅ ନୋଟିସ ଜାରି କରିବା ପାଇଁ କୌଣସି ପ୍ରତିବନ୍ଧକ ନାହିଁ । ତେଣୁ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ଉପରେ ସନ୍ତୋଷଜନକ ପ୍ରଦର୍ଶନ ହେତୁ ଚୁକ୍ତିନାମା ନବୀକରଣ ପାଇଁ ଆବେଦନକାରୀଙ୍କ ଦାବି କରିବା ଭୁଲ ଅର୍ଥରେ ନିଆଯାଇଛି ।

(vii) କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକଙ୍କ ତା ୨୧.୦୪.୨୦୧୮ ରିଖର ପତ୍ର ଏମପିଏଏସ ର ସମସ୍ତ ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀମାନଙ୍କୁ ବର୍ଷ ୨୦୧୮-୧୯ ରେ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ର କାର୍ଯ୍ୟକାରିତା ପାଇଁ ସମସ୍ତ ମୁଖ୍ୟ କାର୍ଯ୍ୟନିର୍ବାହୀ ଏଫଏନଜିଓଏସ ମାନଙ୍କୁ ଏକ ନକଲ ସହିତ ଜାରି କରାଯାଇଥିଲା, ଯେଉଁଥିରେ ଦାତା ସଂସ୍ଥା ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ର ବର୍ଷ ୨୦୧୭-୧୮ ର କାର୍ଯ୍ୟର ଦଲିଲ ଯାଞ୍ଚ ସମୟରେ ଆଇ ଏଫ ଏ ଡି ରୁ ପ୍ରାପ୍ତ ଅନୁଦେଶ ଆଧାରରେ ବେସାମରିକ ନିର୍ମାଣ କାର୍ଯ୍ୟ ପ୍ରତି ସର୍ବନିମ୍ନ ୬୦ % ପାଇଁ ଯଥୋଚିତ ଗୁରୁତ୍ୱ ଦିଆଯାଇଛି । ତେଣୁ, ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ର ତା ୨୧.୦୪.୨୦୧୮ ରିଖ ବିଶିଷ୍ଟ ପତ୍ର କାରଣରୁ ଅନୁସୂଚୀତ ଗ୍ରାମରେ କାର୍ଯ୍ୟ ଜାରି ରଖିବା ପାଇଁ ଆବେଦନକାରୀଙ୍କ ଦାବି ସହମତ ନୁହେଁ ।

(viii) ତା ୦୭.୦୫.୨୦୧୮, ୦୮.୦୫.୨୦୧୮ ଏବଂ ୦୯.୦୫.୨୦୧୮ ରିଖରେ 'ଓପିଇଏଲଆଇପି' ର ମୁଖ୍ୟ କାର୍ଯ୍ୟକର୍ତ୍ତାଙ୍କୁ ନ ଡାକି ଓପିଇଏଲଆଇପି ରେ ନିୟୋଜିତ ସରକାରୀ ଅଧିକାରୀମାନଙ୍କ ସମୀକ୍ଷା ବୈଠକ ଡାକିବା, ଆବେଦନକାରୀ ସମେତ 'ଓପିଇଏଲଆଇପି' ଅଧୀନରେ କାର୍ଯ୍ୟ କରୁଥିବା ସମସ୍ତ ଏନଜିଓ ଗୁଡ଼ିକୁ କାର୍ଯ୍ୟକ୍ରମ କ୍ଷେତ୍ରରେ ବାସନକୁସନ ସେଟ ଏବଂ ମନରେଗା ସରଞ୍ଜାମ ବଣ୍ଟନ ସମ୍ପର୍କରେ ବେଆଇନ ଭାବେ କାରଣ ଦର୍ଶାଅ ନୋଟିସ ଜାରି କରିବା ଅଭିଯୋଗଟି ସମ୍ପୂର୍ଣ୍ଣ ଭ୍ରମାତ୍ମକ ଏବଂ ଅବାସ୍ତବ ଅଟେ । ସମୀକ୍ଷା ବୈଠକରେ ଯୋଗଦେବା ପାଇଁ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ, ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଙ୍କର ତା ୦୩.୦୫.୨୦୧୮ ରିଖ ଯୋଗାଯୋଗ ପତ୍ର ସଂଖ୍ୟା ୮୬୬ ଦ୍ୱାରା ସମସ୍ତ ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀ, ସୂକ୍ଷ୍ମ ପ୍ରକଳ୍ପ ସଂସ୍ଥାମାନଙ୍କୁ ସମ୍ବୋଧିତ କରି ଏନଜିଓ ଗୁଡ଼ିକର ସୁବିଧା ପାଇଁ ମୁଖ୍ୟ କାର୍ଯ୍ୟକର୍ତ୍ତାଙ୍କୁ ଏହାର ଏକ ନକଲ ସହିତ ଜାରି କରାଯାଇଥିଲା । ସେହି ପତ୍ରରେ ଏହା ସ୍ପଷ୍ଟ ଭାବେ ଉଲ୍ଲେଖ କରାଯାଇଛି ଯେ ସମସ୍ତ ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀ ଏବଂ ସୁବିଧା ପ୍ରଦାନ କରୁଥିବା ଏନଜିଓ ଗୁଡ଼ିକର ଦଳ ମୁଖ୍ୟଙ୍କୁ ପ୍ରଦତ୍ତ ଫର୍ମାଟ୍ ରେ ଉପସ୍ଥାପନ କରିବାକୁ କୁହାଯାଇଛି । ଏଫଏନଜିଓ ତରଫରୁ ଓପିଇଏଲଆଇପି କାର୍ଯ୍ୟର କାର୍ଯ୍ୟାନ୍ୱୟନ ପାଇଁ ପ୍ରମୁଖ କାର୍ଯ୍ୟକର୍ତ୍ତା, ଏଫଏନଜିଓ ର ଦଳର ମୁଖ୍ୟ ଏହି ସମୀକ୍ଷା ବୈଠକରେ ଯୋଗ ଦେଇଥିଲେ । ଉକ୍ତ ତାରିଖରେ କାର୍ଯ୍ୟର ଅଗ୍ରଗତିର ସମୀକ୍ଷା ମଧ୍ୟ ମୁଖ୍ୟ କାର୍ଯ୍ୟକର୍ତ୍ତାଙ୍କ ଜ୍ଞାତସାରରେ ଥିଲା । ଯେ କୌଣସି ପ୍ରଗତି ବିବୃତି, ଏଫଏନଜିଓ ର ମୁଖ୍ୟ କାର୍ଯ୍ୟକର୍ତ୍ତାଙ୍କ ଜ୍ଞାତସାରରେ ନିର୍ଦ୍ଧାରିତ ବିନ୍ୟାସରେ ଉପସ୍ଥାପିତ ହେବା ଆବଶ୍ୟକ । ତେଣୁ, ଆବେଦନକାରୀଙ୍କ ଆଳ ଯେ ତାଙ୍କୁ ସମୀକ୍ଷା ବୈଠକ ପାଇଁ ଡକାଯାଇ ନଥିଲା,ତାହା ସମ୍ପୂର୍ଣ୍ଣ ଭାବରେ ଅନର୍ଥମୂଳକ ।

(ix) କାର୍ଯ୍ୟାଳୟ ବିବୃତି ଅନୁଯାୟୀ, ତା ୦୯.୦୫.୨୦୧୮ ରିଖରେ କୌଣସି ସମୀକ୍ଷା ବୈଠକ ଅନୁଷ୍ଠିତ ହୋଇନଥିଲା ଏବଂ ତା ୦୯.୦୫.୨୦୧୮ ରିଖରେ ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଦ୍ୱାରା ସମୀକ୍ଷା ବୈଠକ ଆୟୋଜନ

ହୋଇଥିବା ଆବେଦନକାରୀଙ୍କ ଦାବିର କୌଣସି ଆଧାର ନାହିଁ । ତା ୦୭.୦୫.୨୦୧୮ ରିଖ ଏବଂ ତା ୦୮.୦୫.୨୦୧୮ ରିଖରେ ସମୀକ୍ଷା ବୈଠକ ଅନୁଷ୍ଠିତ ହୋଇଥିଲା ଏବଂ ସେହି ଅନୁଯାୟୀ, ସମୀକ୍ଷା ବୈଠକର କାର୍ଯ୍ୟବିବରଣୀ ରିଟ୍ ଆବେଦନର ଏଫଏନଜିଓର ମୁଖ୍ୟ କାର୍ଯ୍ୟକର୍ତ୍ତାଙ୍କୁ ସୂଚିତ କରାଯାଇଛି । କାର୍ଯ୍ୟବିବରଣୀରେ, କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ ୨୦୧୭-୧୮ ଆର୍ଥିକ ବର୍ଷ ପାଇଁ କାର୍ଯ୍ୟର ଖରାପ/ଦୁର୍ବଳ ପ୍ରଗତି ଏବଂ ଏନଜିଓ ଗୁଡ଼ିକୁ ସୁବିଧା ପ୍ରଦାନପୂର୍ବକ ସମ୍ପ୍ରଦାୟଗୁଡିକୁ ବାସନକୁସନ ବଣ୍ଟନ, ମନରେଗା ସରଞ୍ଜାମ ବଣ୍ଟନ ଉପରେ ଅସନ୍ତୋଷ ବ୍ୟକ୍ତ କରିଥିଲେ ଏବଂ ଶେଷ ମନ୍ତବ୍ୟରେ ଅନୁଦେଶ ଦେଇଥିଲେ ଯେ ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀଗଣ ଏବଂ ଏନ ଜି ଓ ମାନେ ସମସ୍ତ ସ୍ତରରେ ସ୍ୱଚ୍ଛତା ସୁନିଶ୍ଚିତ କରନ୍ତୁ ଏବଂ ପୂର୍ଣ୍ଣ ପ୍ରାଣରେ କାର୍ଯ୍ୟ କରନ୍ତୁ ।

(x) ପୁନଶ୍ଚ, ବର୍ଷ ୨୦୧୭-୧୮ ଅବଧିକାଳରେ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* କାର୍ଯ୍ୟର ଅନୁପଯୁକ୍ତ କାର୍ଯ୍ୟକାରିତା ଉପରେ ୯ ଟି ଏନଜିଓ ଙ୍କୁ କାରଣ ଦର୍ଶାଅ ନୋଟିସ ଜାରି କରାଯାଇଥିଲା । ତେଣୁ, ଏହା ଉପସ୍ଥାପିତ ହୋଇଛି ଯେ ୧୭ ଟି ସୂକ୍ଷ୍ମ ପ୍ରକଳ୍ପ ସଂସ୍ଥା କାର୍ଯ୍ୟ କରୁଥିବା ୧୫ ଟି ଏଫଏନଜିଓ ମଧ୍ୟରୁ ଆବେଦନକାରୀଙ୍କ ସମେତ କେବଳ ୯ ଟି ଏନଜିଓ କୁ କାରଣ ଦର୍ଶାଅ ନୋଟିସ ଜାରି କରାଯାଇଛି ଏବଂ ସମସ୍ତ ଏନଜିଓ ମାନଙ୍କୁ ନୁହେଁ ।

(xi) ବାସନପତ୍ର ଏବଂ ଏମଜିଏନ୍‌ଆରଇଜିଏସ୍ ଉପକରଣ ବଣ୍ଟନ ନିର୍ଣ୍ଣୟ ଉପରେ ଆବେଦନକାରୀଙ୍କ ଦାବି ତାଙ୍କର ଅନନ୍ୟ ନିର୍ଣ୍ଣୟ ନଥିଲା, ବରଂ ଏହା ଗ୍ରାମ ବିକାଶ ସଂସ୍ଥା *(ଭିଡିଏ)* ର ସଦସ୍ୟ ଏବଂ ସମ୍ପୃକ୍ତ ଜିଲ୍ଲାର ଜିଲ୍ଲାପାଳଙ୍କ ସମେତ ସ୍ଥାନୀୟ ସରକାରୀ ଅଧିକାରୀଙ୍କ ନିର୍ଣ୍ଣୟ ଥିଲା ଏବଂ ଆବେଦନକାରୀ ଓପିଇଏଲ୍‌ଆଇପି ର ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ର ସୁବିଧା ପ୍ରଦାନକାରୀ ସଂସ୍ଥା ହୋଇଥିବାରୁ କେବଳ ସେମାନଙ୍କର ନିର୍ଦ୍ଦେଶକୁ ପାଳନ କରିବା ସମ୍ପୂର୍ଣ୍ଣ ଅନୁପଯୁକ୍ତ ଅଟେ । ଏନଜିଓ ଗୁଡ଼ିକୁ ସୁବିଧାଜନକ କରିବାର ମୁଖ୍ୟ ଭୂମିକା ହେଉଛି କାର୍ଯ୍ୟକ୍ରମର ଆଦେଶ ଅନୁଯାୟୀ ସମ୍ପ୍ରଦାୟଗୁଡ଼ିକୁ ମାର୍ଗଦର୍ଶନ କରିବା, ଗତିଶୀଳ କରିବା, ଐକ୍ୟବଦ୍ଧ ସମର୍ଥନ ପ୍ରଦାନ କରିବା, କ୍ଷମତା ପ୍ରଦାନ କରିବା, ମଜବୁତ କରିବା । ଗ୍ରାମ ବିକାଶ ସଙ୍ଗଠନ ଗୁଡିକ *(ଭିଡିଏ ଗୁଡିକ)* ଏବଂ ଗ୍ରାମ ବିକାଶ ସମ୍ପ୍ରଦାୟ ଗୁଡିକ *(ଭିଡିସି ଗୁଡିକ)* ପିଭିଟିଜି ସମ୍ପ୍ରଦାୟର ଏବଂ ସେମାନେ ନିରକ୍ଷର ଏବଂ କାର୍ଯ୍ୟକ୍ରମର ନିର୍ଦ୍ଦେଶାବଳୀ ବିଷୟରେ ଅଜ୍ଞ । ସେହି କାରଣରୁ ଏନଜିଓ ଗୁଡ଼ିକୁ ସୁବିଧା ପ୍ରଦାନ କରିବା ଦାୟିତ୍ୱ ଦିଆଯାଇଛି । ସଠିକ୍ ମାର୍ଗଦର୍ଶନ ସହିତ ଉପଯୁକ୍ତ କ୍ଷମତା ଗଠନ ନକଲେ, ବାସନ ଏବଂ ଏମଜିଏନଆରଇଜିଏ ଉପକରଣ ଯୋଗାଇବା ଦ୍ୱାରା ସେମାନଙ୍କର ଦାବି ଏପରି ଖର୍ଚ୍ଚର ଏକମାତ୍ର କାରଣ ହୋଇପାରିବ ନାହିଁ । ଆବେଦନକାରୀଙ୍କୁ ପେସାଦାରଙ୍କ ଉପଲବ୍ଧି କରାଯାଇଛି, ଯେଉଁମାନେ ଗ୍ରାମବାସୀମାନେ ଦାବି କଲେ ମଧ୍ୟ ସଠିକ୍ ନିର୍ଣ୍ଣୟ ନେବା ଦିଗରେ ସମ୍ପ୍ରଦାୟକୁ ମାର୍ଗଦର୍ଶନ କରିବେ | ଏହି ମାମଲାରେ, ଆବେଦନକାରୀ ଗ୍ରାମ ବିକାଶ ସଂଘ *(ଭିଡିଏ)* ଦାବି କରିଥିବାର ଏକ ବାହାନା ସହିତ ଲୁଚି ରହି ଏପରି କରିବାରେ ବିଫଳ ହୋଇଛନ୍ତି । ଏଫ୍‌ଏନଜିଓ ର ଦାୟୀତ୍ୱ ଥିଲା ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ଅଧୀନରେ ଥିବା ସମ୍ପ୍ରଦାୟ ଆଧାରିତ କାର୍ଯ୍ୟକାଳପକୁ ଚିହ୍ନଟ କରିବା ଏବଂ ସ୍ଥାନୀୟ ସରକାରୀ ଅଧିକାରୀଙ୍କ ଠାରୁ ଅନୁମୋଦନ କିମ୍ବା ସମ୍ମତି ପାଇବା ଦିଗରେ ସେମାନଙ୍କୁ ସଠିକ୍ ମାର୍ଗଦର୍ଶନ କରିବା । ଭିଡିଏ କିମ୍ବା ସରକାରୀ ଅଧିକାରୀଙ୍କ ଦ୍ୱାରା ଇପିଏ କାର୍ଯ୍ୟକଳାପର ଅନୁମୋଦନ ଉଲ୍ଲେଖ କରିବା ଏନଜିଓ ର କୁକର୍ମକୁ କ୍ଷମା କରେ ନାହିଁ ।

(xii) ଅଧିକନ୍ତୁ, ପିଭିଟିଜି ସମ୍ପ୍ରଦାୟମାନେ ଖାଦ୍ୟ ପ୍ରସ୍ତୁତିରେ ସେମାନଙ୍କର ଖରାପ ବ୍ୟବସ୍ଥାଏବଂ ଖାଦ୍ୟ ସଂରକ୍ଷଣରେ ଅଣ-ଧାତବ ଏବଂ ନ୍ୟୁନ ବାସନ/ପାତ୍ରର ବ୍ୟବହାର ଯୋଗୁଁ କୁପୋଷଣ ଏବଂ ଅନେକ ରୋଗରେ ପୀଡିତ ହୁଅନ୍ତି ବୋଲି କାର୍ଯ୍ୟକ୍ରମ କ୍ଷେତ୍ରରେ ଏପରି କୌଣସି ପରୀକ୍ଷାମୂଳକ ପାଠ୍ୟ ବିବୃତି / ନିଷ୍କର୍ଷ ନାହିଁ । ଏହା ସମ୍ପୂର୍ଣ୍ଣ କାଳ୍ପନିକ ଏବଂ ଆବେଦନକାରୀଙ୍କ ନିଜସ୍ୱ ସୃଷ୍ଟି । ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ଅଧୀନରେ ଏହାଙ୍କ ଭୁଲ୍ କାର୍ଯ୍ୟକଳାପକୁ ଯଥାର୍ଥ ସାବ୍ୟସ୍ତ କରିବା ପାଇଁ ଆବେଦନକାରୀ ଏପରି ମତାମତ ପ୍ରକାଶ କରିଛନ୍ତି ।

(xiii) ଆବେଦନକାରୀ ଦାବି କରିଛନ୍ତି ଯେ ଓପିଇଏଲଆଇପି କ୍ଷେତ୍ରଗୁଡ଼ିକ ଅଧୀନରେ ସୁବିଧା ପ୍ରଦାନକାରୀ ଏନଜିଓ ଭାବେ ଆବେଦନକାରୀଙ୍କ ସହିତ ଚୁକ୍ତିନାମାକୁ ତା ୧୭ ଜୁନ୍, ୨୦୧୮ ରିଖ ସୁଦ୍ଧା ସମାପ୍ତ କରିବାକୁ

କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ ବେଆଇନ ଏବଂ ମନମୁଖୀ ଭାବରେ ତା ୧୯.୦୫.୨୦୧୮ ରିଖରେ ନିର୍ଦ୍ଦେଶ ଦେଇଥିବା ତଥ୍ୟ ସମ୍ପୂର୍ଣ୍ଣ ମିଥ୍ୟା । ତା ୧୯.୦୫.୨୦୧୮ ରିଖର ପତ୍ର ସଂଖ୍ୟା ୧୦୩୩ ଅନୁଯାୟୀ ଖଣ୍ଡ-୨.୮ ଅଧୀନରେ ଅର୍ଥାତ ୩୦ ଦିନର ସମାପ୍ତି ନୋଟିସ ଦେଇ ତା ୧୭ ଜୁନ ୨୦୧୮ ରିଖ ଠାରୁ ଏନଜିଓ କୁ ସମାପ୍ତ କରାଯାଇଥିଲା ।ତେଣୁ ଆବେଦନକାରୀଙ୍କ ସହିତ ସ୍ୱାକ୍ଷରିତ ଚୁକ୍ତିନାମା ଅନୁଯାୟୀ ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଦ୍ୱାରା ଜାରି ହୋଇଥିବା ଚୁକ୍ତିର ସମାପ୍ତି ହୋଇଥିଲା ।

(xiv) ଆବେଦନକାରୀଙ୍କ ଅଭିଯୋଗ ଯେ ସମାନ ଅଭିଯୋଗ ଆଧାରରେ, କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ *(୮ ଟି ଏମ୍ ପିଏ ପାଇଁ) ଥିବା ୬ ଟି ଏନଜିଓ କୁ ନୋଟିସ କରିଥିଲେ । ୮ ଟି ଏମପିଏ ମଧ୍ୟରୁ ୦୫ ଟି ଏମପିଏଏସ କୁ ନେଇ ୩ଟି ଏନଜିଓ ଏହି ଅଦାଲତଙ୍କ ଦ୍ୱାରସ୍ଥ ହୋଇଥିଲେ । କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ ଅଲଗା କାରଣ ପାଇଁ ଏହା ଉପରେ କୌଣସି ଆଦେଶ ପାରିତ ନକରି ସେମାନଙ୍କୁ ଜାରି କରାଯାଇଥିବା କାରଣ ଦର୍ଶାଅ ନୋଟିସ ଉପରେ ବସିରହି ଜାରି ରହିବାକୁ ଅନୁମତି ଦେଇଛନ୍ତି । ଅଧିକନ୍ତୁ, ଆବେଦନକାରୀ ଅଭିଯୋଗ କରିଛନ୍ତି ଯେ ଏହି ଅଦାଲତକୁ ତାଙ୍କର ଆଗମନ ହେତୁ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ ପ୍ରତିଶୋଧମୂଳକ ଭାବରେ ବିଦ୍ୟମାନ ଚୁକ୍ତିରୁ ସମାପ୍ତି ଆଦେଶ ପାରିତ କରିଛନ୍ତି ଯାହା ସମ୍ପୂର୍ଣ୍ଣ କାଳ୍ପନିକ ଏବଂ ପ୍ରସଙ୍ଗ ବାହାରେ | ବାସ୍ତବତା ହେଉଛି, ୯ଟି ଏଫ୍ଏନ୍ ଜିଓ *(୧୧ ଟି ଏମପିଏ ପାଇଁ)* ଙ୍କୁ କାରଣ ଦର୍ଶାଅ ନୋଟିସ୍ ଜାରି କରାଯାଇଥିଲା, ଯେଉଁଥିରୁ ୦୬ଟି ଏନଜିଓ *(୦୮ ଟି ଏମପିଏ ପାଇଁ)* କୁ ପ୍ରତ୍ୟାହାର କରି ନିଆଯାଇଥିଲା । ଏହି ୬ଟି ଏନଜିଓ ମଧ୍ୟରୁ ୩ଟି ଏନଜିଓ *(୫ଟି ଏମପିଏ ପାଇଁ)* ଏହି ଅଦାଲତଙ୍କ ଦ୍ୱାରସ୍ଥ ହୋଇଥିଲେ । ରିଟ୍ ଆବେଦନର ଅନୁଲଗ୍ନକ-୧୮ ଭାବରେ ସଂଲଗ୍ନ ହୋଇଥିବା ତା ୦୩.୦୭.୨୦୧୮ରିଖ ପତ୍ର ଅନୁଯାୟୀ, ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀଙ୍କୁ ସୂଚିତ କରାଯାଇଥିଲା ଯେ ପ୍ରତ୍ୟାହାର କରାଯାଇଥିବା ଏନଜିଓ ଏମଜିଏନଆରଇଜିଏସ ର ଚରମ ପର୍ଯ୍ୟାୟରେ ପଡ଼ିରହିଥିବା କାର୍ଯ୍ୟକୁ ନୂତନ ସଂସ୍ଥା ଚୟନ ଚୂଡ଼ାନ୍ତ ହେବା ପର୍ଯ୍ୟନ୍ତ କିମ୍ବା ପରବର୍ତ୍ତୀ ନିର୍ଦ୍ଦେଶ ପର୍ଯ୍ୟନ୍ତ, ଯାହା ପୂର୍ବରୁ ଥିବ,ଜାରି ରଖିବା ଉଚିତ । ଏହି ନ୍ୟାୟାଳୟଙ୍କ ନିକଟକୁ ଆସିଥିବା କାରଣରୁ ଅବେଦନକାରୀଙ୍କୁ ବିଦ୍ୟମାନ ଚୁକ୍ତିରୁ ବରଖାସ୍ତ କରିବାକୁ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ ପ୍ରତିଶୋଧମୂଳକ ଭାବରେ ଆଦେଶ ପାରିତ କରିଥିଲେ ଯାହା ଭାରତୀୟ ସମ୍ବିଧାନର ଅନୁଚ୍ଛେଦ ୧୪ ର ପରିପନ୍ଥୀ ଏବଂ ଉଲ୍ଲଂଘନ ଅଟେ, ଆବେଦନକାରୀଙ୍କ ଏପରି ଅଭିଯୋଗ ସତ୍ୟ ନୁହେଁ | ଏହି ପରିପ୍ରେକ୍ଷୀରେ, ଏହା ଦର୍ଶାଯାଇଛି ଯେ ଆବେଦନକାରୀଙ୍କ ସଂଗଠନ ସମେତ ୩ଟି ଏନଜିଓ *(୦୫ ଏମପିଏ)* ଏହି ଅଦାଲତଙ୍କ ଦ୍ୱାରସ୍ଥ ହୋଇଥିଲେ, ଯେଉଁଥିରୁ ଦୁଇଟି ଏନଜିଓ କୁ ସେମାନଙ୍କ କାରଣ ଦର୍ଶାଅ ଉତ୍ତର, ବ୍ୟକ୍ତିଗତ ଶୁଣାଣି, ସେମାନଙ୍କ ଇପିଏ କାର୍ଯ୍ୟର ଯଥାର୍ଥତା, ପ୍ରମାଣ ଉପସ୍ଥାପନ ଇତ୍ୟାଦି ଆଧାରରେ ଏନଜିଓ ର ସୁବିଧା ଜାରି ରଖିବାକୁ ଅନୁମତି ଦିଆଯାଇଥିଲା । ତେଣୁ, ଚୁକ୍ତିର ପକ୍ଷପାତିତା ସମାପ୍ତି ଏବଂ ଭାରତୀୟ ସମ୍ବିଧାନର ଧାରା ୧୪ ର ଉଲ୍ଲଙ୍ଘନ ବୋଲି ଅଭିଯୋଗ କରିବା ତ୍ରୁଟିପୂର୍ଣ୍ଣ ଅଟେ ।

(xv) ଉପରୋକ୍ତ ତଥ୍ୟ ଦାଖଲକୁ ଦୃଷ୍ଟିରେ ରଖି, ଆବେଦନକାରୀଙ୍କ ପ୍ରାର୍ଥନା ଯୋଗ୍ୟତା ବିହୀନ ହୋଇଥିବାରୁ ଖାରଜ ହେବା ଯୋଗ୍ୟ । ଫଳସ୍ୱରୂପ ରିଟ୍ ଆବେଦନକୁ ବରଖାସ୍ତ କରାଯାଇପାରେ ।

V. ନ୍ୟାୟାଳୟଙ୍କ ବିଶ୍ଳେଷଣ ଏବଂ କାରଣଯୁକ୍ତ ବିଚାର:

୧୫. ପରିଚାଳନା ନିର୍ଦ୍ଦେଶାବଳୀ ଅନୁଯାୟୀ, ଇପିଏ ଉଦ୍ଦେଶ୍ୟରେ ଥିବା ମାର୍ଗଦର୍ଶକ ନୀତି ପ୍ରଦାନ କରିଥାଏ ଯେ ଅନ୍ୟ ସମସ୍ତ ମଧ୍ୟରେ *"ସ୍ଥାନୀୟ ସମ୍ପ୍ରଦାୟର ଜରୁରୀ ଆବଶ୍ୟକତା ଉପରେ ଆଧାରିତ କାର୍ଯ୍ୟ ଯେପରିକି ଗୋଷ୍ଠୀ ମନ୍ଦିରର ପୁନର୍ବାସ, ପାନୀୟ ଜଳ, ଜଳ ଅମଳ, ସୌର ଲଣ୍ଠନ ଯୋଗାଣ, ଏମଜିଏନଆରଇଜିଏ ଉପକରଣ ଯୋଗାଣ ଇତ୍ୟାଦି"* କୁ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ ଅନ୍ତର୍ଭୁକ୍ତ କରିବ ।

୧୬. ବିଭିନ୍ନ ନିର୍ଦ୍ଦେଶାବଳୀ ଧାର୍ଯ୍ୟ କରି "କାର୍ଯ୍ୟକ୍ରମ ରୂପାୟନ ନିୟମପୁସ୍ତିକା" ନାମକ ନିର୍ଦ୍ଦେଶାବଳୀ ସମୂହ ଜାରି କରାଯାଇଥିଲା । ଏହି କାର୍ଯ୍ୟକ୍ରମ ରୂପାୟନ ନିୟମପୁସ୍ତିକା ନିମ୍ନମତେ ବ୍ୟବସ୍ଥା ପ୍ରଦାନ କରିଥାଏ:

> *"୧୬. ଏହି କାର୍ଯ୍ୟକ୍ରମ ସମ୍ପ୍ରଦାୟର ଆତ୍ମବିଶ୍ୱାସ ହାସଲ ପାଇଁ ଏକ କିମ୍ବା ଅଧିକ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ ଅନୁପାଳନ କରିବ । ବିଭିନ୍ନ କାର୍ଯ୍ୟକଳାପକୁ କାର୍ଯ୍ୟକାରୀ କରିବା ପାଇଁ ଏହା ସମ୍ପ୍ରଦାୟ ପାଇଁ ପ୍ରଶିକ୍ଷଣ କ୍ଷେତ୍ର ହେବ । ଏହି କାର୍ଯ୍ୟକ୍ରମରେ ପ୍ରତ୍ୟେକ ଗ୍ରାମ ପାଇଁ ଭାରତୀୟ ମୁଦ୍ରା ଟ ୧,୭୫୦୦୦ ଙ୍କା ଆବଣ୍ଟନ କରାଯାଇଛି । ଏହି କାର୍ଯ୍ୟକଳାପଗୁଡ଼ିକ ପାଇଁ ଯୋଜନା ପ୍ରସ୍ତୁତ କରିବା କୁ ଗ୍ରାମକୁ ସୁବିଧା ଦିଆଯିବ । ଏହି କାର୍ଯ୍ୟକଳାପଗୁଡ଼ିକ ଭିଡିଓ ରେ ଚୟନ କରାଯିବ ଏବଂ ଯଥାସମ୍ଭବ, ସାଧାରଣ ଉପଯୋଗର ସମ୍ପତ୍ତି, ବିଶେଷ କରି ମହିଳାମାନଙ୍କୁ ଲକ୍ଷ୍ୟ କରି ଯେପରିକି ପାନୀୟ ଜଳ ସୁବିଧା, ପ୍ରକ୍ଷାଳନ ଏବଂ ସ୍ନାନ ଚଉତରା, ଏନଟିଏଫପି ଗୁଡିକା/ଫସଲ ଶୁଖାଇବା ପାଇଁ ଚଉତରା ଇତ୍ୟାଦି ନିର୍ମାଣ କିମ୍ବା ମରାମତି କରିବ"।*

୧୭. ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ ସମ୍ପନ୍ନ ପାଇଁ, ପ୍ରଥମେ ଏକ ଚୁକ୍ତିନାମା କାର୍ଯ୍ୟକାରୀ କରାଯାଇଥିଲା | ଇପିଏ କାର୍ଯ୍ୟକାରୀ କରିବା ଏବଂ କାର୍ଯ୍ୟକ୍ରମର ରୂପାୟନ ପାଇଁ ପ୍ରାରମ୍ଭିକ ଚୁକ୍ତି ତା ୦୧.୦୬.୨୦୧୭ ରିଖରୁ ତା ୩୧.୦୩.୨୦୦୮ ରିଖ ଅବଧି ପାଇଁ ଥିଲା, ଯାହା ପକ୍ଷମାନଙ୍କ ମଧ୍ୟରେ ପରାମର୍ଶଦାତା ସେବା ପାଇଁ ଚୁକ୍ତି ରାଜିନାମାର ସ୍ୱତନ୍ତ୍ର ସର୍ତ୍ତାବଳୀ ଚୁକ୍ତିର ଖଣ୍ଡ ୨.୪ ଅନୁଯାୟୀ ଥିଲା ।

୧୮. ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ଏବଂ ଏହାର ଉଦ୍ଦେଶ୍ୟକୁ ବିଚାରକୁ ନେଇ, ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ସଂସ୍ଥା ତା୦୯.୦୫.୨୦୧୮ ରିଖ ଏକ କାରଣ ଦର୍ଶାଅ ନୋଟିସ୍ ମାଧ୍ୟମରେ ଆବେଦନକାରୀ ଏମଜିଏନଆରଇଜିଏ ଉପକରଣ, ରୋଷେଇ ବାସନ ଇତ୍ୟାଦି କ୍ରୟ ଏବଂ ବିତରଣ ପାଇଁ ବିପୁଳ ଖର୍ଚ୍ଚ କରିଥିବା ଏବଂ ଏହା ସହିତ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ଅଧୀନରେ ସ୍ୱତନ୍ତ୍ର କାର୍ଯ୍ୟକଳାପ, ଯାହା ପିଭିଟିଜିଏ ର ଜୀବନଧାରଣ ସ୍ଥିତିରେ ଉନ୍ନତି ଆଣିପାରିଥାନ୍ତା, ଖର୍ଚ୍ଚ, ପର୍ଯ୍ୟାପ୍ତ ଶ୍ରମ ଦିବସ ସୃଷ୍ଟି କରିବାରେ ସକ୍ଷମ ନହୋଇଥିବା ଆଧାରରେ ଆବେଦନକାରୀଙ୍କୁ ଏକ ସୁବିଧାଜନକ ଏନଜିଓରୁ ପ୍ରସ୍ତାବିତ ପ୍ରତ୍ୟାହାର ବିରୁଦ୍ଧରେ ସ୍ପଷ୍ଟୀକରଣ ମାଗିଥିଲେ ।

୧୯. ତଦନୁସାରେ, ଆବେଦନକାରୀଙ୍କ ଦ୍ୱାରା ତା ୧୩.୦୫.୨୦୧୮ ରିଖରେ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ *(ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪)* ଙ୍କୁ ଏକ କାରଣ ଦର୍ଶାଇବା ଉତ୍ତର ଦିଆଯାଇଥିଲା । ଆବେଦନକାରୀଙ୍କ ଦ୍ୱାରା ଦିଆଯାଇଥିବା ଉତ୍ତର ସନ୍ତୋଷଜନକ ନଥିଲା ଏବଂ ସେହି ଅନୁଯାୟୀ, ୩୦ ଦିନ ମଧ୍ୟରେ ଅର୍ଥାତ ଖଣ୍ଡ ୨.୮ ଅନୁଯାୟୀ ତା ୧୭.୦୬.୨୦୧୮ ରିଖ ସୁଦ୍ଧା ଆବେଦନକାରୀ ଏନଜିଓ ସହିତ ଚୁକ୍ତି ସମାପ୍ତ କରି ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଦ୍ୱାରା ତା ୧୯.୦୫.୨୦୧୮ ରିଖ ରେ ଚିଠି ଜାରି କରାଯାଇଥିଲା । ଏହା ପରେ, ଆବେଦନକାରୀ ତା ୧୯.୦୫.୨୦୧୮ ରିଖରେ ରିଟ୍ ଆବେଦନ *(ଦେୱାନୀ)* ସଂଖ୍ୟା୯୫୫୯/୨୦୧୮ ର ସମାପ୍ତି ଆଦେଶକୁ ଆହ୍ୱାନ କରି ଏହି ନ୍ୟାୟାଳୟଙ୍କ ଦ୍ୱାରସ୍ଥ ହୋଇଥିଲେ, ଯାହା ତା ୩୧.୦୮.୨୦୨୧ ରିଖରେ "ଆବେଦନକାରୀଙ୍କୁ ତା ୦୬.୦୯.୨୦୨୧ ରିଖରେ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ, ଓପିଇଏଲଆଇପି, ଅନୁସୂଚିତ ଜନଜାତି ଏବଂ ଅନୁସୂଚିତ ଜାତି ଉନ୍ନୟନ ବିଭାଗ *(ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪)* ଙ୍କ ସମ୍ମୁଖରେ ଉପସ୍ଥିତ ରହି କିମ୍ବା ଆଭାସୀ ମାଧ୍ୟମରେ ହାଜର ହେବାକୁ ଏକ ନିର୍ଦ୍ଦେଶ ସହିତ ନିକାଶ ହୋଇଥିଲା, ଯିଏ ଆବେଦନକାରୀଙ୍କୁ କାରଣ

ଦର୍ଶାଇବା ସହିତ ବ୍ୟକ୍ତିଗତ ଶୁଣାଣି ଦେବା ପାଇଁ ଏକ ତାରିଖ ସ୍ଥିର କରିବାକୁ ନିର୍ଦ୍ଦେଶିତ ହୋଇଛନ୍ତି । ଏହିପରି ଶୁଣାଣି ସମାପ୍ତ ହେବା ପରେ, ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ କୁ ନିୟମ ଅନୁଯାୟୀ ଚୂଡ଼ାନ୍ତ ଆଦେଶ ପାରିତ କରିବାକୁ ନିର୍ଦ୍ଦେଶ ଦିଆଯାଇଥିଲା।"।

୨୦. ଆବେଦନକାରୀଙ୍କ ପାଇଁ ବିଦ୍ୱାନ ଓକିଲ ଯୁକ୍ତି କରିଛନ୍ତି ଯେ ଆକ୍ଷେପିତ ଆଦେଶ ପାରିତ କରିବା ସମୟରେ, ଚୁକ୍ତିର ଖଣ୍ଡ - ୨.୭ କଦାପି ପାଳନ କରାଯାଇ ନାହିଁ । ଆବେଦନକାରୀଙ୍କୁ ୩୦ ଦିନ କିମ୍ବା ୬୦ ଦିନର ନୋଟିସ କେବେବି ଦିଆଯାଇ ନାହିଁ । ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଦ୍ୱାରା ଏପରି ଏକ ନୋଟିସ ପ୍ରଦାନ ନକରି ସିଧାସଳଖ ସମାପ୍ତି ଭଳି କାର୍ଯ୍ୟାନୁଷ୍ଠାନ ମାରାତ୍ମକ ଅଟେ । ତେଣୁ, ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ଦ୍ୱାରା ପ୍ରାକୃତିକ ନ୍ୟାୟ ନୀତିଗୁଡ଼ିକର ପୁନର୍ବାର ଉଲ୍ଲଙ୍ଘନ ହୋଇଛି ।

୨୧. ପ୍ରତିବାଦୀଙ୍କ ପାଇଁ ବିଦ୍ୱାନ ଓକିଲ ସ୍ୱଷ୍ଟ କରିଛନ୍ତି ଯେ ରିଟ୍ ଆବେଦନ *(*ଦେୱାନି*)* ସଂଖ୍ୟା ୯୫୫୯/୨୦୧୮ ରେ ତା ୧୯.୦୫.୨୦୧୮ ରିଖର ଆଦେଶକୁ ଧ୍ୟାନରେ ରଖି, କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ (ପ୍ରତିବାଦି ସଂଖ୍ୟା ୪) ଆବେଦନକାରୀଙ୍କୁ ବ୍ୟକ୍ତିଗତ ଶୁଣାଣି ପାଇଁ ଏକ ତାରିଖ ସ୍ଥିର କରିବାକୁ ତା ୦୬.୦୯.୨୦୨୧ ରିଖରେ ଶାରୀରିକ କିମ୍ବା ଆଭାସୀ ମାଧ୍ୟମରେ ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ସମ୍ମୁଖରେ ହାଜର ହେବାକୁ ନିର୍ଦ୍ଦେଶ ଦେଇଛନ୍ତି । ଆବେଦନକାରୀ ହାଜର ହୋଇନଥିଲେ । ପରବର୍ତ୍ତୀ ସମୟରେ, ଆବେଦନକାରୀ ତା ୨୩.୦୯.୨୦୨୧ ରିଖରେ, କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ *(*ପ୍ରତିବାଦି ସଂଖ୍ୟା ୪ *)* ଙ୍କ ତା ୦୯.୦୫.୨୦୧୮ ରିଖର କାରଣ ଦର୍ଶାଅ ନୋଟିସ ସଂଖ୍ୟା ୯୨୦ କୁ ସେ ପିବିଡିଏ, ଖୁଣ୍ଟଗାଓଁ, ସୁନ୍ଦରଗଡ ଜିଲ୍ଲା ଏବଂ କେକେଡିଏ, ବେଲଘର, କାନ୍ଧମାଳ ଜିଲ୍ଲାରେ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(*ଇପିଏ*)* ଗ୍ରହଣ କରିଥିବାର କାରଣ ବର୍ଣ୍ଣନା କରି ଉତ୍ତର ଦେଇଥିଲେ ।

୨୨. ଆବେଦନକାରୀଙ୍କ ଉତ୍ତର ସନ୍ତୋଷଜନକ ନ ଥିବାରୁ, ପ୍ରତିବାଦୀ ସଂଖ୍ୟା ୪ ତା ୦୭.୧୦.୨୦୨୧ ରିଖରେ ବ୍ୟକ୍ତିଗତ ଶୁଣାଣି ପାଇଁ ସୁଯୋଗ ପ୍ରଦାନ କରିଥିଲେ । ତଦନୁସାରେ,ଏନଜିଓ ସଭାପତି ଶ୍ରୀ ଧନେଶ୍ୱର ସାହୁଙ୍କ ସହ ଆବେଦନକାରୀ ବ୍ୟକ୍ତିଗତ ଶୁଣାଣିରେ ଯୋଗ ଦେଇଥିଲେ । ଶୁଣାଣି ସମୟରେ, କାର୍ଯ୍ୟକ୍ରମ କ୍ଷେତ୍ରରେ ଏମଜିଏନଆରଇଜିଏ ଉପକରଣ ଯୋଗାଣ ଦ୍ୱାରା ଏମଜିଏନଆରଇଜିଏ ଅଧୀନରେ ଶ୍ରମ ଦିବସ ସୃଷ୍ଟି କରିବାରେ କୌଣସି ଗୁରୁତ୍ୱପୂର୍ଣ୍ଣ ଉନ୍ନତି ଘଟିଛି କି ନାହିଁ ତାହା ବ୍ୟାଖ୍ୟା କରିବାରେ ସେମାନେ ବିଫଳ ହୋଇଥିଲେ । ଏହା ସ୍ୱଷ୍ଟ ଥିଲା ଯେ ପ୍ରତ୍ୟେକ ହିତାଧିକାରୀଙ୍କ ପାଇଁ ୫ଟି ଶ୍ରମ ଦିବସ ସୃଷ୍ଟି କରାଯାଇଥିଲା, ଯାହା ଏମଜିଏନଆରଇଜିଏ ଅଧୀନରେ ଆଶା କରାଯାଉଥିବା ଫଳାଫଳଠାରୁ ବହୁତ କମ୍ ଥିଲା ।

୨୩. ଆହୁରି ମଧ୍ୟ, ଆବେଦନକାରୀ ଏବଂ ଏନଜିଓ ସଭାପତିଙ୍କ ଅନୁରୋଧ କ୍ରମେ, ସେମାନଙ୍କୁ ଏମଜିଏନଆରଇଜିଏ ଉପକରଣ, ରୋଷେଇ ବାସନ ବଣ୍ଟନ ଏବଂ ୨୦୧୭-୧୮ ବର୍ଷ ପାଇଁ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(*ଇପିଏ*)* ଅଧୀନରେ ସ୍ୱତନ୍ତ୍ର କାର୍ଯ୍ୟକଳାପ ସମ୍ବନ୍ଧୀୟ ପ୍ରମାଣ ଉପସ୍ଥାପନ କରିବାକୁ ତା ୧୦.୦୨.୨୦୨୨ ରିଖରେ ଉପସ୍ଥିତ ହେବାକୁ ଆଉ ଏକ ସୁଯୋଗ ଦିଆଯାଇଥିଲା । ଶୁଣାଣି ସମୟରେ, ସେମାନେ *(*୧*)* ଭିତ୍ତିଭୂମି ସମ୍ବନ୍ଧୀୟ ଜିପିଏସ୍ ଫଟୋଗ୍ରାଫ୍ *(*୨*)* ସୌର ଆଲୋକ ବ୍ୟବସ୍ଥାର ବିତରଣ ସମ୍ବନ୍ଧୀୟ

ଜିପିଏସ୍ ଫଟୋଗ୍ରାଫ୍ ଏବଂ *(୩)* ପ୍ରକ୍ରିୟାକରଣ ଏକକର ଜିପିଏସ୍ ଫଟୋଗ୍ରାଫ୍ ଓ କେକେଡିଏ, ବେଲଘର ଏବଂ ପିବିଡିଏ, ଖୁଣ୍ଟଗାଓଁ ପାଇଁ ୨୦୧୭-୧୮ ବର୍ଷ ପାଇଁ ସେମାନଙ୍କର ବର୍ତ୍ତମାନର କାର୍ଯ୍ୟକ୍ଷମ ସ୍ଥିତି ଦାଖଲ କରିବାକୁ ରାଜି ହୋଇଥିଲେ । ଆବେଦନକାରୀ ୨୦୧୭-୧୮ ବର୍ଷ ମଧ୍ୟରେ ଦୁଇଟି ସୂକ୍ଷ୍ମ ପ୍ରକଳ୍ପ ସଂସ୍ଥାରେ ନିଆଯାଇଥିବା ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ର ସମ୍ପୂର୍ଣ୍ଣ ଜିପିଏସ ଫଟୋଗ୍ରାଫ୍ ପ୍ରଦାନ କରିପାରିଲେ ନାହିଁ । ସେମାନେ କେକେଡିଏ, ବେଲଘର ଅଧୀନରେ ଥିବା ୦୮ଟି ଗାଁର ଫଟୋ ଏବଂ ପିବିଡିଏ, ଖୁଣ୍ଟଗାଁ ଅଧୀନରେ ଥିବା ୯ ଟି ଗ୍ରାମ ବିକାଶ ସମ୍ପ୍ରଦାୟ *(ଭିଡିସି)* ର କିଛି କାର୍ଯ୍ୟକଳାପ ଫଟୋ ଦାଖଲ କରିଥିଲେ । ଯଦିଓ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ର ପରିଚାଳନା ନିର୍ଦ୍ଦେଶାବଳୀ ଅନୁଯାୟୀ ଜିପିଏସ୍ ଫଟୋଗ୍ରାଫ୍ ନେବା ବାଧତାମୂଳକ, ଆବେଦନକାରୀ ଯୋଜନାଗୁଡ଼ିକୁ କାର୍ଯ୍ୟକାରୀ କରିବାରେ ଫଟୋଗ୍ରାଫ୍ ଆକାରରେ ପ୍ରାମାଣିକ ତଥ୍ୟ ପ୍ରଦାନ କରିପାରିଲେ ନାହିଁ ।

୨୪. ବିଭିନ୍ନ ତାରିଖରେ ମଞ୍ଜୁର ହୋଇଥିବା ବ୍ୟକ୍ତିଗତ ଶୁଣାଣି ପରେ ଏବଂ ଉଭୟ ପିବିଡିଏ, ଖୁଣ୍ଟଗାଁ ଏବଂ କେକେଡିଏ ବେଲଘର ସ୍ୱତନ୍ତ୍ର ଅଧିକାରୀଙ୍କ ଠାରୁ ପ୍ରାପ୍ତ ପ୍ରାସଙ୍ଗିକ ଦସ୍ତାବିଜ ଏବଂ ନଥି ଗୁଡ଼ିକୁ, ତା ୦୯.୦୫.୨୦୧୮ ରିଖର କାରଣ ଦର୍ଶାଅ ନୋଟିସରେ ଆବେଦନକାରୀଙ୍କଠାରୁ ପ୍ରାପ୍ତ ଉତ୍ତର, ଗ୍ରହଣ ହୋଇଥିବା ପରବର୍ତ୍ତୀ ସୂଚନା ଏବଂ ଫଟୋ ଇତ୍ୟାଦି ଯାଞ୍ଚ କରିବା ପରେ କାର୍ଯ୍ୟକ୍ରମ ନିର୍ଦ୍ଦେଶକ *(*ପ୍ରତିବାଦି ସଂଖ୍ୟା ୪*)* ପିଭିଟିଜି ସମ୍ପ୍ରଦାୟର ବୃହତ୍ତର ସ୍ୱାର୍ଥ ଏବଂ ଅବଶିଷ୍ଟ କାର୍ଯ୍ୟଗୁଡ଼ିକର ସମୟୋଚିତ କାର୍ଯ୍ୟକାରିତାକୁ ଧ୍ୟାନରେ ରଖି ଚୁକ୍ତିନାମା ସମାପ୍ତ କରିବାକୁ ନିଷ୍ପତ୍ତି ନେଇଥିଲେ ଏବଂ ଫଳସ୍ୱରୂପ, ଆବେଦନକାରୀଙ୍କ ସଂଗଠନକୁ ତୁରନ୍ତ ପ୍ରଭାବ ସହିତ ବିଚ୍ଛିନ୍ନ କରିଥିଲେ । ତେଣୁ, ଏହି ନ୍ୟାୟାଳୟଙ୍କ ମତ ହେଉଛି ଯେ ଆବେଦନକାରୀଙ୍କୁ ପର୍ଯ୍ୟାପ୍ତ ସୁଯୋଗ ପ୍ରଦାନ କରାଯାଇଥିବାରୁ ପ୍ରାକୃତିକ ନ୍ୟାୟ ନୀତିର କୌଣସି ଉଲ୍ଲଂଘନ ହୋଇନାହିଁ ।

୨୫. ଅଧିକନ୍ତୁ, ଆବେଦନକାରୀଙ୍କ ଅଭିଯୋଗ ଯେ ରିଟ୍ ଆବେଦନରେ କାରଣ ଦର୍ଶାଅ ନୋଟିସ କାର୍ଯ୍ୟକ୍ରମ ରୂପାୟନ ସଂସ୍ଥା *(*ପିଏଲଏ*)* ଦ୍ୱାରା ଜାରି କରାଯାଇଥିବା ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(*ଇପିଏ*)* ର ପରିଚାଳନା ନିର୍ଦ୍ଦେଶାବଳୀର ଆବଶ୍ୟକତାକୁ ପ୍ରଭାବିତ କରେ ନାହିଁ ଏବଂ ତେଣୁ ଚୁକ୍ତିର ସମାପ୍ତିର ଆଧାର ଗଠନ କରିପାରିବ ନାହିଁ କୁ ସମ୍ପୂର୍ଣ୍ଣ ଭାବେ ଭୁଲ ଅର୍ଥ କରାଯାଇଛି । ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(*ଇପିଏ*)* ର ମୁଖ୍ୟ ଉଦ୍ଦେଶ୍ୟ ହେଉଛି *(i)* ପ୍ରଭାବୀ ଏବଂ ଅଂଶଗ୍ରହଣକାରୀ ପ୍ରକଳ୍ପ କାର୍ଯ୍ୟନ୍ୱୟନ ପାଇଁ ଗୋଷ୍ଠୀ ସଂହତି *(ii)* ପ୍ରକଳ୍ପ ଏବଂ ସେମାନଙ୍କ ପରିଚାଳନା ଦକ୍ଷତା ଉପରେ ନିର୍ଦ୍ଦିଷ୍ଟ ସମ୍ପ୍ରଦାୟର ବିଶ୍ୱାସ ହାସଲ କରିବା *(iii)* ନିର୍ଦ୍ଦିଷ୍ଟ ସମ୍ପ୍ରଦାୟକୁ ବାସ୍ତବ ସମ୍ପତ୍ତି ପ୍ରଦାନ କରିବା ଏବଂ *(iv)* ଗ୍ରାମବାସୀଙ୍କୁ ସ୍ୱଳ୍ପକାଳୀନ ଆର୍ଥିକ ଲାଭ ଏବଂ ପ୍ରୋତ୍ସାହନ ପ୍ରଦାନ କରିବା *(*ମଜୁରୀ*)* । ଏହି ବ୍ୟାପକ ଉଦ୍ଦେଶ୍ୟକୁ ଆଧାର କରି, କାରଣ ଦର୍ଶାଅ ବିବୃତି ଜାରି କରାଯାଇଥିଲା, ଯେଉଁଥିରେ *(i)* ୨୦୧୭-୧୮ ଆର୍ଥିକ ବର୍ଷରେ ଆରମ୍ଭ କରାଯାଇଥିବା ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(*ଇପିଏ*)* କିପରି ଲକ୍ଷ୍ୟଭୁକ୍ତ ସମ୍ପ୍ରଦାୟକୁ ସଶକ୍ତ କରିବାରେ ସହାୟକ ହୋଇଥିଲା *(ii)* ଲକ୍ଷ୍ୟଭୁକ୍ତ ସମ୍ପ୍ରଦାୟର ସାମର୍ଥ୍ୟ ବୃଦ୍ଧି ଉପରେ କରାଯାଇଥିବା ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(*ଇପିଏ*)* କାର୍ଯ୍ୟର ପ୍ରଭାବ *(iii)* ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(*ଇପିଏ*)* କାର୍ଯ୍ୟ ଦ୍ୱାରା ସ୍ଥାୟୀ ଜୀବିକା ବିକାଶ ହୋଇଛି କି ନାହିଁ ଏବଂ *(iv)*ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(*ଇପିଏ*)* ଅଧୀନରେ ଏମଜିଏନଆରଇଜିଏସ ଉପକରଣ ବଣ୍ଟନ ପରେ ହୋଇଥିବା ଶ୍ରମଦିବସ ସଂଖ୍ୟା ଉପରେ ଉତ୍ତର ମଗାଯାଇ

ଥିଲା । ଏଗୁଡ଼ିକ ଅତ୍ୟନ୍ତ ଗୁରୁତ୍ୱପୂର୍ଣ୍ଣ ଏବଂ ଉପଯୁକ୍ତ ପ୍ରଶ୍ନ ଯାହା ଆବେଦନକାରୀଙ୍କ ଠାରୁ ସ୍ୱଷ୍ଟୀକରଣ ମାଗିଥିବା କାରଣ ଦର୍ଶାଅ ବିଜ୍ଞପ୍ତିର ଅଂଶବିଶେଷ । ତେଣୁ, କାରଣ ଦର୍ଶାଅ ନୋଟିସ ସ୍ୱଷ୍ଟ ଭାବରେ ପ୍ରାରମ୍ଭିକ କାର୍ଯ୍ୟକଳାପ *(ଇପିଏ)* ର ପରିଚାଳନା ନିର୍ଦ୍ଦେଶାବଳୀକୁ ସମର୍ଥନ କରେ | ଅତଏବ ଆବେଦନକାରୀଙ୍କ ଅଭିଯୋଗ ସମ୍ପୂର୍ଣ୍ଣ ଅଯୌକ୍ତିକ ।

୨୬. ଅତିରିକ୍ତ ଭାବରେ, ରାଜିନାମାରେ ମଧ୍ୟସ୍ଥତାର ଏକ ଧାରା ଥିବା ଦୃଷ୍ଟିରୁ ରିଟ୍ ଆବେଦନ ଗ୍ରହଣୀୟ ନୁହେଁ । ରାଜିନାମାର ଖଣ୍ଡ-୮ ମଧ୍ୟସ୍ଥତା ମାଧ୍ୟମରେ ବିବାଦର ସମାଧାନ ବ୍ୟବସ୍ଥା ସହିତ ଜଡିତ । ଏହା ସ୍ଥିରୀକୃତ ଆଇନ ଯେ ଯଦି ବିବାଦର ସମାଧାନ ପାଇଁ ଏକ ମଧ୍ୟସ୍ଥତା ଚୁକ୍ତିନାମା ଅଛି, ପକ୍ଷମାନଙ୍କୁ ମଧ୍ୟସ୍ଥତା ନିକଟକୁ ପଠାଯିବା ଆବଶ୍ୟକ | ଚୁକ୍ତିଭିତ୍ତିକ ପ୍ରସଙ୍ଗରେ ଯେଉଁଠାରେ ତଥ୍ୟର ବିବାଦୀୟ ପ୍ରଶ୍ନ ଜଡ଼ିତ, ଭାରତୀୟ ସମ୍ବିଧାନର ଧାରା ୨୨୬ ଅନୁଯାୟୀ ଏହି ନ୍ୟାୟାଳୟର ଅସାଧାରଣ ନ୍ୟାୟୀକ ଅଧିକାରିତାକୁ ଆବାହନ କରାଯାଇପାରିବ ନାହିଁ । ଆବେଦନକାରୀ କର୍ତ୍ତୃପକ୍ଷଙ୍କୁ ଚୁକ୍ତିର ନିୟମ ଏବଂ ସର୍ତ୍ତ ଅନୁଯାୟୀ କାର୍ଯ୍ୟାନୁଷ୍ଠାନ ଗ୍ରହଣ କରିବାକୁ ବାରଣ କରି ଏହି ନ୍ୟାୟାଳୟଙ୍କଠାରୁ ଏକ ପ୍ରତିବନ୍ଧକ ଆଦେଶ ଜାରି କରିବା ପାଇଁ ପ୍ରାର୍ଥନା କରୁଛନ୍ତି । ଅଧିକନ୍ତୁ, ଚୁକ୍ତିନାମା/ରାଜିନାମା ଯଦି ନିଯୁକ୍ତିଦାତାଙ୍କ ଦ୍ୱାରା ନିଆଯିବାକୁ ଥିବା ଏକ ନିର୍ଦ୍ଦିଷ୍ଟ କାର୍ଯ୍ୟାନୁଷ୍ଠାନ ପ୍ରଦାନ କରେ, ତେବେ ତାଙ୍କୁ ଏପରି କରିବାରୁ ଅଟକାଯାଇପାରିବ ନାହିଁ ଏବଂ ତାଙ୍କ କାର୍ଯ୍ୟାନୁଷ୍ଠାନ ଆହ୍ୱାନର ବିଷୟ ହୋଇପାରେ, କିନ୍ତୁ କୌଣସି ନିଷେଧ ହୋଇପାରିବ ନାହିଁ ।

୨୭. ଉପରୋକ୍ତ ଆଲୋଚନା ଏବଂ ଏଠାରେ ଦର୍ଶାଯାଇଥିବା ମାମଲାଗୁଡ଼ିକ ଆଧାରରେ, ଏହି ନ୍ୟାୟାଳୟଙ୍କ ମତ ହେଉଛି ଯେ ଆବେଦନକାରୀଙ୍କ ଯୁକ୍ତିଗୁଡ଼ିକ ଗୁଣବତ୍ତା ବିହୀନ ଏବଂ ତେଣୁ ଏହାକୁ ଗ୍ରହଣ କରାଯାଇପାରିବ ନାହିଁ । ତେଣୁ, ରିଟ୍ ଆବେଦନକୁ ଏତଦ୍ଦ୍ୱାରା ଖାରଜ କରାଯାଉଛି ।

—— o ——

2023 (III) ILR-CUT- 210

MISS. SAVITRI RATHO, J.

CRLMC NO. 2435 OF 2023

MADHU BARAL @ MADHUSUDAN BARAL .....Petitioner

-V-

STATE OF ODISHA .....Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 311 – Duty of the courts while exercising the discretionary power U/s. 311 of CrPC – Enumerated with reference to case law.

Case Laws Relied on and Referred to :-

1. (2013) 14 SCC **461** : Rajaram Prasad Yadav Vs. State of Bihar.
2. (CRLMC No. 1990 of 2023**)** : Bhaskar Nayak Vs. State of Odisha.

For Petitioner : Mr. B. Baivab

For Opp. Party : Ms. S. Patnaik, A.G.A.

JUDGMENT Date of Judgment: 25.07.2023

MISS. SAVITRI RATHO, J.

This application under section 482 of the Code of Criminal Procedure has been filed by the petitioner for quashing the order dated 27.02.2023 passed by the learned A.D.J.-cum-Special Court under the POCSO Act, Puri in T.R. Case No. 84 of 2016 arising out of Balanga P.S. Case No. 63 of 2016, rejecting the application of the petitioner filed under Section 311 of Cr.P.C. for recalling P.W.1- victim and P.W.3 - informant for further cross-examination.

FACTUAL MATRIX

2. The petitioner is facing trial in T.R. Case No. 84 of 2016 for commission of offences punishable under Section -363 /376 (2) (n) /313 of IPC and Section – 6 of the POCSO Act**.** The victim has been examined as P.W.1 in the trial on 17.05.2017 and cross examined and discharged and her father P.W.3 has been examined on 08.02.2018 and cross examined and discharged. More than four years thereafter on 30.09.2022, an application was filed under Section – 311 Cr.P.C. on behalf of the petitioner with a prayer to recall P.W.1 and P.W. 3 for cross examination for a just decision in the case stating interalia that the victim had got married for which the matter had been compromised and the victim had sworn an affidavit on the basis of which the petitioner had been granted bail by the High Court on 29.04.2022 in CRLA 582 of 2019.

IMPUGNED ORDER

3. The learned District Judge -cum- Special Court under the POCSO Act, Puri has referred to the submission of the learned counsel for the accused who submitted that some material contradiction could not be put to the victim and the informant for which the two witnesses should be summoned so that the contradictions can be put to them. The learned Court has observed that P.W.1 the victim has been examined and cross-examined on 17.05.2017 and P.W.3 the informant has been examined and cross-examined 08.02.2018 and ten witnesses have already been examined from the side of the prosecution. The learned Court has also observed that power under Section 311 of Cr.P.C. can be exercised at any stage for just decision of the case but should be exercised judiciously and not arbitrarily and that the application should be bonafide and should not be filed by way of an after thought or to delay disposal of the case or in order to patch up the lacuna in evidence of a party. Holding that the P.Ws.1 and 3 have been examined and cross-examined in full and discharged, the learned counsel has not submitted the questions to be put to the two witnesses, the petition has been filed much after their evidence and relying on a decision of this Court, rejected the petition.

SUBMISSIONS

4. Mr. B. Baivab, learned counsel for the petitioner submits that after P.W.1 and P.W.3 had been examined and discharged, the matter has been amicably settled and the victim has got married and blessed with a child and she does not want to proceed against the petitioner. In **CRLA No. 582 of 2019** filed by the petitioner with prayer for bail, the victim has filed an affidavit stating that she does not want to proceed against the petitioner for which his prayer for bail has been allowed. The application under Section – 311 Cr.P.C. had therefore been filed to recall the two witnesses for their further cross examination and copy of the application has been annexed to this CRLMC. He has ultimately submitted that P.W.1 and P.W.3 have sworn affidavits before the Notary Public, Nimapara on 27.02.2023, stating that that they do want to proceed against the petitioner and these had been filed before the learned trial Court but the petition under Section – 311 Cr.P.C. has been rejected on the same day in a hyper technical manner. The application under Section 311 Cr.P.C. is annexed as Annexure-1 to this CRLMC.

5. Ms. S. Patnaik, learned Addl. Govt. Advocate opposed the said prayer stating that the victim P.W.1 who was a minor at the time of the incident has already deposed in the trial in the year 2017 and has been discharged. Similarly P.W.3 has deposed in the year 2018 and has been discharged after being cross examined. The petition under Section-311 Cr.P.C. has been filed after four years after their examination on the ground that the victim had got married and the matter had been compromised. She has further submitted that POCSO cases, a victim should not be repeatedly called to the Court to depose especially when the defence had cross examined her. Power under Section – 311 Cr.P.C. cannot be utilized for facilitating a witness to resile from her/his earlier statement.

STATUTORY PROVISIONS

6. The provisions necessary for deciding this application are Section 311 Cr.P.C. and Section -33 (5) of the Prevention of Sexual Offences against Children Act which are extracted below :

> ***"Section – 311. Power to summon material witness, or examine person present****. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case."*

> ***"Section 33 (5) Procedure and powers of Special Court****: (5) The Special Court shall ensure that the child is not called repeatedly to testify in the Court.*

ANALYSIS

7. The position of law so far as exercise of power under Section -311 Cr.P.C. is concerned has been dealt with by the Supreme Court and various High Courts

including this Court in a catena of cases and the position of law has been settled and has to be applied to the facts of a particular case as facts in each case are different.

8. It would be apposite to refer to the decision of the Supreme Court in the case of ***Rajaram Prasad Yadav vs. State of Bihar* : *(2013) 14 SCC 461,*** where an application under Section -311 Cr.P.C. had been filed by a witness who wanted to be re- examined on account of an incident which had occurred after he had deposed in Court. After his application was rejected by the trial court, the High Court had set aside the order of the trial court. The Supreme Court while setting aside the order of the High Court has observed as follows :

> *..."14. A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, in so far as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution"*

After referring to its earlier decisions, the Supreme Court enumerated the principles to be kept in mind by the Courts while dealing with an application under Section – 311 of the Cr.P.C., which are extracted below:

> *"17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?*

17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.
17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right." (emphasis supplied)

It further held :

> *"28. We find that the factors noted by the trial Court and the conclusion arrived at by it were all appropriate and just, while deciding the application filed under Section 311 Cr.P.C. We do not find any bonafides in the application of the second respondent, while seeking the permission of the Court under Section 311 Cr.P.C. for his re-examination by merely alleging that on the earlier occasion he turned hostile under coercion and threat meted out to him at the instance of the appellant and other accused. It was quite apparent that the complaint, which emanated at the instance of the appellant based on the subsequent incident, which took place on 30.5.2007, which resulted in the registration of the FIR in Khizersarai Police Station in case No.78/2007, seem to have weighed with the second respondent to come forward with the present application under Section 311 Cr.P.C., by way of an afterthought…."*

9. This Court in the case of ***Bhaskar Nayak vs. State of Odisha (CRLMC No. 1990 of 2023)*** decided on ***05.05.2023***, relying on the case of ***Rajaram*** (supra) had held as follows **:**

> *"11. From a careful reading of the provisions of Section 33(5) of the POCSO Act, it is apparent that it is more in the nature of a safeguard than a bar. It provides that a child should not be called repeatedly to testify in the Court but it does not prohibit her/his recall. Therefore while considering an application to recall a victim where the accused is facing trial where one of the offences is under the POCSO Act, the provisions of Section 311 Cr.P.C (right of an accused to a fair trial) and the provisions of Section 33 (5) of the POCSO Act (protection of a child victim from harassment), have to be kept in mind and the trial court has to be very cautious while considering the such application and allow recall only when and where it is absolutely necessary for a just decision in a case . It is therefore important that the questions sought to be asked to the victim should be indicated in the petition so that the trial court can examine the questions and suggestions and allow those which have not been asked earlier to the witness or are irrelevant, as these will not be necessary for a just decision in the case but may frustrate the object behind Section – 311 Cr.P.C ."*

In the case of ***Bhaskar Nayak*** (supra) the application under Section 311 Cr.P.C. had been filed two months after the victim had deposed and the questions sought to be put to the victim had been indicated in the petition, but the application had been rejected by the learned trial Court relying on Section 33(5) of the POCSO Act.

10. From a reading of provisions and the settled position of law, it is apparent that power vested under Section 311 Cr.P.C. can be exercised by the Court at any stage in any inquiry or trial or other proceeding. Right of cross examination is a valuable right of an accused and the Court can summon any person as a witness or examine any person who is present in Court even though not summoned as a witness or recall and re-examine any person already examined if it is of the opinion that such examination is necessary for a just decision in the case. The complainant/ prosecution has a similar right. The paramount requirement for exercise of such power is whether it is essential for a just decision. For such determination, the purpose and reason for such witness to be recalled for re-examination or cross

examination has to be examined. Right of cross examination is valuable right of an accused and should not be denied to an accused if such denial is likely to cause prejudice to the accused. If relevant material was not brought on record for some justifiable reason and the party has approached the Court promptly, the Court should be magnanimous while considering the application if it finds that it is necessary for a just decision in the case. But power under Section 311 Cr.P.C. cannot be exercised for changing the nature of evidence already recorded or for facilitating witnesses from resiling from their evidence. Prayer for exercise of such power should not be used as a disguise for retrial, and the evidence which is sought to be introduced should be essential for deciding the case. If the reason for recall has not been disclosed or the questions are irrelevant or the reasons for permitting rectification are not bonafide, the power should not be exercised. In cases involving offences under the POCSO Act, the Court should be more vigilant as the trial should not be allowed to linger or the victim repeatedly summoned to the Court for adducing evidence in the absence of compelling reasons.

11. The prayer for bail of the Appellant has been allowed by this Court order dated 29.04.2022 passed in **CRLA 582 of 2019** taking into account the period of detention (since 07.06.2016) and keeping in view the settlement between the parties. A condition has been imposed that the Appellant should not humiliate the victim in any manner whatsoever.

12. There can be no quarrel over the proposition that on the basis of compromise, an accused may be released on bail. But such compromise cannot be the reason for recalling a witness. P.W.1 and P.W.3 have been examined, cross examined and discharged more than four years back. The questions proposed to be asked to P.W.1 and P.W.3 were not stated in the petition filed in the trial Court (Annexure 1 to this application) nor have they been mentioned in this CRLMC. But from the averments in the petition and the submissions of the learned counsel, it is apparent that the purpose of recalling the two witnesses is to bring the fact of the marriage of the victim and the compromise between the parties on record. The marriage of the victim after the incident or the compromise between the parties are not relevant or essential for a just decision in the case and can therefore not be a ground for exercise of power under Section- 311 Cr.P.C. to recall her and her father P.W.3 for further cross examination.

CONCLUSION

13. Power of this Court under Section 482 Cr.P.C. is very wide. But it is to be exercised to prevent the abuse of process of any Court or otherwise to secure the ends of justice and is to be used sparingly and cautiously. That apart, I do not find any infirmity in the impugned order. I am therefore not inclined to entertain this application by exercising power under Section 482 Cr.P.C.

14. The CRLMC is accordingly dismissed.

2023 (III) ILR – CUT- 217

R.K. PATTANAIK, J.

S.A.O. NO. 13 OF 2022

GADADHAR SWAIN & ORS. .....Appellants

.V.

NAMITA JENA & ORS. .....Respondents

CODE OF CIVIL PROCEDURE, 1908 – Section 96(2) r/w order XLI Rule 27 – Whether additional evidence U/o XLI Rule 27 is admissible in an appeal U/s. 96(2), when there was no evidence adduced by the parties and the suit was decreed ex-parte without filling of any written statement? – Held, No – Reason recorded.

Case Laws Relied on and Referred to :-

1. AIR 2017 (NOC) 882 (Madras) : A. Meiazhagan Vs. Mangayarkkarasi & Ors.
2. AIR 2008 Orissa 46 : Amir Mohammad and Another Vs. Saliman Bibi & Ors.
3. (2005) 1 SCC,787 : Bhanu Kumar Jain Vs. Archana Kumar & Anr.
4. 2007 (II) OLR (SC) 41 : Lal Devi and Anr. Vs. Vaneeta Jain & Ors.

For Appellants : Mr. S. Kar

For Respondents : Mr. S.K. Mishra

JUDGMENT Date of Judgment : 07.08.2023

R.K. PATTANAIK, J.

1. Instant appeal in terms of Order XLIII Rule 1(u) read with Section 104 of the Code of Civil Procedure, 1908 is at the behest of the appellants assailing the impugned judgment dated 2nd November, 2022 promulgated in RFA No.55 of 2014 by the learned Additional District Judge, Jajpur, whereby, the decision in TS No.211 of 2004 was set aside and the suit was remanded back for a fresh disposal by the learned Civil Judge (Senior Division), Jajpur on the ground that the same is not tenable in law and hence, liable to be set aside.

2. The appellants as plaintiffs instituted the suit in TS No.211 of 2004 against the original defendant No.1 and respondents for a declaration that one Maguni, the father of said defendant and respondent Nos.3 to 5 and husband of defendant No.2 not to be the son of late Chakradhar Swain, who was the husband of the original plaintiff which was disposed of ex-parte vide judgment dated 31st October, 2013. Being aggrieved of, the defendants filed the appeal in RFA No.55 of 2014 which resulted in passing of the impugned judgment and decree dated 2nd November, 2022 but the matter was remitted back for fresh adjudication. Since dissatisfied by the order of remand, the appellants have knocked the doors of this Court primarily on the ground, such as, the learned Lower Appellate Court could not have admitted additional evidence as per Order XLI Rule 27 C.P.C. when the respondents had no defence and rather defaulted in appearance leaving the disposal of the suit ex-parte.

3. Heard Mr. Kar, learned counsel for the appellants and Mr.Mishra, learned counsel for the respondents.

4. Mr. Kar, learned counsel for the appellants submits that the order of remand by the learned Lower Appellate Court cannot be sustained in law since it admitted additional evidence under Order XLI Rule 27 C.P.C. despite objection received from the appellants. It is contended that additional evidence at the appellate stage cannot be looked into without pleadings before the Trial Court. According to Mr. Kar, the respondents did not seek for the ex-parte judgment and decree in the suit to be set aside in terms of Order IX Rule 13 C.P.C., rather, challenged the same in appeal under Section 104 C.P.C and when the suit was disposed of ex-parte, the learned Lower Appellate Court could not have accepted additional evidence under Order XLI Rule 27 C.P.C. to introduce evidence without any such pleadings of defendant and while contending so, Mr. Kar, learned counsel for the appellants cited a decision of the Madras High Court in the case of A**. Meiazhagan Vrs. Mangayarkkarasi & Others** reported in **AIR 2017 (NOC) 882 (Madras)**. Furthermore, the following decisions, such as, **Amir Mohammad and Another Vrs. Saliman Bibi and Others AIR 2008 Orissa 46** and of the Apex Court in **Bhanu Kumar Jain Vrs. Archana Kumar & Another (2005) 1 SCC, 787** have also been placed reliance on to contend that two options are available, either to challenge the ex-parte order under Order IX Rule 13 C.P.C. or to file an appeal against the judgment and decree for a decision on merit since the respondents availed the latter, the learned Lower Appellate Court ought to have examined the legality of the impugned decision without accepting any additional evidence in absence of any defence pleading on record.

5. On the contrary, Mr. Mishra, learned counsel for the respondents justified the impugned judgment and decree in RFA No.55 of 2014 and submitted that the learned Lower Appellate Court did not commit any error or illegality in restoring the suit for its disposal by the Trial Court assigning specific reasons therefor. In course of hearing, Mr. Mishra referred to the decision in **Amir Mohammad** (supra) and **Lal Devi and Another Vrs. Vaneeta Jain and Others** of the Apex Court reported in **2007 (II) OLR (SC) 41**. It is contended that the learned Lower Appellate Court on just ground set aside the ex-parte decree and rightly remanded the matter back for a fresh decision so as to enable the respondents to participate.

6. The following questions emerge for adjudication, such as, (i) whether, the learned Lower Appellate Court did possess the power to remand with a direction for the respondents to file Written Statement while disposing of an appeal under Section 96(2) C.P.C? (ii) If the defendants having been permitted to file Written Statement in the suit while remanding the matter back exercising jurisdiction under Section 96(2) C.P.C., the ex-parte decree becomes redundant thereby defeating the purpose of Order IX Rule 13 C.P.C? (iii) Whether, the learned Lower Appellate Court was correct in considering the additional evidence under Order XLI Rule 27 C.P.C. in an appeal under Section 96(2) when there was no evidence adduced by the respondent as the suit was decreed ex-parte without any Written Statement filed?

7. The Trial Court since the respondents did not turn up proceeded with the suit ex-parte and on the basis of the pleading and evidence received from the side of the appellants decreed the suit and declared said Maguni not being the son of Malati and Chakradhar, the predecessor-in-interest of the appellants. In fact, the legal heir certificate marked as Ext.1 was the basis for the Trial Court to declare so and decree the suit. Instead of applying the ex-parte decree to be set aside under Order IX Rule 13 C.P.C., the respondents challenged it in appeal under Section 96(2) C.P.C. wherein the impugned judgment was interfered with subject to remand for a fresh adjudication. As early mentioned, additional evidence was received and considered at the time of deciding the appeal which has been challenged on the ground that there was no scope for the learned Lower Appellate Court to accept it in absence of any such pleading and evidence by the respondents in the suit.

8. In **Meiazhagan** (supra), the Madras High Court held that when there is absence of pleadings before the Trial Court and defendant was proceeded ex-parte, inasmuch as, no steps were taken to contest the suit on merit, additional evidence under Order XLI Rule 27 C.P.C. at the appellate stage cannot be looked into. It has been further held therein that affidavits do not substitute pleadings and the defendant challenging the ex-parte decree cannot take shelter of any such affidavit and he is required to confine the challenge against merits of the ex-parte decree. In **Amir Mohammad** (supra), this Court held that in an appeal under Section 96 C.P.C., a defendant cannot be allowed to show and satisfy the court that he was prevented by sufficient cause from appearing in the suit and for that purpose, it is open for him to take recourse to Order IX Rule 13 C.P.C. In **Bhanu Kumar Jain** (supra), the Apex Court held and observed that when there is an ex-parte decree passed in a suit, the course which is open for a party is to file an application under Order IX Rule 13 C.P.C. and/or an appeal under Section 96(2) apart from seeking review or institution of a suit for setting aside the decree on the ground of fraud and when any such appeal under Section 96(2) C.P.C. is dismissed, application under Order IX Rule 13 would not be maintainable and moreover, if any such request under Order IX Rule 13 C.P.C. failed, the defendant can file an appeal thereagainst under Order XLIII Rule(1)(d) C.P.C. In fact, the Apex Court had a detailed discussion as to the options available for a defendant vis-a-vis an ex-parte decree in a suit. The above remedies are available in case of an ex-parte decree sought to be challenged by a defendant. In the instant case, the respondents challenged the ex-parte decree for a decision on merit, but at no stage before the learned Lower Appellate Court ever raised the ground of default. In other words, the respondents questioned the legality of the judgment of the Trial Court in the appeal under Section 96(2) C.P.C. for a final decision and on merit.

9. The question is, whether, the learned Lower Appellate Court was right in dealing with the additional evidence under Order XLI Rule 27 C.P.C. considering the materials produced? The suit by the appellants is declaratory in nature. The learned Lower Appellate Court did not set aside the ex-parte decree on any such

ground of the respondents which led to the latter's default before the Trial Court. Admittedly, the evidence so submitted by the respondents was considered by the learned Lower Appellate Court while dealing with an application under Order XLI Rule 27 C.P.C. It is not in dispute that the respondents not only failed to respond in the suit but also had not filed their defence. It was therefore, challenged on the ground that in absence of any such pleading by the respondents in the suit, there was no occasion for the learned Lower Appellate Court to receive additional evidence under Order XLI Rule 27 C.P.C. and in that regard, the decision in **A. Meiazhagan** (supra) was referred to. However, the Court finds that the learned Lower Appellate Court not only took cognizance of the additional evidence but also was not satisfied with ex-parte decree while considering it on merit as to the nature of evidence received by the Trial Court. As a matter of fact, the appellants relied on a legal heir certificate marked as Ext.1 on the strength of which the Trial Court decreed the suit. It was realized that Ext.1 was issued on 16thAugust, 2004 which was during the pendency of the suit and it was obtained for a specific purpose, such as, withdrawal of money and therefore, it was concluded that declaration of a status on the basis of such a document was unjustified. That apart, the appellants had sought for declaration simplicitor without any consequential relief when in the pleading it was admitted that certain documents were in place and allegedly created by late Maguni while claiming himself as the son of the original plaintiff. Referring to the decision in **Amir Mohammad** (supra), learned counsel for the respondents submits that even though the correctness of an exparte judgment may be examined on the basis of the materials available on record and also if there was any error, defect or irregularity which affected the decision of the suit. There is no quarrel over the above settled position of law. At the cost of repetition, it is stated that ex-parte judgment may be challenged with all the options available for the defendant but while dealing with an appeal under Section 96(2) C.P.C., the same shall have to be considered on merit and not to examine whether there was sufficient cause for non-appearance before the Trial Court.In the case at hand, the respondents did not question the exparte decree on any such ground of default but on merit which was duly examined by the learned Lower Appellate Court which though received or dealt with the additional evidence but being not satisfied with the nature of evidence already on record and relief sought for which was merely for declaration of status. In the considered view of the Court, the matter was remanded for a fresh adjudication which is not entirely based on additional evidence. As a consequence, the Court is of the view that the respondents should only be allowed to participate in the trial as it is just and expedient in the interest of justice since there is pleading to the effect that late Maguni proclaimed himself as the successor of the original plaintiff and for having noticed existence or creation of certain records in support thereof.

10. Accordingly, it is ordered.

11. In the result, the appeal stands dismissed, however, with the observation as aforesaid but without costs. Since the suit on remand is a year-old one, the learned Civil Judge (Senior Division), Jajpur is hereby requested to ensure its disposal at the earliest.

2023 (III) ILR – CUT- 221

R.K. PATTANAIK, J.

RSA NO. 227 OF 2002

NARAYANI THAKURANI & ORS. …….Appellants

.V.

THE STATE OF ORISSA & ORS. …….Respondents

ODISHA HINDU RELIGIOUS ENDOWMENT ACT, 1951 – Maintainability of suit – The plaintiff instituted suit for declaration of right, title, interest and confirmation of possession and right to seva puja in respect of the deity – Whether in view of the special statute OHRE Act, for determination of the claims of the parties suit U/s. 41 is maintainable? – Held, No. (Para 10-11)

Case Laws Relied on and Referred to :-

1. AIR 2006 ORISSA 72: Executive Officer, Sri Baldev Jew Bije,Keonjhar Vs. Anapurna Jena & Anr.
2. 1986 (I) OLR 636 : The Deity Shri Jagannath Swami & Ors. Vs. Biswanath Panda.
3. ILR 1974 Cutt.187 : Sureswar Pujhari & Ors. Vs. Jadumani Pujhari & Ors.

For Appellants : Mr. Suresh Kumar Choudhury

For Respondents : Ms. S. Mishra, ASC
Mr. Budhiram Das

JUDGMENT Date of Judgment: 21.08.2023

R.K. PATTANAIK, J.

1. Instant appeal under Section 100 of the Civil Procedure Code,1908 is at the behest of the appellants assailing the impugned judgment and decree dated 8th August, 2002 promulgated in Title Appeal No.34/39 of 2002-95 by the learned Adhoc Additional District Judge (Fast Track Court No.I), Puri, whereby, the decision in T.S. No.32 of 1987 of the learned Civil Judge (Junior Division), Puri stands confirmed on the grounds inter alia that the same is against the weight of evidence on record.

2. The appellants as the plaintiffs instituted the suit in T.S.No.32 of 1987 for declaration of right, title, interest and confirmation of possession vis-à-vis the suit schedule land and for perpetual injunction against the defendants and others of village Tentulia restraining them from interfering with its possession and right to Seva Puja in respect of the deity, namely, appellant No.1. In the said suit, respondent No.1 State was set ex-parte and it was dismissed as against the other respondents. Being aggrieved of, the appellants preferred the appeal in Title Appeal No.34/39 of

2002-95 which was again dismissed by the learned Lower Appellate Court. Having been unsuccessful before the learned courts below, the appellants filed the present appeal with the following grounds, such as, the findings are not supported by evidence available on record; the right, title and interest ought to have been declared in favour of appellant No.1; they being the earlier recorded marfatdars, appellant No.1 deity ought to have been under their care and them of having the right to perform Seva Puja; appellant No.1 being a perpetual minor, the deity's property should have been declared as a public religious endowment with the correction of the record since they and others of village-Mula Alasa held to have been the marfatdars in the successive Record of Rights so on and so forth or else for them to approach the Endowment Authority for a declaration in respect thereof instead of dismissing the suit.

3. Heard Mr. Choudhury, learned counsel for the appellants, Ms.Mishra, learned ASC for appellant No.1 and Mr. Das, learned counsel for respondent Nos.2 to 4.

4. Considering the pleadings on record, the learned Civil Judge (Junior Division), Puri framed as many as eight issues including the following, such as, whether the appellants have the right, title and interest and entitled for confirmation of possession vis-à-vis the suit schedule land and if they have the exclusive right to perform Seva Puja of the deity in question. The issues have been answered by the learned Trial Court but finally dismissed the suit and as earlier mentioned, the decision was confirmed in appeal. Having regard to the above, this Court by order dated 5th December, 2002 formulated the substantial question of law, such as, whether in view of the special statute, namely, Odisha Hindu Religious Endowments Act, 1951 (hereinafter referred to as 'the OHRE Act') for determination of the claims of the parties under Section 41 thereof, the suit was barred and as such, the learned courts below should not have entertained the same. In other words, the maintainability of the suit is being questioned by the appellants on the ground that the claim advanced by them was required to be adjudicated upon in terms of Section 41 of the OHRE Act.

5. Mr. Choudhury, learned counsel for the appellants would submit that the learned courts below have conveniently ignored the OHRE Act while deciding the dispute with reference to the claim of Seva Puja and management of the deity while considering, whether, the subject matter in question belongs to the deity. It is further submitted that the suit ought not to have been entertained as it is barred in view of Section 73 of the OHRE Act. Mr. Choudhury contends that the Commissioner of Endowments should have been arrayed as a party in the suit as the dispute is in relation to a public religious institution and involving a deity in view of Section 69(1) of the OHRE Act. So, therefore, it is argued that the dismissal of the suit and

confirmation of the decree by learned Lower Appellate Court in Title Appeal No.34/39of 2002/95 cannot be sustained in law and while advancing such an argument, Mr. Choudhury relies on a decision of this Court in **Executive Officer, Sri Baldev Jew Bije, Keonjhar Vrs. Anapurna Jena and Another AIR 2006 ORISSA 72** stating that the suit is hit under Section 73 of the OHRE Act. One more decision is placed reliance on by Mr. Choudhury reported in **1986 (I) OLR 636** in the case of **The Deity Shri Jagannath Swami and Others Vrs. Biswanath Panda** to contend that the deity and the subject of dispute being in relation to a public religious institution, notice to the Commissioner of Endowments under Section 69(1) was necessarily to be complied with.

6. On the contrary, Mr. Das, learned counsel for the respondent Nos.2 to 4 submits that the learned courts below did not err on facts and law and rightly dismissed the suit after considering all such aspects related to the dispute. It is submitted that the appellants in representative capacity had instituted a suit in T.S. No.54 of 1985 which was, however, withdrawn and on the selfsame cause of action, the present suit was filed without the leave of the court and in view of Order XXIII Rule 4 CPC, they are precluded from instituting it in respect of the same subject matter. That apart, Mr. Das submits that there is no proper description of the plaint schedule property as required under Order VII Rule 3 CPC and on that score, the suit is not maintainable. Furthermore, Mr. Das contends that as per the Record of Right of 1927, the suit Plot No.29, Khata No.45 measuring an area of Ac.0.05 decimal in village Tentulia stood recorded in the name of ex-intermediary and as such, the nature of land was 'Anabadi' and in 1977 settlement, the same was recorded as 'Nayanjori' and at no point in time, it was recorded with the deity and therefore, the appellants or for that matter, the villagers of Mula Alasa do not have any right, title and interest thereon or possessed of any such exclusive right to perform Seva Puja of the deity. Never before, as according to Mr. Das, the appellants approached the Settlement and Consolidation Authorities for correction of the Record of Right in respect of the schedule property and could have preferred an appeal or revision after publication of final consolidation RoR i.e. Ext. F and in absence of any such evidence, the alleged claim in the suit is not maintainable since it is barred by the principle of constructive res judicata as per Explanation VIII to Section 11 CPC. In view of the above, Mr. Das finally submits that the learned courts below committed no serious illegality in dismissing the suit and hence, the appeal sans merit. Whereas Ms. Mishra, learned ASC for appellant No.1 supported the contention of Mr. Das, learned counsel for respondent Nos.2 to 4.

7. The suit by the appellants is in respect of the subject and interest of the deity, namely, appellant No.1 and the right to perform Seva Puja of the said deity being the original marfatdars. On such other grounds besides want of evidence in support of the exclusive right to perform Seva Puja, the learned Trial Court dismissed the suit. The learned Lower Appellate Court reached at a similar conclusion and confirmed the dismissal of the suit but with necessary observation

that appellant No.1 is a public deity and as such, not only the parties involved but also the villagers of Tentulia and Mula Alasa and other general Hindu public have the right of Seva Puja and Darshan of the deity and for that, the appellants cannot claim any exclusive right. So, according to the learned Lower Appellate Court, no one has exclusive right, title and interest over the subject of the deity or to perform Seva Puja as the villagers of Tentulia and Mula Alasa as a whole to be having the said right and Darshan. In any case, the suit was dismissed and such finding of the court of first instance stood confirmed in Title Appeal No.34/39 of 2002/95. Admittedly, the Record of Right does not stand in favour of the appellants. It is also an admitted fact that the appellants or any one from village Mula Alasa never approached the Settlement Authorities challenging the Record of Right. The consolidation RoR has also not been challenged by the appellants. The learned Lower Appellate Court held that any such entry in the earlier settlement record cannot be regarded as a rebuttal presumption as to the correctness of the later one. In fact, the appellants instituted the suit not only for a declaration vis-à-vis the suit schedule property and subject in respect of the deity but also to declare them of having the right to perform Seva Puja exclusively. As earlier discussed, due to absence of evidence, both the learned courts below declined to admit the claim of the appellants vis-à-vis the exclusive right to perform Seva Puja of the deity. However, it is held that appellant No.1 is a public deity. In other words, it is not a dispute between the parties over the nature of the deity whether to be public or otherwise. The dispute is primarily with regard to the claim of being marfatdars of the deity by the appellants which was rejected by the learned courts below disbelieving the exclusive right to perform Seva Puja. Interestingly, the learned Trial Court did not consider the defendants or for that matter, the villagers of Tentulia either to have any such exclusive right to perform Seva Puja. So, therefore, even though the learned courts below held that the dispute is over and in respect of a public deity, both declined to admit and accept the fact that the exclusive right to perform Seva Puja lies with the appellants or private respondents. Quite strangely, respondent No.1 State did not participate in the suit rather was set ex-parte. As against the aforesaid background facts, the legality of the impugned judgment of the learned Lower Appellate Court is to be examined which fully confirmed the findings in the suit.

8. Without touching upon other issues involved, the question with regard to maintainability of the suit in the light of the argument advanced by Mr. Choudhury, learned counsel for the appellants that it is hit by virtue of Section 73 of the OHRE Act is to be examined. It is contended that the learned Civil Judge (Junior Division), Puri ought to have issued notice to the Commissioner of Endowments in view of Section 69 of the OHRE Act which was not accomplished despite the fact that the dispute between the parties to in relation to a public deity is also a matter to be thrashed out. The maintainability of the suit was not questioned by the respondents before the learned courts below.Such a question has been raised by the appellants at

present with the contention that as it was with regard to a public deity, compliance of Section 69 of the OHRE Act was mandatory. That apart, it is claimed the suit is hit under Section 73 of the OHRE Act since the dispute is over and in respect of a public religious institution to be dealt with by the authorities concerned.

9. In **Biswanath Panda** (supra), this Court held and observed that whenever a trustee of any religious institution is sued in respect of any property belonging to any religious institution, notice of such suit shall have to be issued by the court to the Commissioner of Endowments in compliance of Section 69(1) of the OHRE Act as the latter being the Statutory Authority to administer and regulate the activities of all the religious institutions and also referred to one of its earlier decisions in **Sureswar Pujhari and Others Vrs. Jadumani Pujhari and Others ILR 1974 Cutt.187**, wherein, it has been concluded that the said requirement is mandatory and it admits no exception. In Anapurna Jena (supra), this Court held that dispute pertaining to landed property of the public religious institution cannot be the subject matter of any other forum or courts in view of Section 73 of the OHRE Act which is to supersede a general law in place.

10. There is no denial to the fact that in case of public religious institution, if there is any dispute over the same and the deity or for that matter, the trustee is sued, notice of the same is required to be served on the Commissioner of Endowments at least a month before commencement of the proceeding which is the statutory mandate as envisaged in Section 69 of the OHRE Act. It is equally a settled law that any such dispute in relation to a public religious institution, jurisdiction of all other courts stands ousted by virtue of Section 73 of the OHRE Act. In the instant case, the appellants not only sought for a declaration of title over the suit property in respect of the public deity but also demanded a right to perform Seva Puja in exclusion of all others including the respondents and villagers of Tentulia. In so far as Section 73 of the OHRE Act is concerned, the bar from entertaining the suit or any other proceedings applies to and in respect of the administration of a religious institution or any other matter or dispute, for determination of which, the provisions under the OHRE Act apply. As to the suit at hand, it is not merely with respect to the affairs of a public religious institution or for a declaration as to the marfatdars of the deity but inclusive of a relief vis-à-vis title over the suit schedule property and injunction. So, therefore, it is not entirely a dispute to be regarded as and in respect of administration of a public religious institution in view of the declaration of title sought for by the appellants as well. Irrespective of the nature of the property and the manner in which the same has been endowed for the deity, since a declaration is sought for with regard to title and injunction against the private respondents, in the considered view of the Court, bar under Section 73 of the OHRE Act shall not apply to hold that the suit is not maintainable.

11. But, when the learned courts below conclusively held that the dispute related to a public deity or a religious institution attended by the villagers of Mula

Alasa and Tentulia, it was necessary that notice was to be served on the Commissioner of Endowments in compliance of Section 69(1) of the OHRE Act. As earlier discussed, this Court in **Biswanath Panda** (supra) held that such compliance is mandatory and confirmed the view expressed earlier in **Sureswar Pujhari** (supra). As it was in relation to a dispute raised at the behest of the appellants claiming themselves are the original marfatdars seeking other reliefs, notice under Section 69(1) of the OHRE Act was mandatory. In other words, the appellants would have been directed to take notice to the Commissioner of Endowments in confirmity with the requirement of Section 69(1) of the OHRE Act as he is considered to be statutory authority responsible in the administration of all such religious institutions. Nevertheless, the suit since instituted for a declaration of title and injunction vis-à-vis the schedule property apart from claiming right to offer Seva Puja but the appellants having failed to adduce any rebuttal evidence against the recording in Hal and Consolidation RoRs i.e. Exts. D and F, rightly, therefore, it has been concluded by the learned courts below that the appellants cannot take advantage of the endorsement or entry made in the remarks column of Ext.2. The finds that both the courts below proceeded on similar lines and dismissed the relief of title and injunction and also disbelieved the exclusive right of Seva Puja due to want of evidence of rebuttal nature. Of course, a record of right does not create or extinguish title but to dislodge a revenue record, evidence is required to rebut the presumption arising therefrom, which in the instant case found to be conspicuously absent. Law is settled that though an entry is attached with a probative value as to possession but it cannot rebut the presumption of correctness relating to a later Record of Right. In absence of clinching evidence on the issue in juxtaposition to the rival claim, the Court reaches at a conclusion that the findings of the learned courts below to be unassailable. At the first blush, the Court was contemplating to restore the suit for a fresh decision in the immediate presence of the Commissioner of Endowments as the requirement of Section 69(1) of the OHRE Act was in clear deficit but the claim for title having not been proved and established to the hilt, no real purpose would be achieved thereby. But, the dispute remained unresolved which is related to a deity and largely admitted as and in respect of a public religious institution. The appellants demanded for an alternate remedy to approach the Endowment Authority which is otherwise also a course statutorily available even after being unsuccessful in clinching the relief of title. Apart from above, judicial notice of Section 8-B of the OHRE Act which confers an overriding power to the Commissioner of Endowments and such other Authorities so specified therein to initiate action under any of the provisions of the said Act in respect of any such institution, if on information received or otherwise provided it relates to a religious institution within the meaning of Section 3(xiii) thereof. In fact, power is vested with such Authority even to make interim arrangement for smooth management of a religious institution besides adjudication of the dispute amenable to the jurisdiction exercised under the OHRE Act. It would therefore not be incorrect to hold that by virtue of Section 8-B of the OHRE Act, the Authority does have the special power to

administer a religious institution irrespective of any such dispute pending before a court or such other forum. Having held so, the Court reaches at a logical conclusion that the learned courts below having rejected the relief of title and injunction vis-à-vis the schedule property fell into serious error in dismissing the suit without enabling the parties to seek appropriate remedy under the OHRE Act since the appellants claim exclusive right of Seva Puja of the deity by whatever means either by custom, usage or otherwise. Accordingly, the substantial question of law is answered.

12. Accordingly, it is ordered.

13. In the result, the appeal stands allowed in part. As a necessary corollary, the impugned judgment and decree dated 8th August,2002 in Title Appeal No.34/39 of 2002-95 of the learned Adhoc Additional District Judge (Fast Track Court No.I), Puri, is hereby set aside to the extent as aforesaid leaving the parties to avail the remedy under the OHRE Act.

—— o ——

2023 (III) ILR – CUT - 227

SASHIKANTA MISHRA, J.

RSA NO. 228 OF 2014

SALIPUR COLLEGE, SALIPUR …….Appellant

.V.

SALIPUR TRAINING COLLEGE & ORS. ……..Respondents

CODE OF CIVIL PROCEDURE, 1908 – Order II Rule 2 – The plea of Bar under Order 2 Rule 2 have not taken in the written statement filed in response to the notice of the suit – No issue was framed on that point by the Learned Trial Court – The same was not agitated before the Appellate Court – Whether the Appellant is permitted to raise the issue for the first time at the stage of second Appeal? – Held, No. (Para 15)

Case Laws Relied on and Referred to :-

1. AIR 1964 SC 1801:Gurubux Singh Vs. Bhoora Lal.
2. (1999) 6 SCC 40: Rikob Das A Oswal Vs. Deepak Jewellers.
3. (2004) 7 SCC 650:Dalip Singh Vs. Mehar Singh Rathee.
4. (2022) 19 SCC 80 :B. Santoshamma & An.r Vs. D. Sarala & Anr.

For Appellant : Mr. Jayadeep Pal, Mr. Abhijit Pal

For Respondents : Mr. S.P.Mishra, Sr. Adv.

JUDGMENT Date of Judgment: 21.07.2023

SASHIKANTA MISHRA, J.

1. The Appellant was the Defendant No.1 in C.S. No.52/2006 of the Court of Civil Judge (Jr. Division), Salipur which was dismissed vide judgment passed on 12th July, 2013 followed by decree on 27th July, 2013. The said judgment and decree was set aside in appeal as per judgment and decree passed on 22nd February, 2014 and 4th March, 2014 respectively by the Addl. District Judge, Cuttack in R.F.A. No.110/2013. The present appeal has been filed questioning the correctness of the judgment passed by the First Appellate Court.

2. For convenience, the parties are referred to as per their respective status in the Court below.

3. The Second Appeal was admitted on the following substantial question of law;

> *"Whether in view of dismissal of the earlier suit bearing C.S. No.61 of 2003 of the court of learned Civil Judge (Jr. Division), Salipur on contest and in view of attainment of the finality of said judgment and decree passed therein, the present suit ought to have been held to be barred under Order 2 Rule 2 of the Code of Civil Procedure?"*

4. The present Respondent No.1 being the Plaintiff filed the aforementioned suit for declaration of right, title and interest including possession over the suit property with an alternative prayer to direct the Defendant No.1(present Appellant), Salipur College to execute a deed of conveyance in favour of the plaintiff. The plaintiff was a wing of Salipur College along with another wing namely, Pharmacy College with both being under the common management of the College. On a proposal submitted by the management of the College as per Resolution passed on 24th August 1980 before the Government in the Department of Education and Youth Services and accepted by it, private land adjoining the College to the extent of Ac.7.388 decs. was allowed to be acquired by Defendant No.1 (Salipur College) on the condition of the entire cost thereof to the tune of Rs.6,20,406.30 being borne by Plaintiff. The entire cost was deposited being collected from different sources including from the two wings. On 4th March, 1986 Salipur College instructed the Plaintiff College to bear the cost of the suit land which was calculated as Rs.75,745.00. On 5th March, 1986, the amount was deposited by the Plaintiff College. The Pharmacy wing was similarly directed to deposit the amount which it did. Thus, on deposit of the entire amount Ac.6.523 decs. of land in place of Ac.7.388 decs. including the suit land was acquired in the name of Salipur College from its private owners. The possession of land was handed over in favour of the Principal-cum-Secretary, Salipur College by way of a certificate granted on 24th August, 1987. On 12th November, 1988 a meeting was held for final allotment of plots of land acquired and accordingly, the suit land was exclusively allotted by Salipur College in favour of the Plaintiff Training College and possession was also delivered. Since then, the Plaintiff is in peaceful, continuous and uninterrupted

possession. On 17th July, 2003 the Defendant intended to encroach upon a part of the suit land for which the plaintiff filed a suit being C.S. No.61/2003 with prayer for declaration of title, possession and permanent injunction. The suit was however, dismissed on contest by holding that the same had been filed only to avoid the execution of a deed of conveyance. Thereafter, the plaintiff requested the Defendant No.1 to execute a deed of conveyance in its favour, but the Defendant No.1 refused for which the plaintiff filed the present suit claiming the relief as already stated hereinbefore.

5. Out of three defendants, only Defendant No.1 contested the suit while Defendant No.3 adopted the written statement filed by Defendant No.1. In its written statement, Defendant No.1 admitted the case of the plaintiff to the extent that the right, title and interest over the suit property is in fact in favour of the plaintiff and therefore, the prayer made in the suit be allowed. Since plaintiff is the owner of the suit property in possession, no deed of conveyance is required to be executed in its favour.

6. Basing on the rival pleadings, the trial Court framed four issues for determination including the pivotal Issue No.III, which runs as follows;

> *"III. Whether the plaintiff is entitled to a decree of declaration of its right, title, interest and possession over the suit land or in alternative a direction be issued to the defendant no.1 to execute a deed of conveyance in respect of the suit land in favour of the plaintiff?"*

7. After considering the oral and documentary evidence, the Trial Court observed that despite claiming the relief of declaration of right, title and interest and possession, the prayer of the plaintiff is actually confined to the execution of deed of conveyance by the Defendant No.1 in its favour. However, such prayer was found to be non-specific and abstract inasmuch as the plaintiff had not specified the form and nature of conveyance which it sought from the Defendant No.1. The Trial Court further refused to rely upon the resolution of the Managing Committee on the ground that the same cannot confer title upon any person in respect of any property. As regards the previous suit (C.S. No.61/2003), the Trial court held that both the suits contained identical prayers and only to avoid the principle of res-judicata the plaintiff had added the alternative prayer for direction to defendant no.1 to execute the deed of conveyance. Thus, holding the suit as a collusive one, the Trial Court held that the plaintiff has no cause of action to institute the suit as defendant No.1 is not the rightful person to execute a deed of conveyance in favour of the plaintiff and moreover in the absence of any evidence the relief of declaration of title cannot be granted.

8. In the First Appellate Court, it was contended on behalf of the plaintiff-appellant that since Defendant No.1 had admitted the title of the plaintiff over the suit land but had only resisted the prayer to execute a deed of conveyance, the Trial Court committed gross error of law in dismissing the suit by holding the same to be barred by the principle of res-judicata. In course of hearing of the appeal, the

Government pleader representing the other defendants acknowledged the entire claim of the plaintiff-appellant and as such the plaintiff did not insist upon the other relief claimed by it for execution of deed of conveyance. The First Appellate Court specifically found that such relief had not been claimed in the earlier suit and that the oral and documentary evidence on record clearly revealed that the plaintiff has right, title and interest over the suit property and is in peaceful and exclusive possession thereof since 12th November, 1988. The First Appellate Court therefore, held that under such circumstances, it cannot be held that the plaintiff had no cause of action to agitate. Further, relying upon some case laws the First Appellate Court held that the plaintiff can be said to have possessory title over the suit property. Therefore, applying the principle 'possession follows title' it was held that the Trial Court committed an error in denying the relief for declaration of right, title, interest and possession in favour of the plaintiff. The First Appeal was thus allowed in part by issuing necessary declaration in favour of the plaintiff.

9. Heard Mr. Abhijit Pal, learned counsel for the Appellant and Mr.S.P.Mishra, learned Senior Counsel appearing for the contesting Respondent No.1.

10. Assailing the judgment of the First Appellate Court, Mr. Pal would argue that the Resolution dated 12th November, 1988 on the basis of which the plaintiff was allotted the suit land was never exhibited before the Trial Court. Therefore, the finding of the First Appellate Court that the plaintiff has possessory title over the suit property is entirely illegal. Mr. Pal would further contend that the earlier suit claiming the same relief having been dismissed on contest, the subsequent suit including the prayer for direction to the Defendant No.1 to execute the deed of conveyance is hit by the principles enshrined under Order II Rule 2 C.P.C. inasmuch as the alternative relief for direction to execute the deed of conveyance was available to be claimed also in the first suit but was not done. Mr. Pal has relied upon a decision of the Apex Court in the case of **Gurubux Singh v. Bhoora Lal**; reported in AIR 1964 SC 1801 in support of his contention.

11. Mr. S.P.Mishra, learned senior counsel appearing for the Plaintiff-Respondent No.1, on the other hand, would argue that the bar under Order II Rule 2 of C.P.C. has no automatic application but has to be pleaded and satisfactorily established. In order to sustain the plea the concerned party is required to make necessary pleadings and also to satisfactorily establish the same. In the case at hand, the Defendant No.1 never took the plea of bar under Order II Rule 2 of C.P.C. in its written statement for which no issue was framed by the Trial Court. According to Mr. Mishra therefore, it is not open to the Defendant No.1 to raise such plea at this belated stage. Mr. Mishra has also relied upon several judgments of the Apex Court in this regard namely;

(1) ***Alaka Gupta vrs. Narendra Kumar Gupta*** *(Civil Appeal No.8321/2010).*

*(2)****Rikob Das A Oswal vrs. Deepak Jewellers****; reported in (1999) 6 SCC-40.*

*(3)**Dalip Singh Vrs. Mehar Singh Rathee**; reported in (2004) 7 SCC 650.*

*(4)**B. Santoshamma and another vrs. D. Sarala and another**; reported in (2022)19 SCC 80.*

12. The facts of the case as narrated hereinbefore are undisputed inasmuch as the plaintiff had originally filed a suit being C.S. No.61/2003 claiming the relief of declaration of right, title, interest and possession over the suit property. In the subsequent suit i.e. C.S. No.52/2006 the same relief was claimed and in addition, alternative relief of direction to execute the deed of conveyance was claimed. On the face of it, the subsequent suit appears to be barred by the principles underlined under Order II Rule 2 of C.P.C.. In the case of **Gurubux Singh (Supra)**, the constitution Bench of the Apex Court held as follows;

> *"In order that a plea of a bar under Order 2 Rule 2 (3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order 2 Rule 2, Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits……"*

13. So essentially, **Gurubux Singh (Supra)** dwells upon the conditions necessary for application of the bar under Order II Rule 2 of C.P.C. There is no quarrel with the proposition laid down in **Gurubux Singh (supra),** but the question raised before this Court is slightly different inasmuch as it relates to the permissibility of taking the plea of bar under Order II Rule 2 C.P.C. at a subsequent stage if not taken earlier.

14. In the judgments cited by Mr. Mishra particularly the case of ***Rikob Das A Oswal (supra)***, the Apex Court held that the plea of bar under Order 2 Rule 2 of C.P.C. is a technical plea which has to be pleaded and satisfactorily established and further that if such plea is not taken, the Court should not suo motu decide the plea. In ***Dalip Singh (supra),*** the Apex Court held that the plea of applicability of Order II Rule 2 of C.P.C. and the subsequent suit being barred was not taken by the appellant in his written statement filed in response to the notice of the suit nor any issue framed on the point;

"..... We need not examine the merit of the case as we have held that in the absence of pleadings or the issue regarding the bar of Order 2 Rule 2 of C.P.C. in filing the suit, the appellant cannot be permitted to raise such a plea."

15. Thus, in the absence of specific pleading by Defendant No.1 in its written statement of the suit being barred by Order II Rule 2 of C.P.C. nor the same being agitated before the First Appellate Court, cannot be permitted to be raised for the first time before this Court.

16. For the foregoing reasons therefore, this Court finds that the appeal is based on untenable premises and therefore, cannot be entertained.

17. In the result, the appeal fails and is therefore, dismissed but in the circumstances, without any cost.

—— o ——

2023 (III) ILR – CUT- 232

SASHIKANTA MISHRA, J.

RSA NO. 359 OF 2013

SUBASINI MEHER .....Appellant

.v.

JANMAJAYA PANIGRAHI & ORS. .....Respondents

REGISTRATION ACT, 1908 – Section 49 – Whether the unregistered sale deed can be treated as an agreement for sale so as to be enforced legally? – Held, No – An unregistered sale deed tendered not as evidence of complete sale but as proof of oral agreement for sale which can be received in evidence and can be used for collateral purpose. (Para 13)

Case Laws Relied on and Referred to :-

1. (2010) 5 SCC 401 : S.Kaladevi Vs V.R.Somasundaram & Ors.
2. (2008) 8 SCC 564 : K.V.Saha and Sons (P) Ltd. Vs. Development Consultant Ltd.
3. 2023 Live Law (SC) 304 : R. Hemalatha Vs. Kasthuri.

For Appellant : Mr. Ramakanta Mohanty, Sr. Adv.
Mrs. Sumitra Mohanty

For Respondents : Mr. K.A.Guru

JUDGMENT Date of Judgment: 09.08.2023

SASHIKANTA MISHRA, J.

1. This appeal is against the confirming judgment passed by learned District Judge, Sambalpur on 18th May, 2013 followed by decree in R.F.A. No.45/2012. The Appellant is the Defendant in the original suit i.e. Civil Suit No.14/2005 of the court

of learned Civil Judge (Sr. Division), Sambalpur. The suit was filed by the Plaintiff for a decree of specific performance of contract against the Defendant directing her to execute a fresh sale deed in his favour in respect of the suit schedule land, alternatively, for recovery of the consideration money paid by him with pendent lite and future interest. The said suit was decreed vide judgment dated 5th January, 2012 followed by decree on 20th November, 2012. The decree was confirmed in the First Appeal.

2. For convenience, the parties are referred to as per their respective status in the Court below.

3. The Second Appeal has been admitted on the following substantial question of law;

> *"Whether the so called Agreement to sell dated 19.4.2003 with P.W.3 in which the plaintiff claims to have been substituted, could have been specifically enforced in this suit when that transaction came to an end for non-registration on a reason not attributable to the defendant-appellant and the plaintiff's own case is that he wanted the Defendant to execute a fresh Sale deed which is not backed by any agreement to sell"*

4. The Plaintiff's case is that the suit schedule land belongs to the Defendant, she having purchased the same from the previous owner vide RSD No.1734 dated 9th July, 1990. She executed an Agreement on 19th April, 2003 with one Rajaram Panda to sell Ac.0.05 dec. (Schedule 'A') for Rs.50,000/- to meet the expenses of her daughter's marriage. She received Rs.40,000/- in cash from said Rajaram Panda towards advance. Being in need of further money she approached Rajaram Panda but he refused to pay. Under such circumstances, the defendant offered to sell the property to the original plaintiff Sachidananda Panigrahi (who having expired during pendency of the suit since has been substituted by his L.Rs) for a consideration amount of Rs.60,000/-. On 25th January, 2003 a sale deed was scribed according to the defendant's instruction and the original plaintiff paid Rs.60,000/- to her in presence of witnesses, whereupon she executed the sale deed. Out of the said amount she repaid Rs.40,000/- to Rajaram Panda. The sale deed however, could not be registered for various reasons and on being approached, the defendant remained unresponsive despite service of registered notice on her. Hence, the suit.

5. The defendant took the plea that she wanted to sell the land to the plaintiff and as per their understanding the entire consideration amount was to be paid at the time of registration, but the sale deed was scribed when the plaintiff paid the amount towards stamp to the Stamp Vendor. Thus, the defendant denied the assertion that the plaintiff had paid the consideration amount for which she did not agree for registration of the sale deed. It is her further stand that she being a woman was requested by the plaintiff to put her signature on the sale deed for completion of the procedural formalities, which she did on good faith. Non-registration of the sale deed was not due to her fault and she had no further agreement, either oral or otherwise to execute another sale deed.

6. Basing on the rival pleadings, the trial Court framed seven issues for determination including the pivotal Issue No.2, which reads as follows;

> *"2.Whether the defendant entered into an agreement with the plaintiff on 25.4.2003 to sale Schedule A land and the sale deed was scribed in the same day after receipt of Rs.60,000/ towards the consideration amount?"*

7. The trial Court scanned the oral and documentary evidence in detail and found evidence to show that the defendant had received the consideration money of Rs.60,000/- and had executed the sale deed in favour of the plaintiff fully knowing the contents of the documents, but subsequently, the sale deed could not be registered. Thus, holding that the consideration amount was paid, the suit was decreed by directing the defendant to register the sale deed in favour of the plaintiff in respect of Schedule 'A' land within two months.

8. The plaintiff carried the matter in appeal. The First Appellate Court also looked at the oral and documentary evidence on record and held that the finding of the Court below regarding receipt of the consideration amount of Rs.60,000/- by the defendant and execution of the sale deed does not warrant any interference more so, as the receipt of registered notices issued by the plaintiff to the defendant had not been disputed. On such findings, the First Appellate Court dismissed the appeal.

9. Heard Mr. Ramakanta Mohanty, learned senior counsel for the Appellant-Defendant being assisted by Mrs. Sumitra Mohanty and Mr.K.A.Guru, learned Counsel appearing for the contesting Respondent-Plaintiff.

10. Learned Senior counsel Mr. Mohanty submits that once the agreement for sale with Rajaram Panda fell through, there was no subsisting agreement for sale between the plaintiff and the defendant so as to be enforced in the Court of law. The sale deed though executed was not registered and cannot be treated as a contract capable of being enforced more so as it does not contain any recital to suggest a prior agreement for sale between the parties. According to Mr. Mohanty therefore, both the Courts below have completely misdirected themselves to treat the unregistered sale deed as an agreement for sale for the plaintiff to maintain a suit for its specific performance.

11. Mr. K.A.Guru, learned counsel for the Respondent No.1, on the other hand, would argue that admittedly the defendants offered to sell the land for consideration of Rs.60,000/- to the original plaintiff which was accepted. There was thus a valid contract of sale between them. Further, as per the evidence on record, the plaintiff had paid the total consideration amount thereby performing his part of the contract. The onus is therefore, on the defendant to perform her part of the contract by registering the sale deed.

12. The basis facts are not disputed and hence, it is not proposed to delve deep into the pleading of the parties. It would suffice to note that as per the defendant's

own stand taken in her written statement, she wanted to sell the suit land to the plaintiff. It is borne out from the evidence on record that an amount of Rs.60,000/- was paid by the plaintiff to the defendants at the time of scribing of the deed. It is also not disputed that the sale deed was executed being signed by the defendant. The question that falls for consideration on such facts is, whether the unregistered sale deed can be treated as an agreement for sale so as to be legally enforced. It goes without saying that only a valid contract can be enforced subject to the provisions of the Specific Relief Act. As regards the effect of an unregistered sale deed, it would be apposite to refer to Section 49 of the Registration Act, 1908, which reads as follows;

> *"49. Effect of non-registration of documents required to be registered.—No document required by section 17 1[or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall—*
>
> *(a) affect any immovable property comprised therein, or*
>
> *(b) confer any power to adopt, or*
>
> *(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered: 54 [Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) 55, 56 [***] or as evidence of any collateral transaction not required to be effected by registered instrument.]*

13. Thus while an unregistered sale deed may not be capable of transferring title from vendor to vendee yet, it can be used for collateral purposes as laid down in the proviso quoted hereinabove. It is also well settled that an unregistered sale deed tendered not as evidence of complete sale but as proof of oral agreement for sale can be received in evidence. Reference may be had to the decision of the Apex Court in the case of ***S.Kaladevi vs V.R.Somasundaram & Ors***; (2010) 5 SCC 401. In the said case the earlier decision of the Apex Court in the case of ***K.V.Saha and Sons (P) Ltd. vs. Development Consultant Ltd***.; (2008) 8 SCC 564 was referred to, wherein the following principles were culled out;

> *"1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.*
>
> *2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.*
>
> *3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.*
>
> *4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.*

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

`It was further observed in para-15 as follows;

"15. This Court then held that the first appellate court rightly took the view that under Section 49 of the 1908 Act, an unregistered sale deed could be received in evidence to prove the agreement between the parties though it may not itself constitute a contract to transfer the property. It was held: (Kalavakurti Venkata case [(1999) 7 SCC 114] , SCC p. 119, para 11)

"11. ... The document has not been presented by the respondent to the Sub-Registrar at all for registration although the sale deed is stated to have been executed by the appellant as he refuses to cooperate with him in that regard. Therefore, various stages contemplated under Section 77 of the Act have not arisen in the present case at all. We do not think, in such a case when the vendor declines to appear before the Sub-Registrar, the situation contemplated under Section 77 of the Act would arise. It is only on presentation of a document the other circumstances would arise. The first appellate court rightly took the view that under Section 49 of the Act the sale deed could be received in evidence to prove the agreement between the parties though it may not itself constitute a contract to transfer the property."

Same principle has been reiterated by the Apex Court in a recent judgment rendered in the case of ***R. Hemalatha Vs. Kasthuri***; 2023 Live Law (SC) 304.

14. Coming to the facts of the present case, it is not disputed that the unregistered sale deed was admitted into evidence as Ext.2 obviously as evidence of an agreement for sale and not of sale per se. The defendant has admitted the execution of the deed. She also admits to have not responded to the registered notices issued by the plaintiff (Exts.4 and 5) to register the sale deed. In such view of the matter, this Court is of the considered view that both the Courts below have rightly rejected the plea of the defendant and held that the plaintiff is entitled to a decree for Specific Performance of Contract by way of directing the defendant to register the sale deed in favour of the plaintiff in respect of the Schedule A land.

15. For the foregoing reasons therefore, the appeal is found to be devoid of merit and is therefore, dismissed but in the circumstances, without any cost.

—— o ——

2023 (III) ILR – CUT - 236

A.K. MOHAPATRA, J.

RVWPET NO. 257 & W.P.(C) NO.19402 OF 2023

KABITA JENA & ORS. …….Petitioners

.V.

RAJAT KUMAR MISHRA & ORS. …….Opp. Parties

W.P.(C) NO.19402 OF 2023
RUKSANA ARA BEGUM & ORS. -V- RAJAT KUMAR MISHRA & ORS.

(A) CODE OF CIVIL PROCEDURE, 1908 – Order 47, Rule 1 – The petitioners are the short listed candidates for appointment to the post of ASO – The selection process of ASO was challenged in the earlier writ petition – No effort was made by the petitioner to implead themselves as parties to the earlier writ petition – After the final judgment was delivered upon conclusion of a lengthy hearing, the present petitioners have approached this court by filling the present review on the ground of non-joinder of necessary party – Whether review is maintainable? – Held, No. (Para 34-36, 39-40)

(B) CONSTITUTION OF INDIA, 1950 – Article 226 r/w Order 47, Rule 1 of CPC – Whether a second writ petition filed by a person aggrieved, who was not impleaded as a party in the first writ petition is maintainable? – Held, Yes – To entertain such application, the petitioners are required to establish that they are necessary parties to the earlier writ petition. (Para-38)

Case Laws Relied on and Referred to :-

1. (2010) 12 SCC 204 : Public Service Commission, Uttaranchal Vs. Mamta Bisht & Ors.
2. 2020 (I) OLR (SC) - 216 :Jharkhand Public Service Commission Vs. Manoj Kumar Gupta & Ors.
3. (2008) 6 SCC 797 : State of Uttaranchal Vs. Madan Mohan Joshi & Ors.
4. (2009) 1 SCC 768 : Tridip Kumar Dingal & Ors. Vs. State of West Bengal & Ors.
5. (2020) 4 SCC 86 : Mukul Kumar Tyagi & Ors. Vs. The State of Utter Pradesh.
6. (2006) 12 SCC 724 : Km. Rashmi Mishra Vs. M.P. Public Service Commission & Ors.
7. AIR 1963 SC 1909 : Shivdeo Singh & Ors. Vs. State of Punjab & Ors.
8. (2006)8SCC192 : Union of India & Ors. Vs. Bikash Kuanar.

For Petitioners : Mr. Budhadev Routray,Sr. Adv.
M/s. S. Routray, M. Panda & Parida,

M/s. S.K.Samal, S.P.Nath, S.Routray, S.Sekhar,
J. Biswal & A.K.Das.

For Opp. Parties: Mr. Tarun Pattnaik, Addl. Standing Counsel

Mr. P.K. Mohanty, Sr. Adv

M/s. Pronoy Mohanty,
S.K. Sahu, S.N. Dash & K.T. Muduli

JUDGMENT Date of Hearing : 13.07.2023: Date of Judgment : 31.07.2023

A.K. MOHAPATRA, J.

The private Opposite Parties No.1 to 16 in the above noted review petition as well as in the above noted writ petition had earlier approached this Court by filing

W.P.(C) No.32174 of 2022. In the said writ petition, the private Opposite Parties No.1 to 16 as Petitioners questioned the selection procedure adopted by Odisha Public Service Commission (OPSC) while conducting the recruitment examination for appointment to the post of Assistant Section Officer (ASO) in Group-B of Odisha Secretariat Service. This Court after hearing the learned counsels appearing for both the sides in the said writ petition vide a detailed judgment dated 19.05.2023 under Annexure-7 to the review petition allowed the writ petition. Accordingly, the select list of the short listed candidates published vide Notice dated 07.11.2022 by the OPSC for the next phase of the selection process, i.e., for document verification and skill test under Annexure-5 to the aforesaid writ petition was quashed. Further, this Court directed the OPSC to redraw the select list of the short listed candidates strictly in terms of Rule-6(5) and Rule-6(6) as well as the schedule appended to the Odisha Secretariat Service (Method of Recruitment and Conditions of Service) Rules, 2016 on the basis of the aggregate marks secured by the candidates within a period of two months from the date of judgment.

2. The Petitioners, who are the candidates short listed after conclusion of the first phase of selection process and were supposed to appear in the second phase of the selection, i.e., document verification and skilled test, have approached this Court by filing the above noted review petition with a prayer to review/recall the judgment dated 19.05.2023 under Annexure-7 to the review petition. The above named Petitioners have also filed a writ petition as mentioned hereinabove with a prayer for review/recall of the judgment dated 19.05.2023 passed in the above noted writ petition. Therefore, on a careful scrutiny of both the review petition as well as the writ petition noted hereinabove, this Court observed that not only the parties are same, but also the prayer made in both the petitions are almost identical. Since both the aforesaid applications arise out of a common set of facts and the judgment dated 19.05.2023 has been assailed almost on identical grounds, therefore, this Court deems it proper to take up both the matters together and the same is being disposed of by this common judgment.

RVWPET No.257 of 2023

3. The factual background on which the present review petition has been filed, as narrated in the review petition, is that the OPSC published an advertisement on 31.12.2021 bearing Advertisement No.26 of 2021-22 for recruitment to the post of Assistant Section Officer in Group-B of Odisha Secretariat Service under Home Department. Accordingly, online applications were invited from prospective candidates. 25.02.2022 was the last date for submission of registered online application. In total 796 posts of A.S.O. in Group-B Cadre of Secretariat Service were advertised to be filled up.

4. Pursuant to the aforesaid advertisement dated 31.12.2021 under Annexure-1 to the review petition, many eligible candidates submitted their online application form to participate in the recruitment process. On receiving the application forms of

the candidates having eligibility to participate in the recruitment process, the OPSC initially scrutinized the application forms and after such verification, the candidates were issued with admit card to appear in the written examination which was to take place on 21.8.2022. However, subsequently postponed to 27.8.2022. The Petitioners along with private Opposite Parties and many other eligible candidates appeared in the examination held on 27.8.2022. The dispute arose after publication of the provisional list of the short listed candidates. The private Opposite Parties No.1 to 16 approached this Court challenging the list of short listed candidates published on 07.11.2022 on the allegation that such list has not been prepared in terms of the Rule-6 and the schedule attached to the relevant rules. It was also alleged by the private Opposite Parties that the OPSC without having the authority of law and contrary to the rules has fixed minimum qualifying marks of each subject in the written test. Accordingly, it was also alleged that the final list of short listed candidates reflecting the names of 1104 candidates (1.5 times of the advertised vacancy categoriwise) was prepared illegally and contrary to the provisions of the relevant rules.

5. It is pertinent to mention here that at the time of admission of W.P.(C) No.32174 of 2022, this Court after hearing the learned counsel appearing for the Petitioner as well as learned counsel for the State and the learned counsel appearing for the OPSC, passed an interim order on 02.12.2022 to the effect that the process of selection for the post of A.S.O. may continue as per schedule, however, no final merit list shall be published/notified till the next date. Such interim order continued till disposal of the writ petition.

W.P.(C) No.19402 of 2023

6. The present writ petition has been filed by the above named Review Petitioners with almost identical pleading and prayer. Since the present Petitioners were not arrayed as parties to W.P.(C) No.32174 of 2022, they have filed the above referred review petition for review/recall of judgment dated 19.05.2023. However, apprehending that the review may not be maintainable at their instance since they were not parties to the earlier writ petition, for abundant precaution, they have also filed the present writ petition by invoking jurisdiction of this Court under Articles 226 and 227 of the Constitution of India seeking review/recall of the judgment dated 19.05.2023 passed in W.P.(C) No.32174 of 2022. Since the factual background of both the review petition as well as the present writ petition is almost identical, to avoid repetition, this Court is of the view that the same is not necessary to be reiterated here again.

Grounds of Challenge

7. On perusal of the review petition, this Court observed that the review petition has been filed principally on the ground that the present Petitioners as well as the short listed candidates of the list published vide Notice dated 07.11.2022 containing 1104 number of candidates were not arrayed as Opposite Parties in the

earlier writ petition bearing W.P.(C) No.32174 of 2022. Therefore, it has been stated in the review petition that since they are necessary parties to the earlier writ petition, in their absence the judgment delivered by this Court needs to be reviewed by this Court. It has also been stated that nonjoinder of the short listed candidates is an error apparent on the face of the record and, as such, the same is a very good ground to review the judgment dated 19.05.2023.

8. Additionally, it has also been contended in the counter affidavit, the State has raised a question with regard to maintainability of the writ petition on the ground of nonjoinder of necessary parties. However, the same has not been dealt with and answered while delivering the judgment dated 19.05.2023. Accordingly, it has been stated that the same is also a very good ground to review judgment dated 19.05.2023.

9. The judgment dated 19.05.2023 is also sought to be reviewed by the present Petitioners on the ground that the advertisement dated 31.12.2021 under Annexure-1 contains a clause, i.e., Clause-6(c) providing that "The Commission shall be competent to fix up the qualifying marks in any or all the subjects of the examination." Therefore, it has been stated in the review petition that the OPSC being the recruiting agency is competent to fix up the qualifying marks in order to short list the candidates for appearing in the skill test and, as such, there is no illegality in the press note. It has also been stated that a total number of 148888 aspirants applied pursuant to the advertisement and that the OPSC being the expert body had devised its own method to short list the best candidates as per Clause-6(c) of the advertisement dated 31.12.2021. Moreover, it is also alleged in the review petition that the Petitioners were well aware of the Clause-6(c) of the advertisement and that after being unsuccessful in their attempt, they are estopped to turn around and challenge the select list of the short listed candidates.

10. In the grounds of the review petition, it has also been stated that since Clause-6(c) of the advertisement was not challenged and such Clause-6(c) confers discretion on the OPSC to fix up the qualifying marks in all or any other subjects, therefore, there is an error apparent on the face of the record and the judgment which is being sought to be reviewed. The grounds taken in the review petition further reveals that the Petitioners are also seeking review of the judgment on the ground that Rule-6(5) and Rule-6(6) of the 2016 Rules only specify the scheme and subject for the written examination and that one has to secure at least 40% marks in the skill test to qualify. Therefore, the aforesaid rules does not provide anything with regard to aggregate marks secured by the candidates moreover the aforesaid rules does not specify the method of short listing of the candidates. Accordingly, it has been stated in the review petition that the same is a very good ground for review of judgment dated 19.05.2023.

11. Finally, a ground has also been taken in the review petition that a valuable right has accrued in favour of 1104 selected candidates including the Review

Petitioners. Therefore, they were necessary parties to the earlier writ petition. Further, the judgment dated 19.05.2023 deciding the issue in the absence of the Petitioners and other short listed candidates has caused serious prejudice to such candidates as they were not impleaded as Opposite Parties and no opportunity of hearing was given to such candidates. Therefore, it was alleged that the earlier writ petition was a defective one and such a ground has not been dealt with in the impugned judgment.

12. On perusal of the above noted writ petition filed by the Review Petitioners, it appears that the grounds taken in the writ petition seeking review/recall of judgment dated 19.05.2023 are almost identical. Therefore, for the sake of brevity, the same is not repeated here.

13. Heard Mr. Budhadev Routray, learned Senior Counsel appearing for the Petitioners; Mr. Pradipta Kumar Mohanty, learned Senior Counsel appearing for the Odisha Public Service Commission and Mr. Tarun Patnaik, learned Additional Government Advocate appearing for the State-Opposite Parties.

14. Mr. Budhadev Routrary, learned Senior Counsel appearing for the Petitioners, at the outset, submitted that the judgment dated 19.05.2023 delivered in W.P.(C) No.32174 of 2022 needs to be reviewed by this Court as there are errors apparent on the face of the record and moreover no opportunity of hearing was given to the Petitioners while delivering the final judgment in the above noted writ petition. While elaborating his argument, Mr. Routray, learned Senior Counsel appearing for the Petitioner assailed the judgment dated 19.05.2023 mainly on the ground that the present Petitioners, who were short listed after conclusion of first phase of selection, were not arrayed as parties to the writ petition. He further submitted since a valuable right of the Petitioner is likely to be affected, therefore, they are necessary parties to the writ petition. As such, he further submitted that any decision in the absence of the necessary parties like the Petitioners, the judgment rendered by this Court on 19.05.2023 is a nullity in the eye of law.The entire argument and focus of Mr. Routray, learned Senior Counsel, while assailing the judgment dated 19.05.2023 was focused on the fact that necessary parties like the Petitioners were not arrayed as Opposite Parties and, as such, they did not get any opportunity to present their case before the final judgment was delivered on 19.05.2023. In such view of the matter, he further contended that the judgment dated 19.05.2023 needs to be reviewed/recalled by this Court on that ground alone.

15. Keeping in view the argument advanced by the learned Senior Counsel appearing for the Petitioners and the grounds taken in both the review petition as well as the writ petition, this Court is of the opinion that the present review application involves the following questions of law for adjudication:-

> (i) Whether the grounds taken in the review petition are good grounds to come to a conclusion that there exists an error apparent on the face of the record and, accordingly,

the same calls for interference in judgment dated 19.05.2023 by this Court in exercise of its review jurisdiction?

(ii) Whether the writ petition which is in the shape of a review/recall application by the parties, who were not arrayed as Opposite Parties to the original writ petition, is maintainable in law?

(iii) Whether the review petition at the instance of the present Petitioners is entertainable within the parameters of law laid down for entertaining a review/recall application, particularly keeping in view the factual background of the present case?

16. Before adverting to answer the aforesaid questions, this Court would like to clarify, at the outset, that in course of his argument, Mr. Routray, learned Senior Counsel appearing for the Petitioners led much emphasis on the ground that the judgment dated 19.05.2023 is unsustainable on the ground that the Petitioners, who are necessary parties to the earlier litigation were not arrayed as Opposite Parties and they were not given an opportunity of hearing in violation of the principles of natural justice. So far other grounds taken in the writ petition are concerned, not much emphasis was led on such grounds by the learned Senior Counsel appearing on behalf of the Petitioners. Therefore, this Court would proceed to adjudicate the review petition as well as the writ petition keeping in view the factual background of the present case as well as the fact that the learned Senior Counsel for the Petitioners assailed the judgment dated 19.05.2023 on the ground that the said judgment is required to be reviewed on the ground that the Petitioners were not added as Opposite Parties and, as such, they were not heard before delivering the judgment dated 19.05.2023. On a analysis of the ground other than the nonjoinder of necessary parties as taken in the review as well as in the writ petition, this Court is of the considered view that such grounds are based on merits of the matter which can only be challenged by filing an intra-court appeal as provided in law.

17. In view of the aforesaid factual scenario, this Court would like to first analyze the scope of the review by this Court of judgment dated 19.05.2023. It is no doubt that the review is a creature of the statute. Therefore, the same has to be based on the principle as enumerated in Order-47 Rule-1 of the C.P.C. Although the provisions of the Code of Civil Procedure, 1908 does not apply to the writ proceedings in view of the specific provision contained in the explanation to Section-141 of C.P.C. However, as a standard practice, the Hon'ble Supreme Court as well as this Court have on many occasions held that the principle laid down in the Code of Civil Procedure are applicable to the writ proceedings although the substantive provision may not be applicable to the writ proceeding.

18. Keeping in view the aforesaid position of law, this Court would proceed to analyze the provisions contained in Order-47 Rule-1 of the C.P.C. Order-47 Rule-1 of the C.P.C. provides that any person considering himself aggrieved (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; (b) by a decree or order from which no appeal is allowed; or (c) by a

decision on a reference from a court to small causes and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of same mistake or error apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree passed or order made against him, may apply for review of judgment to the court which passed the decree or made the order. The aforesaid sub-rule(1) is clarified by the provisions contained in sub-rule(2). Sub-rule(2) provides that a party, who is not appealing from a decree or order may apply for a review of the judgment notwithstanding the pendency of the appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he appeals for the review. Moreover, the explanation attached to Order-47 Rule-1 of C.P.C. reveals that the fact that the question of law involved in the judgment of the court, which has been reversed or modified by the subsequent decision of a superior court in another case, shall not be a ground for review of such judgment.

19. It is an admitted position of fact that the present Petitioners were not arrayed as parties to the writ petition wherein the judgment passed even sought to be reviewed. The law with regard to such person is also no more *res integra.* It has been held by the Hon'ble Supreme Court in many judgments including the one reported in **86 (1998) CLT 738 (SC)** that review at the instance of such persons is maintainable. It has also been held by the Hon'ble Supreme Court in many judgments including the one reported in **2014(1) OLR 642 (SC)** that the review jurisdiction is extremely limited and unless there is a mistake apparent on the face of the record, the order/judgment does not call for review. The mistake apparent on record means that the mistake is self-evident, needs no such elaboration and stairs at its face. While observing in the above manner, the Hon'ble Supreme Court as well as this Court in many judgments have also cautioned that the review application shall not be used as an appeal in disguise and that the review does not permit rehearing the mattes on merits. By applying the aforesaid yardsticks, this Court has decided many applications for review. It would be apt to mention here that the stand taken by a party not considered in the order/judgment sought to be reviewed, has been considered to be an error apparent on record and, accordingly, the order/judgment has been reviewed on such ground. In this context, the judgment of the Hon'ble Supreme Court reported in **AIR 2005 SC 2087** may be referred to.

20. In a judgment of Hon'ble High Court reported in **AIR 2005 SC 592**, it has also been held that the review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of record, but also if the same is necessitated on account of some mistake or for any other sufficient reasons. The words "sufficient reasons" are wide enough to include a misconception of fact or law by a court or even an advocate. The application for review may be necessitated by way of invoking the doctrine of "*actus*

curiae niminem gravabit". Moreover, by applying the broader principle that law has to bend before justice, if the courts find that the error pointed out in the review petition was under a mistake and the earlier judgment could not have been passed but for erroneous assumption which in place did not exist and its perpetration shall result in miscarriage of justice, then nothing would preclude the court from rectifying the error. Similarly, review cannot be entertained merely to conduct the scrutiny of the order/judgment to find fault with the predecessor as if the court reviewing the order/judgment is exercising the power of appellate court. In the said context, it would be desirable to refer to the judgment of the Hon'ble Supreme Court reported in **AIR 1979 SC 1047** which has been taken note of in the judgment reported in **AIR 1995 SC 455**. A wholesome reading of the aforesaid judgments and on a wholesome analysis of the principle enunciated by the courts so far would establish that it is a standard procedure that is being followed by the courts that a review of the order/judgment is permissible to prevent miscarriage of justice and to correct grave and palpable errors.

21. In view of the aforesaid analysis of the legal position with regard to entertaining an application for review/recall of an order/judgment, this Court is required to analyze the facts of the present case as well as the grounds taken by the Petitioners in their application and in the event this Court comes to a conclusion that the grounds taken by the Petitioners in both review as well as the writ petition falls within the parameters as prescribed and elaborated by various judgments, then this Court would certainly review the judgment dated 19.05.2023, otherwise not.

22. Reverting back to the argument advanced by the learned Senior Counsel appearing on behalf of the Petitioners, this Court is required to adjudicate as to whether such grounds fall within the parameters as provided under Order-47 Rule-1 of C.P.C. or the judgments referred to hereinabove.

23. Mr. Routray, learned Senior Counsel appearing for the Petitioners in course of his argument led much emphasis on the ground that the Petitioners, who are the short listed candidates after conclusion of the first phase of selection, were not arrayed as Opposite Parties. Therefore, the judgment dated 19.05.2023 delivered by this Court without providing them an opportunity is a nullity in law. Accordingly, he also argued that such a glaring defect in the judgment is a good ground for review as provided under Order-47 Rule-1 of the CPC and in various pronouncements of the Hon'ble Supreme Court and this Court. Other than the aforesaid grounds, learned Senior Counsel appearing for the Petitioners did not press on the other grounds taken in the review petition.

24. In course of his argument, Mr. Routray, learned Senior Counsel appearing for the Petitioners first referred to the judgment in ***Prabodh Verma and Others v. State of Uttar Pradesh and Others,*** reported in ***(1984) 4 SCC 251***. By referring to the aforesaid judgment, more particularly to paragraph-50 of the judgment, it was

argued before this Court that a High Court ought not to hear and dispose of the writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least some of them being before it as respondents in a representative capacity, if their number is too large to join them as respondents individually. Moreover, if the Petitioners refuse to join them, the High Court ought to dismiss the petition for nonjoinder of necessary parties. Such a proposition of law has been affirmed by the Hon'ble Supreme Court in a recent judgment in ***Ajay Kumar Shukla and Ors. v. Arvind Rai and Ors.*** decided in Civil Appeal No.5966 of 2021 vide judgment dated 08.12.2021.

In the above noted case of ***Prabodh Verma*** (supra), the Hon'ble Supreme Court has categorically held that the Allahabad High Court ought not to have proceeded to hear and dispose of the civil Miscellaneous Writ No.9174 of 1978 without insisting upon the reserve pool teachers being made respondents to that writ petition or at least some of them being made respondents thereto in a representative capacity as the number of the reserve pool teachers was too large and, had the Petitioners refused to do so, to dismiss that writ petition for nonjoinder of necessary parties. On a careful analysis of the judgment in ***Prabodh Verma's*** case (supra), this Court found that the reserve pool teachers whose rights got affected directly by the judgment of the High Court, were not arrayed as parties to the writ petition. The Hon'ble Supreme Court came to a conclusion that they were necessary parties. Therefore, nonjoinder of such necessary parties and a decision in their absence would affect such reserve pool teachers adversely. Accordingly, the Hon'ble Supreme Court in concluding paragraph-52 of the judgment has come to the conclusion as has been narrated hereinabove. Therefore, in sum and substance in the judgment of ***Prabodh Verma's*** case (supra), it was held by the Hon'ble Supreme Court that the left out reserve pool teachers were necessary parties to the writ petition. Therefore, it was held that in the absence of such necessary parties, the High Court of Allahabad could not have decided the issue in their absence.

25. The next judgment that was relied upon by the learned Senior Counsel appearing for the Petitioners is in the case of ***Public Service Commission, Uttaranchal v. Mamta Bisht and Others,*** reported in ***(2010) 12 SCC 204***.

26. Referring to the aforesaid judgment, it was argued by the learned Senior Counsel appearing for the Petitioners that the Hon'ble Supreme Court referring to the case of ***Prabodh Verma*** (supra) has categorically held that if a person challenges the selection process, successful candidates or at least some of them are necessary parties. Accordingly, it was argued by the learned Senior Counsel appearing for the Petitioners that the Petitioners in the present case being the short listed candidates are necessary parties and, accordingly, the selection process could not have been challenged by the private Opposite Parties without adding the present Petitioners, who are necessary parties to the said writ petition.

27. Similarly, reference was made to the judgment in ***Jharkhand Public Service Commission v. Manoj Kumar Gupta and Ors.,*** reported in ***2020 (I) OLR (SC) - 216*** by the learned Senior Counsel appearing on behalf of the Petitioners. On a careful analysis of the factual background of the aforesaid judgment, this Court found that the selection process for appointment as Lecturer was under challenge in the aforesaid judgment by some of the unsuccessful candidates. Moreover, such unsuccessful candidates approached the High Court after final publication of the result wherein the Petitioners were found not to be eligible to be considered for appointment as Lecturer. Although the ground taken by the Petitioners in the said writ petition was that the rules of the game were changed after the selection process has started, however, the Hon'ble Supreme Court after analyzing the facts came to a conclusion that the said case is not a case of change of rules of the game after the selection process had started. Relying upon the said judgment, learned Senior Counsel appearing on behalf of the Petitioners made an attempt to seek review of the judgment dated 19.05.2023 on merits of the case already adjudicated by this Court vide judgment dated 19.05.2023. It is needless to mention here that the Petitioners are estopped to seek review of the judgment by merely relying upon a judgment of the Hon'ble Supreme Court which had taken a different view in a given set of facts involved in the aforesaid writ petition. Such an attempt by the learned Senior Counsel appearing on behalf of the Petitioners is contrary to the explanation appended to sub-rule(2) of Order-47 of C.P.C. Moreover, such a scenario has been taken note of by this Court in a judgment reported in **1991(1) OLR 44** and it has been held that the same shall not be a ground for review of the judgment. In course of his argument, learned Senior Counsel appearing for the Petitioners also referred to a judgment of the Hon'ble Supreme Court in ***Ajay Kumar Shukla*** (supra). On perusal of the aforesaid judgment, this Court observed that the Appellants before the Hon'ble Supreme Court challenged the final seniority list by filing a writ petition. The Appellants before the Hon'ble Supreme Court-Writ Petitioners belonged to the Mechanical and Civil Stream whereas the private Respondents were from the Agriculture Stream. The learned Single Judge allowed the writ petition and, accordingly, quashed the seniority list. However, in an intra-court appeal before the Hon'ble Division Bench of the High Court, the judgment delivered by the learned Single Judge was set aside. Accordingly, the Writ Petitioners had approached the Hon'ble Supreme Court by filing the above noted case. The Hon'ble Supreme Court on a careful analysis of the facts as well as law came to a conclusion that the appointing authority had in fact committed an error while preparing the seniority list and, as such, the Appellants cannot be found at fault. It was also held that the Division Bench committed an error in setting aside the judgment of the learned Single Judge. Accordingly, while allowing the appeal, the judgment of the learned Single Judge was affirmed by the Hon'ble Supreme Court while setting aside the judgment of the Hon'ble Division Bench.

28. In ***Ajay Kumar Shukla's*** case (supra), the Hon'ble Supreme Court in paragraphs-42, 43, 45 and 47 analyze the position with regard to nonjoinder of the

necessary party to the writ petition. Referring to the judgment of the Hon'ble Supreme Court in ***Prabodh Verma's*** case (supra) and ***State of Uttaranchal v. Madan Mohan Joshi and Ors.,*** reported in ***(2008) 6 SCC 797***, as well as the judgment in ***Tridip Kumar Dingal & Ors. v. State of West Bengal & Ors.,*** reported in ***(2009) 1 SCC 768*** and ***Mukul Kumar Tyagi and Ors v. The State of Utter Pradesh, reported in (2020) 4 SCC 86***, it was concluded in paragraph-47 to the effect that in matters relating to service jurisprudence, time and again it has been held that it is not essential to implead each and everyone who could be affected but if a section of such affected employees is impleaded, then the interest of all is represented and protected. Further, it is well settled that impleadment of a few of the affected employees would be sufficient compliance of the principle of joinder of parties and they could defend the interest of all affected persons in their representative capacity. Non-joining of all the parties cannot be held to be fatal. For better appreciation, paragraph-47 of the judgment in ***Ajay Kumar Shukla's*** case (supra) is quoted herein below:-

> *"47. The present case is a case of preparation of seniority list and that too in a situation where the Appellants (original writ petitioners) did not even know the marks obtained by them or their proficiency in the examination conducted by the Commission. The challenge was on the ground that the Rules on the preparation of seniority list had not been followed. There were 18 private respondents arrayed to the writ petition. The original Petitioners could not have known who all would be affected. They had thus broadly impleaded 18 of such Junior Engineers who could be adversely affected. In matters relating to service jurisprudence, time and again it has been held that it is not essential to implead each and every one who could be affected but if a section of such affected employees is impleaded then the interest of all is represented and protected. In view of the above, it is well settled that impleadment of a few of the affected employees would be sufficient compliance of the principle of joinder of parties and they could defend the interest of all affected persons in their representative capacity. Non-joining of all the parties cannot be held to be fatal.*

29. Finally, Mr. Routray, learned Senior Counsel appearing for the Petitioners also referred to the judgment of the Hon'be Supreme Court in ***Km. Rashmi Mishra v. M.P. Public Service Commission and Others,*** reported in ***(2006) 12 SCC 724.*** In the aforesaid matter, a ground was taken by the private Opposite Parties to the writ petition that the private Opposite Parties, who were finally selected, are only a part of the selected candidates. Further, it was pleaded that all 17 candidates were not impleaded as parties in the writ petition against whom allegation of irregularities were made and that no steps were taken in terms of Order-1 Rule-8. The factual background involved in the above noted case is that the validity/legality of the selection process involved in the process of selecting Assistant Registrars, Class-II Gazetted posts, who were finally selected by the PSC pursuant to an advertisement and the recruitment procedure was called in question before the Hon'ble Supreme Court. On perusal of the paragraph-8 of the said judgment it clearly reveals that pursuant to the advertisement, 6158 candidates filed their applications. After

conducting an examination on 23.11.2003, the PSC short listed 55 candidates for 17 posts. The short listed candidates were asked to appear in the viva voce test. Interviews were held between 9.2.2004 and 11.02.2004. Finally, a final select list of 17 candidates was prepared by the PSC including Respondents No.3 and 4. One of the unsuccessful candidates approached the High Court by filing a writ petition. However, only adding respondents No.3 and 4 out of 17 candidates on the allegation that they were inexperienced and were having inferior academic qualification and were selected being influential persons. The counsel appearing for the Petitioner in that case before the High Court, among other grounds, took a ground that all the selected candidates having not been impleaded as parties, the writ petition was not maintainable and while doing so he had also referred to the judgment in ***Prabodh Verma's*** case (supra). The Hon'ble Supreme Court in paragraphs-13 and 15 of the judgment has categorically held that all finally selected 17 candidates are necessary parties to the writ petition. However, only 2 of them were added as parties and no steps under Order-1 Rule-8 whatsoever was taken with regard to other finally selected candidates. Accordingly, in paragraph-30 of the judgment, it has been held that since all the selected candidates were not impleaded as parties in the writ petition, no relief can be granted to the appellant. However, it is worthwhile to refer to paragraph-28 of the judgment, which is quoted herein below:-

> *"28. The post of Assistant Registrar in the universities was not of such nature which would answer the requirements of the tests laid down by this Court at certain times. The post requires no professional experience. What was required to be seen was academic qualification, experience and other abilities of the candidate. Whereas the ability of communication and other skills may have to be judged through interview, experience of the candidate as also the marks obtained by him in the written examination could not have been ignored. It is not that the Commission was not called upon to hold a written examination. The Rules enabled the Commission to do so. Such a written examination in fact was held. However, the same was held only for the purpose of shortlisting the candidates and not for any other purpose. It was not a fair exercise of power. The marks obtained by the candidates in the said written examination should have been taken into consideration. Evidently, the Commission did not do so. For the reasons stated hereinbefore, we would direct the State of Madhya Pradesh therefor to consider the desirability of amending the Rules suitably so that such charges of favoritism or nepotism by the members of the constitutional authority in future are not called in question."*

30. Learned Senior Counsel appearing for the Petitioners argued that this Court in judgment dated 19.05.2023 although has referred to the issue of nonjoinder of necessary party in paragraph-14 of the judgment, however, the same has not been answered while delivering the final judgment. In this context, this Court would like to observe that a bare reading of the paragraph-14 of the judgment would reveals that the same has been mentioned with reference to the pleading in the counter affidavit of the Opposite Party. It is further clarified that in course of final hearing of the matter, none of the counsels appearing for the Opposite Parties neither raised the said question nor led any emphasis on such aspect of the matter. Therefore, the

contention that the issue was although raised but the same has not been answered would not be a fair argument in the factual background of the present case. Moreover, the learned Senior Counsel appearing for the Review Petitioners was not the counsel in the matter in which the judgment delivered by this Court is being sought to be reviewed. Since such a question of nonjoinder of necessary party has been raised in the review as well as in the connected writ petition, this Court would discuss the same in this judgment.

31. To be impleaded as a party in a proceeding, it is the well established proposition of law that the person who is taking the plea of nonjoinder of party has to prima facie establish that he is a necessary party to the proceeding and in whose absence the lis could not have been decided. Order-1 of the C.P.C. deals with parties to the suits. Although the substantive provision does not apply, however, as a matter of practice, the Courts in India are guided by the underlying principle of Order-1 of C.P.C. while considering the issue as to who can be added as a party to the suit/proceeding. Further, Order-1 Rule-3 of the C.P.C. provides as to who may be joined as defendant. The same provides all persons may be joined in one suit as defendants where any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally. The aforesaid provision essentially means that a person can be added as defendant/Opposite Party against whom relief is sought for by the Petitioner/Plaintiff. Therefore, no suit or proceeding can be decided effectively in their absence. They are also otherwise known as necessary parties to the proceeding. A necessary party is a person/party whose presence in the proceeding is necessary and in whose absence the lis cannot be decided as has been held in several judgments delivered by the Hon'ble Supreme Court as well as this Court.

32. By applying the aforesaid well settled principle of law with regard to determination of a necessary party to a proceeding to the facts of the present case, this Court would now examine as to whether the Review Petitioners are necessary parties to the writ petition filed earlier by the private Opposite Parties No.1 to 16. The writ petition out of which the present Review Petition arises or the judgment dated 19.05.2023 which has been challenged in the connected writ petition was filed by the private Opposite Party No.1 to 16 assailing the selection process adopted by the OPSC while short listing the candidates, who had submitted their candidature pursuant to the Advertisement No.26 of 2021-22 under Annexure-1 issued by the OPSC on the principal ground that the procedure adopted by the OPSC for the second stage of selection, i.e., viva voce test is illegal, arbitrary and dehors the rules. They had also prayed for quashing of the lis of the short listed candidates published vide Notice dated 7.11.2022 by the OPSC and further for a direction to the OPSC to prepare a fresh merit/select list of candidates by taking into consideration the provisions of the relevant rules.

33. The analysis of aforesaid factual background of W.P.(C) No.32174 of 2022, this Court found that the final merit list had not been published by the time the writ petition was filed before this Court. Moreover, the Wirt Petitioners-present Opposite Parties No.1 to 16 had approached this Court by challenging the method of selection adopted by the OPSC at an interim stage. On a detailed analysis of facts as well as the law, this Court in the earlier writ petition had come to a conclusion that the procedure adopted by the OPSC in short listing the candidates after written examination is dehors the relevant rules. Therefore, this Court had to intervene in the matter by delivering judgment dated 19.05.2023. Moreover, by the time the judgment was delivered on 19.05.2023, no legal right was crystallized in favour of the Review Petitioners as the selection process for recruitment to the post of ASOs was not concluded and, as such, had not attained the finality. Therefore, by no stretch of imagination, it can be concluded that the selection for appointment to the post of ASO by the OPSC was final by mere publication of a Notice dated 07.11.2022 and thus a valuable right has accrued in favour of the Petitioners. Mere reflection of name in the notice of short listed candidates for the next phase of selection does not confer any legal right on the Review Petitioners. Therefore, this Court believes that the learned counsels appearing for the Opposite Parties in the writ petition although raised the ground of nonjoinder of necessary party, however, the same was not pressed into service at the time of final hearing of the matter as no right has accrued in favour of the Petitioners by mere inclusion of their name in the list of short listed candidates for the next phase of selection. In such view of the matter and in the absence of any legal right to finally claim for appointment, it cannot be said that the Petitioners had acquired a right to be appointed to the post of ASOs for which the selection process was on going. Accordingly, this Court has no hesitation in coming to a conclusion that the Review Petitioners were not necessary parties to the earlier writ petition bearing W.P.(C) No.32174 of 2022.

34. Even otherwise also, mere inclusion of the name in the select list does not confer any right to claim for appointment. However, the right to get appointment once the final select list is published after completion of the entire selection process cannot just be merely brushed aside. The judgments relied upon by learned Senior Counsel appearing for the Review Petitioners are either based on the fact of final publication of the select list or where the Petitioners were already in service and their promotion/seniority was being questioned without impleading them as parties. Therefore, there is a huge difference between the two scenarios depicted hereinabove. (1) Where the right has not crystallized, i.e, the selection process is not over and a mere list of short listed candidates prepared in violation of rules and the other scenario. (2) After publication of the final select list or while questioning the promotion/seniority vis-à-vis a candidate who have not been added as a party to the writ petition. Under the first scenario, no right of such persons is affected as it was not finalized that they would be considered for being appointment after the entire selection procedure got over.

35. In addition to the above, this Court would also like to observe that in course of hearing of the earlier writ petition bearing W.P.(C) No. 32174 of 2022, learned Senior Counsels including the Advocate General appearing for the State-Opposite Parties took almost all possible grounds to defend the conduct of the OPSC. This Court in a detailed judgment by taking note of the contentions of all the appearing parties vide judgment dated 19.05.2023 disposed of the said writ petition. Moreover, by an interim order, this Court had directed not to finalize the selection process, as a result of which the selection could not be finalized for several months. The short listed candidates were all aware of the pendency of the earlier writ petition as the selection for appointment to the post of ASO was hanging for quite some time. However, no effort whatsoever was made by them to implead themselves as parties to the earlier writ petition. On the contrary, they preferred to wait and watch as fence-sitters. After the final judgment was delivered by holding that the selection process adopted by the OPSC is dehors the relevant rules, the Review Petitioners have approached this Court by filing the present review petition as well as connected writ petition only with the intention to delay the selection further.

36. Indisputably, in the facts and circumstances of the present case, the Review Petitioners were not finally selected and no final merit/select list was published by the OPSC thereby conferring a valuable right on the Review Petitioners for being appointed to the post of ASO. Further, the private Opposite Parties No.1 to 16 had challenged the selection process on the errors which were apparent on the face of the record, i.e., the OPSC had conducted the selection process by violating the provisions of the relevant rules, more particularly, the provisions of Rule-6. Further, the previous writ petition remained pending before this Court for several months and by virtue of the interim order, the selection process was directed not to be finalized. The hearing of the matter also continued for several days and the same was being reported by the local newspapers as well as the electronic media. No attempt whatsoever was made to intervene in the matter at that stage. However, after the final judgment was delivered upon conclusion of a lengthy hearing, the Review Petitioners have approached this Court by filing the present review as well as writ petition challenging the final judgment dated 19.05.2023. In addition to the above, this Court has categorically held that the Review Petitioners were not necessary parties to the previous writ petition.

37. In the aforesaid background, this Court would now record its finding to the issues formulated in the preceding paragraph. The first ground that was formulated by this Court was as to whether the grounds taken in the review petition are good grounds and, accordingly, a review petition is entertainable on such grounds? In reply to the said ground, this Court is of the considered view that the ground with regard to nonjoinder of necessary party which was emphatically argued by the learned Senior Counsel is definitely a good ground, so far maintainability of the review petition is concerned. With regard to the other grounds taken in the review

petition, this Court would like to record that such grounds are based on the merits of the issue which has already been decided by this Court in the earlier writ petition. Therefore, in the event the Petitioners are aggrieved by the findings of this Court they should have been well advised to challenge the same by filing an intra-court appeal. Thus, the first issue is answered accordingly.

38. The next question that was formulated by this Court was with regard to maintainability of the writ petition by the Review Petitioners challenging the judgment dated 19.05.2023 in a proceeding where they were not added as parties? In reply to the same, this Court would like to refer to a judgment of a constitution Bench of the Hon'ble Supreme Court in the matter of ***Shivdeo Singh and others v. State of Punjab and others,*** reported in ***AIR 1963 SC 1909.*** The constitution Bench while interpreting Order-47 Rule-1 of C.P.C. has categorically held that this Court has inherent power to review its order under Article 226 of the Constitution of India and, accordingly, it was held that the second writ petition filed by a person aggrieved, who was not impleaded as a party in the first writ petition, is maintainable and that the High Court had not acted without jurisdiction in reviewing its previous order at the instance of the subsequent Writ Petitioners. In the said judgment, the constitution Bench has categorically held that there is nothing in Article 226 of the Constitution of India to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it and, therefore, in entertaining the subsequent writ petition challenging the order passed by the earlier writ petition by the High Court. The High Court did what the principle of natural justice required it to do. In view of the law pronounced by the aforesaid constitution Bench of the Hon'ble Supreme Court in ***Shivdeo Singh's*** case (supra), this Court has no hesitation to come to a conclusion that the writ petition at the instance of the Review Petitioners is maintainable in law.

39. In view of the answer arrived at to the Question Nos.(i) and (ii), this Court is of the considered view that both the writ petition as well as the review petition at the instance of the Petitioners are maintainable. So far acceptance of such review petition and the writ petition and the entertainability thereof is concerned, this Court is required to apply underlying principle of Order-47 Rule-1 of C.P.C. As in both the above noted applications this Court was called upon to review of its own judgment dated 19.05.2023. To entertain such application, the Petitioners are required to establish that they are necessary parties to the earlier writ petition and, therefore, the earlier writ petition as well as the judgment dated 19.05.2023, which is sought to be reviewed in the present applications are vitiated by nonjoinder of necessary parties. While analyzing the question as to whether the Petitioners were necessary parties to the previous writ petition, this Court has already held in the preceding paragraph that they are not necessary parties to the previous writ petition as no right was crystallized in their favour by publishing the final select/merit list for appointment to the post of ASO. Moreover, the process of selection was continuing dehors the

relevant rules, particularly Rule-6 of the Rules in question. Such error was apparent on the face of record.

40. With regard to observance of principles of natural justice and providing an opportunity to the Petitioners is concerned, this Court would like to refer to a judgment of the Hon'ble Supreme Court in ***Union of India and Others v. Bikash Kuanar,*** reported in ***(2006)8SCC192***. In paragraph-12 of the aforesaid judgment, it has been held as follows:-

> *"12. The matter relating to appointment or recruitment of EDDA is not governed by any statute but by departmental instructions. It is now trite that if a mistake is committed in passing an administrative order, the same may be rectified. Rectification of a mistake, however, may in a given situation require compliance with the principles of natural justice. It is only in a case where the mistake is apparent on the face of the records, a rectification thereof is permissible without giving any hearing to the aggrieved party."*

Since the Petitioners were not necessary parties to the earlier writ petition and further the error in the selection process was apparent on the face of the record, by applying the principle as reflected in paragraph-12 of ***Bikash Kuanar's*** case (supra), this Court holds that rectification of such errors/mistakes is permissible without giving any hearing to the aggrieved party, if any, there is one. Thus, this Court found no force in the argument of learned Senior Counsel appearing for the Petitioners that the judgment dated 19.05.2023 rendered by this Court in the previous writ petition is vitiated in any manner by nonjoinder of a party, who according to this Court, are not necessary parties, and by not providing such parties an opportunity of hearing before giving a direction for rectification of the mistake/error in the selection process as it cannot be construed that the Petitioners can be in any manner be called as aggrieved parties.

41. In view of the aforesaid analysis of the legal as well as factual position, this Court found no ground whatsoever to entertain the review petition as well as the writ petition filed by the Petitioners. Hence, both the review petition as well as writ petition are hereby dismissed.

42. Accordingly, both the review petition as well as the writ petition stand disposed of.

—— o ——

2023 (III) ILR – CUT - 253

A.K. MOHAPATRA, J.

W.P.(C) NO. 5694 OF 2023

MOHAN CHANDRA MOHANTA .....Petitioner

.V.

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

W.P.(C) NO. 8280 OF 2023
CHINTAMANI BEHERA & ORS. -V- STATE OF ODISHA & ORS.

W.P.(C) NO.8284 OF 2023
HAREKRUSHNA MAHAKUD & ANR. -V- STATE OF ODISHA & ORS.

REGULARIZATION–The petitioner claim engagement and regularization from the date the juniors have been regularized – The authority by violating the principle of "Last Come First Go" regularized the juniors – Effect of – Held, this court has no hesitation in coming to a conclusion that the petitioners are entitled to be regularized in view of Finance Department resolution dated 15.5.1997.

For Petitioner : Mr. P.C. Acharya
For Opp. Parties : Mr. T.Pattanaik, Addl. Standing Counsel

JUDGMENT Date of Hearing : 02.08.2023 : Date of Judgment:22.08.2023

A.K. MOHAPATRA, J.

1. The petitioners have approached this Court by filing the present writ application with a prayer for a direction to the Opposite Parties to take back the petitioner to NMR post of Mulia with seniority as per their show-causes notice under Annexures-3, 4 and 5 and the order passed in CONTC(CPC) No.653 of 2012 dated 29.11.2022 within a short time.

2. The factual genesis of the case, leading to filing of the aforesaid writ applications in a narrow compass, is that the present petitioners 149 others had earlier approached the learned State Tribunal, Cuttack Bench, Cuttack in O.A. No.2196(C) of 2001 challenging their retrenchment without following the principle of "last come first go". It is alleged in the said O.A. application that when the petitioners were retrenched, their juniors were allowed to continue in services. The petitioners were Mulia under the Opposite Party No.3 when they were retrenched from service. The pleadings further reveals that the petitioners were at Sl. Nos.2, 3, 4, 5, 6 7, 9, 10, 11, 203 and 195 in the combined gradation list of Mulia under the Superintending Engineer Northern Division Circle, Keonjhar. It has also been stated by the petitioners that initially the petitioners joined in service on 29.07.1987. A copy of the combined gradation list has been annexed to the writ applications.

3. Learned Odisha Administrative Tribunal, Cuttack Bench, Cuttack took up the above noted O.As and the same was disposed of vide order dated 13.09.2011 with following observation:-

> "In view of the government policy for regularization of NMR/DLR employees as per F.D. Office memorandum No.22764/F dated 15.05.1997 and in view of the fact that the juniors of the applications have already been regularized allegedly in violation of principle of 'last come first go', respondents are directed reconsider the engagement/regularization of the applicants as per their eligibility in vacancies if any

> existing or likely to arise in various projects taking their seniority into account in view of the fact that the applicants have previous experience in the aforesaid filed work. Appropriate orders in the matter be issued within a period of three months from the date of receipt of this order.
>
> With these observations, the O.A. is disposed of."

4. Since the order passed by the learned Tribunal was not complied with by the Opposite Parties, the petitioners along with other applications bearing C.P. No.563(C) of 2012 for implementation of the Tribunal's order dated 13.09.2011. In the said application a show-cause affidavit was filed. It has been categorically stated that in O.A. No.2196(C) of 2001, out of 49 workers, two juniors are continuing in Government service, only 43 applicants are left. A proposal for reinstatemnt of remaining 43 applicants were submitted to the Department of Water Resources by the Director Personnel, Office of the Engineer-in-Chief, Water Resources, Odisha vide letter No.5685 dated 16.05.2013. A copy of the said letter has been annexed to the show-cause affidavit as Annexure-B as well as letter No.8668 dated 29.07.2013 has also been annexed as Annexure-C to the aforesaid show-cause affidavit. Further such a stand had been taken awaiting the final decision of the Government, as no final decision has been taken with regard to the petitioners. The letters as has been annexed as Annexures-B and C to the show-cause affidavit reveals that the Director Personnel, office of the Engineer-in-Chief, Water Resources, Odisha had sought for necessary permission from the Government for retrenchment of the petitioners since some of the employees who are juniors to the petitioners, have been allowed to continue in service.

5. It has also been stated in the writ applications that the Opposite Party No.6 also filed a show-cause reply dated 24.04.2015 stating therein that the Opposite Party No.1 i.e. Government of Odisha have given its approval to comply with the order of leaned Tribunal by retrenching the juniors.

On perusal of the said Additional show-cause affidavit, it appears that in paragraph-4 it has been stated that no posts are lying vacant to reconsider the case of 43 employees on the basis of their seniority.

6. Mr. Acharya, learned counsel appearing for the petitioners further referring to letter dated 20th of May, 2014, which is a part of the additional show-cause affidavit, submitted before this Court that the Additional Secretary to Government wrote a letter to the Engineer-in-Chief, Water Resources Department, Odisha by intimating the concurrence of the Government to implement the order dated 13.09.2011passed by the Odisha Administrative Tribunal, Cuttack in O.A. No.2196(C) of 2001 while considering the grant of approval to implement the order and to take appropriate steps to reinstate seniors in service by replacing juniors on principle of "last come first go" as advised by the Finance Department and to report such compliance. He, therefore, submitted that the Government has given its concurrence to engagement of persons, who have not been reinstated in service in violation of the principle of "last come first go" of the Finance Department.

7. While the matter of contempt proceeding was pending before the learned Tribunal, the learned Tribunal got abolished. Accordingly, the contempt proceeding transferred to this Court and was re-registered as CONTC(CPC) No.653 of 2012. The aforesaid contempt proceeding was dropped vide order dated 29.12.2022 by recording the statement of learned Additional Standing Counsel for the State that all 14 persons are eligible. In view of the aforesaid facts, Mr. Acharya, learned counsel appearing for the petitioner contended before this Court that although the petitioners are entitled to be reinstated in service, the Opposite Parties, despite the direction of the learned Tribunal as well as concurrence given by the Government, have not taken steps for reengagement of the petitioners in service.

8. Opposite Party Nos.1 to 5 have filed a counter affidavit. In the counter affidavit, it has been stated that there was no vacant post by the time the order was passed by the Tribunal. Accordingly on the basis of instruction received from the Government, 18 employees, who are juniors to the petitioners, were retrenched, however,the said employees approached the learned Tribunal and their retrenchment order was stayed by the learned Odisha Administrative Tribunal. Therefore, it has been stated that there was no vacancy under the Chief Construction Engineer, Anandapur Barrage Project, which was intimated letter dated 27.06.2014.

9. Learned Additional Standing Counsel in course of his argument submitted that there is no ongoing project where the petitioners could be engaged. He further submitted that there are no vacancies to accommodate the petitioners in compliance of order dated 13.09.2011. Learned counsel for the State also submitted that steps are being taken by the concerned authorities to reengage the petitioners by retrenching the juniors to the petitioners, who are continuing in their service. However, the retrenchment order could not be given effect to due to the intervention of learned Odisha Administrative Tribunal. Therefore, there are no vacancies to accommodate the petitioners in compliance of order passed the Odisha Administrative Tribunal dated 13.09.2011. Accordingly, learned Additional Standing Counsel for the State submitted that the petitioners cannot be reinstated in service due to non-availability of vacancy.

10. Mr. Acharya, learned counsel appearing for the petitioners contended that there are several vacancies in different projects. He further contended that the petitioners are working since long in different projects undertaken by the Government of Odisha. He further contended that the seniority of the petitioners, the resolution of the Finance Department dated 15.05.1997 as well as judgment of the Hon'ble Supreme Court basing upon which guidelines were made by the Government have been violated in the present case as the Opposite Parties have not given appointment to the petitioner and allowing juniors to the petitioners to continue in service while retrenching the petitioners and throwing them out arbitrarily.Mr. Acharya, learned counsel appearing for the petitioners also contended that out of 18 junior employees, who were sought to be retrenched, 10 have already

retired in the meantime. Therefore, he further submitted that the said posts are lying vacant at the moment. He also contended that vacancy positions that have been stated in the counter affidavit as well as in the show-cause affidavit are of the year 2014-2015. The Opposite Parties have not furnished the latest position with regard to vacancy in the posts of Mulia in different projects under the Government of Odisha. The common gradation list which was proposed to be prepared the purpose as well as direction of the Hon'ble Supreme Court has also not been given effect to by ignoring the just and fair claim of the petitioners and persons admittedly juniors to the petitioners have been appointed in different projects in the Government of Odisha. Accordingly, Mr. Acharya, learned counsel for the petitioners, submitted that the necessary direction be given to the Opposite Parties to reinstate the petitioners immediately.

11. Heard Mr. P.C. Acharya, learned counsel appearing for the Petitioner and Mr. T. Patttanaik, learned Additional Standing Counsel for the State.

12. Having heard learned counsels appearing for the respective parties, on a careful consideration of their submissions and after going through the materials on record, this Court is of the considered view that in view of the order dated 13.09.2011 passed by the learned Tribunal in O.A. No.2196(C) of 2001, the principle involved in the writ application has already been adjudicated and such adjudication by the learned Tribunal has also attained finality and in the meantime, same has not been assailed by challenging any further by the State Opposite Parties. On perusal of the order dated 13.09.2011, it appears that the learned Tribunal by referring to the resolution of the Finance Department No.22764 dated 15.05.1997 came to a conclusion that the juniors to the petitioners have already been regularized by violating the principle of "last come first go". Accordingly, a direction was given to the State Opposite Parties to consider the engagement/regularization of the petitioners as per their eligibility in the existing vacancies or the likely to occur in various projects of the Government taking into consideration the seniority of the petitioners. On perusal of the record, this Court is of the view that the decision of the learned Tribunal dated 13.09.2011 has already been accepted by the State Opposite Parties and accordingly communications are available on record whereunder concurrence by the Engineer-in-Chief to the retrenchment of the juniors, who have been engaged ignoring the claim of the petitioners.

13. Moreover, steps were taken to retrench such junior workers. However, due to intervention of the learned Tribunal in the retrenchment order, the same could not be given effect for a long time. Admittedly, the petitioners were appointed much prior to the cut-off date and as such, they are covered under the Finance Department office memorandum dated 15.05.1997. Such a factual position remains undisputed. Further, some juniors to the petitioners were also engaged ignoring the legitimate right of the petitioners. Accordingly, the learned Tribunal was not justified to intervene in the order dated 13.09.2011. From the aforesaid facts, it is clear that the

petitioners have better right over the junior employees keeping in view the gradation list and the office memorandum of the Finance Department referred to hereinabove. Such rights, which were approved in favour of the petitioners, were taken away merely by saying that no vacancies are available and at the same time, the Opposite Parties committed illegality by engaging the juniors to the petitioners in service.

14. In view of the aforesaid factual analysis and keeping in view the legal position as well as order of the learned Tribunal dated 13.09.2011 under Annexure-2 to the writ applications and further keeping in view the concurrence of the Government vide letter dated 20.05.2014 vide memo No.13253/DOWR, this Court is of the considered view that the order of the learned Tribunal should have been given effect to so far the present petitioners are concerned, who are fourteen in number. Moreover, keeping in view the submission made by learned counsel for the petitioners that at least ten persons have retired from service on attaining the age of superannuation out of eighteen persons whose services were not retrenched, it cannot be said that there was no vacancies at all to give effect to the order passed by the learned Tribunal.

Therefore, this Court has no hesitation in coming to a conclusion that the petitioners are entitled to be regularized in view of the Finance Department resolution dated 15.05.1997. Accordingly, this Court directs that the Opposite Parties shall regularize the service of the petitioners in terms of the resolution dated 15.05.1997 against the available vacancies including the post which are directly to fall vacant within a period of two months from the date of communication of the certified copy of this judgment. A copy of this judgment be communicated to the Opposite Parties by Registry by issuing a writ at the cost of the petitioners.

15. With the aforesaid observation, the writ petitions are disposed. However, there shall no order as to cost.

—— o ——

2023 (III) ILR – CUT - 258

V. NARASINGH, J.

W.P.(C) NO. 6143 OF 2013

NIRANJAN MOHAPATRA ……Petitioner

.V.

UTKAL GRAMEEN BANK & ORS. ……...Opp. Parties

(A) CONSTITUTION OF INDIA, 1950 – Articles 226 & 227– Disciplinary proceeding – Scope of Judicial Review – Indicated.

(B) DISCIPLINARY PROCEEDING – Non-supply of documents – Effect of – Held, it is clear case of violation of principle of Natural Justice – This court is left with no other option but to set aside the impugned report of enquiry and remitted matter back to the stage of enquiry. (Para 19-20)

Case Law Relied on and Referred to :-

1. Civil Appeal Nos.2049-2050 of 2022 : The State of Uttar Pradesh & Ors. Vs. Rajit Singh.

For Petitioner : Mr. S.P. Mishra, Sr. Adv., Mr. R. Agarwal
For Opp. Parties : Mr. P.V. Balakrishna

JUDGMENT Date of Hearing & Date of Judgment: 05.07.2023

V. NARASINGH, J.

1. Heard Mr. Mishra, learned Senior Counsel instructed by Mr. Agarwal, learned counsel for the petitioner and Mr. Balakrishna, learned counsel for the Opposite Parties.

2. The petitioner while working as Branch Manager of Sumandi Branch of Rushikulya Gramya Bank, faced Departmental Enquiry in which he was found guilty by the Enquiry Officer. Assailing the enquiry report at Annexure-10 and the notice to show cause vis-à-vis the report of such Enquiry Officer at Annexure-11 dated 19.01.2013 and 25.02.2013 respectively and the charge sheet, the present Writ Petition has been filed.

3. The prayer in the Writ Petition is quoted hereunder for convenience of ready reference:-

> *"It is therefore prayed that this Hon'ble Court may graciously be pleased to admit this writ petition, issue Rule NISI in the nature of writ of certiorari/mandamus calling upon the Opp. Parties to show cause as to why the enquiry report dtd. 19.01.2013 as well as the show cause notice 25.02.2013 vides annexure-10 and 11 and the charge sheet dtd. 14.08.2008 shall not be set-aside/quashed and further as to why the Opp. Parties shall not be directed to supply all relevant documents as sought for by the petitioners before framing of charges and initiation of domestic enquiry.*
>
> *And if the Opp. Parties fail to show cause or show insufficient cause the said rule be made absolute and the enquiry report dtd. 19.01.2013 as well as the show cause notice dtd. 25.02.2013 vide annexure-10 and 11 and the charge sheet dtd. 14.08.2008 be set-aside/quashed and the Opp. Parties be directed to supply the petitioner all relevant documents as sought for before framing of charge and initiation of domestic inquiry."*

xxx xxx xxx

4. During the incumbency as Branch Manager of Sumandi Branch of erstwhile Rushikulya Gramya Bank alleging certain dereliction of duty, charge sheet was served on the petitioner. The memorandum of charges runs thus:-

xxx xxx xxx

> *"1. While allowing the operations in S.B.A/c no.2620 at Sumandi branch on 07.08.2003 you have violated and deviated established guidelines and procedures of the bank.*

.2. The above mentioned act where you have not discharged your duties with due diligence has resulted in financial loss of Rs.3,15,718.00 to the Bank."

xxx xxx xxx

5. It is the case of the petitioner that because relevant documents were not provided to him, he could not submit his show cause for which memorandum of charges was served and enquiry was instituted.

6. During the pendency of such enquiry, referring to the denial of supply of documents, the petitioner approached this Court by filing W.P.(C) No.19636 of 2012 and the same was disposed of by order dated 02.11.2012. The order reads thus.

xxx xxx xxx

"Heard learned counsel for the petitioner.

The grievance of the petitioner in this writ application that in a disciplinary proceeding the authorities are not supplying the documents to the petitioner as required by him.

Learned counsel for the petitioner submits that the petitioner shall file an application before the Enquiry Officer on the next date of inquiry and in such event before proceeding with the inquiry the Enquiry Officer shall deal with the application, so filed by the petitioner and the relevant documents shall be supplied to him and thereafter he will proceed with the inquiry.

The writ application is accordingly disposed of.

Issue urgent certified copy."

xxx xxx xxx

7. It would be apposite to note that taking into account the contention of the petitioner that he was facing a departmental proceeding, this Court specifically directed that "the relevant documents shall be supplied to him".

8. In terms of the direction of this Court, the petitioner submitted a representation at Page-32 of the brief dt.08.11.2012. In the said representation while referring to the order passed by this Court adverted to above, the petitioner asked for the following documents.

xxx xxx xxx

"1) Copy of High Court Writ Petition No. W.P.(C) 17009/06

2) KYC Norms Circular of Bank upto 07.08.2003.

3) Internal Inspection report, questionnaire and its replies from 2003 to 2008.

4) Copy of Letter dtd. 11.06.2007 of Smt. Kuntala Behera.-MEX-2D."

xxx xxx xxx

9. Admittedly, there was no response to such representation by the Opposite Party-Bank and the enquiry proceeded as evident from the enquiry report dated 19.01.2013. The Enquiry Officer under the heading "Documentary Evidence" dealt with the grievance of the petitioner referred to as CSO, requesting for copies of the

documents to be presented as "Additional Defence Exhibits" and the said documents have been quoted in the proceeding by the Enquiry Officer.

10. For convenience of ready reference, the said documents and the noting of the Enquiry Officer is culled out hereunder:-

xxx xxx xxx

Besides the above documents, CSO requested for copies of the following documents to be presented as Addl. Defence Exhibits.

i. High Court W.P.(C) 17009 of 2006.

ii. Application copies did.11.6.2007 filed by Smt.Kuntala Behera

iii.Inspection reports and Inspection Questionnaires from 2003 to 2008 alongwith its Compliances relating to SB A/c position only.

iv. KYC (Know Your Customer) Circulars issued by H.O to branches upto 7.8.2003.

Pending receipt of the afore-noted documents from Management, CSO made oral presentations as below although he insisted that he is in need of the documents sought by him to defend his case effectively.

xxx xxx xxx

11. It is the submission of the learned Senior Counsel, Mr. Mishra that in spite of the petitioner approaching this Court and in the face of the order and petitioner making a representation in terms of said the order passed, sought for documents which would enable him to effectively defend his rights. Yet, such documents were not provided to him for which he was handicapped in presenting an effective defence resulting in adverse order being passed by the E.O. And, according to the learned Senior Counsel the non supply of documents goes to the root of the matter and being a facet of principle of natural justice, the impugned order of the Disciplinary Authority is liable to be set aside solely on the said count and he relies on the judgment of the Apex Court in the case of **The State of Uttar Pradesh and others v. Rajit Singh in Civil Appeal Nos.2049-2050 of 2022** disposed of on 22.03.2022 and the judgment of the **Allahabad High Court** dated **18.09.2013 in W.P.(C) No.1647 (SB) of 2010** in this context.

12. Per contra, learned counsel for the Opposite Party-Bank, Mr. Balakrishna states that the contours of interfering with a Disciplinary Proceeding are earmarked and hence whatever grievance the petitioner has, can be addressed if he chooses to prefer an appeal and hence this Court in exercise of its plenary jurisdiction ought not to interfere in the matter.

13. It is his further submission that there is nothing on record to show as to how the petitioner is prejudiced by the non supply of the documents.

14. It is the further submission of the learned counsel for the Opposite Party-Bank since no prejudice has been established by the petitioner, the order of the Disciplinary Authority ought not to interfered and the petitioner should prefer appeal.

15. This Court carefully examined the order passed by the Enquiry Officer adverted to hereinabove. While the Enquiry Officer has diligently taken note of the grievance of the petitioner for non-supply of the document and response of the Bank thereto. Yet, while recording his finding, any reference to such prayer for supply of document is conspicuously absent.

16. In fact, it is worth recording that one of the documents sought by the petitioner is W.P.(C) No.17009 of 2006 and application copies dated 11.06.2007 filed by one Smt. Kuntala Behera.

16-A. While recording his finding, the Enquiry Officer has referred to the account holder Smt. Kuntala Behera and also the Writ Petition filed by her.

16-B. On the face of it, the submission of the learned counsel for the Bank that the petitioner was not prejudiced does not stand to reason.

17. While coming to the submission of the learned counsel for the Bank regarding the power of the Constitutional Courts to interfere in a Departmental Proceeding, the boundaries are well laid. One of the exceptions to non exercise of jurisdiction is violation of principle of natural justice, as held by the judgment relied on by the learned Senior Counsel in the case of **State of Uttar Pradesh (Supra).**

xxx xxx xxx

> *"As per the settled proposition of law, in a case where it is found that the enquiry is not conducted properly and/or the same is in violation of the principles of natural justice, in that case, the Court cannot reinstate the employee as such and the matter is to be remanded to the Enquiry Officer/Disciplinary Authority to proceed further with the enquiry from the stage of violation of principles of natural justice is noticed and the enquiry has to be proceeded further after furnishing the necessary documents mentioned in the charge sheet, which are alleged to have not been given to the delinquent officer in the instant case."*

xxx xxx xxx

17-A. It is clear that in case of violation of principle of natural justice, this Court is not precluded from interfering even at the threshold without leaving the delinquent to explore the alternative remedies. Even otherwise, it is trite law that availability of alternative remedies have never been an impediment for the exercise of jurisdiction under Article 226 when the factual matrix so warrants.

18. The next question that this Court is called upon to answer is what relief can be granted to the petitioner. For that cue can be taken from the judgment of the apex Court in the case of State of Uttar Pradesh (Supra) that once the Courts sets aside an order of punishment on the ground that enquiry was not properly conducted, the Court cannot substitute its opinion for that of the Enquiry Officer. But it is not denuded of the power to remit the matter to the stage from which the enquiry can be conducted in an even handed manner balancing the interest of the organization as well as the delinquent.

19. In the light of the said judgment of the apex Court, this Court is persuaded to hold that there has been glaring violation of natural justice in the case at hand. Inasmuch, even in the face of order passed by this Court directing for supply of documents, the documents asked for were not supplied and there is no finding as to why such prayer of the petitioner was not acceded to as already noted. And, at the cost of repetition is restated that one of the documents has been specifically referred to by the Enquiry Officer in his finding.

20. Hence, in the given circumstances, this Court is left with no other option but to set aside the enquiry report at Annexure-10 and the show cause vis-à-vis such enquiry report at Annexure-11. Keeping in view the contours of jurisdiction of this Court in a Disciplinary Proceeding, it is directed that the enquiry shall proceed from the stage of non-supply of the documents as referred to in **para-8** after furnishing the copies of such documents. List of the said documents is extracted hereunder for convenience of reference, at the cost of repetition.

xxx xxx xxx

"1) Copy of High Court Writ Petition No. W.P.(C) 17009/06

2) KYC Norms Circular of Bank upto 07.08.2003.

3) Internal Inspection report, questionnaire and its replies from 2003 to 2008.

4) Copy of Letter dtd. 11.06.2007 of Smt. Kuntala Behera.-MEX-2D."

xxx xxx xxx

21. Since the petitioner has retired in the meanwhile, it is directed that the said enquiry shall be concluded within a period of six months from the date of receipt/production of the copy of this judgment. Needless to say giving adequate opportunity to the petitioner to put forth his stand.

22. Accordingly, the Writ Petition stands disposed of. No costs.

—— o ——

2023 (III) ILR – CUT- 263

V. NARASINGH, J.

BLAPL NO. 6864 OF 2023

CHHAGAN BAPU SHINDE
@ CHHAGAN BAPU SHINDE ……Petitioner

.V.

STATE OF ODISHA ……...Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Bail – Commission of the offence U/s. 20(b)(ii)(c) of NDPS Act – Petitioner's claim parity with the co-accused who have been released on Bail –

Held, the allegation against the co-accused was that they were escorting the vehicle from which the contraband was seized not from their possession – Therefore the Petitioner is not similarly circumstanced with the co-accused, hence, claim of parity is thoroughly misconceived. (Page 25-26)

Case Laws Relied on and Referred to :-

1. 2022 (10) SCC 51 : Satender Kumar Antil Vs. Central Bureau of Investigation & Anr.
2. 2021 (2) Crimes 164 (SC) : Boota Singh & Ors. Vs. State of Haryana.
3. (2009) 8 SCC 539 : Karnail Singh Vs. State of Haryana.
4. (2002) 7 SCC 419 : Avtar Singh & Ors. Vs. State of Punjab.
5. (2002) 3 SCC 496 : Haryana Financial Corporation Vs. Jagdamba Oil Mills.
6. (2001) 7 SCC 673 : State of M.P. Vs. Kajad.

For Petitioner : Mr. S. Manohar

For Opp. Party : Mr. K.K. Gaya, ASC.

JUDGMENT Date of Hearing & Judgment :23.08.2023

V. NARASINGH, J.

1. Heard learned counsel for the Petitioner Mr. S. Manohar through virtual mode and Mr. Gaya, learned Additional Standing Counsel for the State.

2. The Petitioner is an accused in connection with Special G.R Case No.143 of 2022 pending on the file of learned Additional Sessions Judge-cum-Special Judge, Malkangiri, arising out of Chitrakonda P.S. Case No.118 of 2022 for commission of the alleged offence under Sections 20(b)(ii)(C) of the NDPS Act. The allegation is of possession of contraband (ganja) to the tune of 104 kg 500 grams.

3. Being aggrieved by the rejection of his application for bail U/s. 439 Cr.P.C by the learned Sessions Judge-cum-Special Judge, Malkangiri by order dated 14.03.2023 in the aforementioned case, the present bail application has been filed.

4. It is submitted by the learned counsel that the petitioner is in custody since 15.09.2022 and charge sheet has already been filed on 09.03.2023.

5. Learned counsel for the petitioner brings to the notice of this Court that two of the co-accused have since been released on bail by this Court by order dated 25.04.2023 in BLAPL No.4001 of 2023 (Dhanraj Papulu) and by order of this day i.e. 23.08.2023 in BLAPL No.3894 of 2023 (Sibamani Sankam).

6. Hence, relying on the judgment of the Apex Court in the case of ***Satender Kumar Antil vrs. Central Bureau of Investigation & another, reported in 2022 (10) SCC 51***, inter alia on the ground of parity, the petitioner seeks release.

7. Learned counsel for the petitioner, Mr. Manohar has further alleged non-compliance of Section 50 and 42 of the NDPS Act.

Relating to the alleged non-compliance of Section 50 of the NDPS Act and his right to be enlarged on bail, the petitioner relies on the following judgments;

(a) Vijay Singh Chandubha Jadeja vs. State of Gujrat [2010 SCC Online SC 1248], in which the following decisions were stated to have been relied upon;

(i) Ashok Kumar Sharma vs. State of Rajasthan [(2013) 2 SCC 67]

(ii) Narcotics Central Bureau vs. Sukh Dev Raj Sodhi [(2011) 6 SCC 392]

(b) K. Mohanan vs. State of Kerala [(2000) 10 SCC 222]

(c) Beckodan Abdul Rahiman vs. State of Kerala [(2002) 4 SCC 229]

(d) State of Rajasthan vs. Permanand [(2014) 5 SCC 345]

(e) S.K. Raju vs. State of West Bengal [2018 (9) SCC 708]

(f) Sanjeev vs. State of Himanchal Pradesh [2022 LiveLaw (SC) 267]

8. So far as alleged infraction of Section 42 of the NDPS Act and its effect is concerned, the petitioner has relied upon

(a) Mohinder Kumar vs. State of Panaji Goa: (1998) 8 SCC 655,

(b) Darshan Singh vs. State of Haryana: (2016) 14 SCC 358

(c) Judgment of High of Chandigarh in the case of Pankaj vs. State of Punjab (CRM.M.25498 of 2021 disposed of on 14.06.2022)

(d) Judgment of the Apex Court in the case of Rajender Singh vs. State of Haryana (Criminal Appeal No.1051 of 2009 disposed of on 08.08.2023),

(e) Sarija Banu (A) Janarth ani and Ors. Vs. Respondent: State through Inspector of Police, (2004) 12 SCC 266

9. It is further submitted that

"IN CASE OF NON-COMPLIANCE OF SECTION 42 AND 50 OF THE NDPS ACT BAR OF SECTION 37 OF NDPS ACT WILL MELT BOWN" and in this context judgments of the Kerala High Court in the case of

(a) Basanth Balram Vs. State of Kerala, 2019(2) RCR (Criminal) 488 and

(b) Judgment of Bombay High Court in the case of Raju Bhavlal Pawar & Ors. Vs. The State of Maharashtra 2021 ALL MR. (Cri) 4651 has been relied upon.

10. And, it is also his further submission that presumption under Section 114(g) of the Evidence Act has to be drawn against the prosecution.

11. Per contra, learned counsel for the State Mr. Gaya, ASC refutes the allegation as made and submits that there has been due compliance of the stipulation under Section 42 and 50 of the NDPS Act.

12. Relying on the materials on record, it is his further submission that in the case at hand admittedly since, the seizure is from a vehicle, compliance of Section 50 of the NDPS Act as such is not necessary.

13. The brief facts for the just adjudication as stated in the FIR dated 14.09.2022 is that during the blocking and motor vehicle checking which was being carried out during patrolling, the police personnel noticed one blue-black colour Hero motor cycle without number plate coming in a high speed and on being stopped and being interrogated, they gave the information that they are escorting one ganja loaded Bolero vehicle which is coming behind. "After few minutes the said bolero came in a high speed, though they were forewarned, so put the wooden logs on the road and tactically approached and able to stopped the said Bolero vehicle. Seeing the police personnel suddenly the driver of the Bolero and side sitter started running towards jungle side, but we could able to apprehend them." It is apt to state that petitioner is one of the two persons who were in the Bolero and trying to escape.

13.A. It is stated that the bolero having registration No.MH 12 SQ 5273 was searched and "one iron chamber in the middle seat of the said Bolero, being opened found four numbers of polythene packets containing suspicious material was found from which acute smell of ganja was coming."

14. It is stated that the complainant, S.I. thereafter, intimated the OIC, Chitrakonda over phone and later on follow up measures in terms of the NDPS Act were taken.

15. While detailing the consequential statutory measures, it has been categorically mentioned that in the presence of two independent witnesses, notice under Section 50 of the NDPS Act was served on the detainees including the present petitioner and when the detainee opted to be searched in presence of an Executive Magistrate, his services were requisitioned and the four jerry bags in the Bolero were opened. On opening the jerry bags ganja to the tune of 104 kg 500 grams was detected.

16. To appreciate the contention of the learned counsel for the petitioner, Section 42 of the NDPS Act is extracted as under;

> "**42. Power of entry, search, seizure and arrest without warrant or authorization.-** (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or

freezing or forfeiture under Chapter V-A of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure of freezing or forfeiture under Chapter V-A of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

[Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that] if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.]

xxx xxx xxx

17. It is apt to note here that admittedly, the case at hand is one of chance detection. Therefore, strict compliance of Section 42(1) of the NDPS Act is not necessary.

18. But, at the same time total non-compliance of the Section 42 of NDPS Act cannot be countenanced. (Ref: **Boota Singh & others vs. State of Haryana; 2021 (2) Crimes 164 (SC).)**

In this context, reference can also be made to the judgment of the Apex Court in the case of **Karnail Singh vrs. State of Haryana: (2009) 8 SCC 539**.

19. On a bare perusal of the constitution Bench judgment in the case of Karnail Singh (Supra), it is abundantly clear that the aspect of compliance of Section 42 of the NDPS Act has to be decided in each case on its own facts. And, in the factual matrix of the case at hand, referring to the Pages 12 and 13 of the charge sheet which is on record, this Court is of the considered view that there has been compliance of Section 42 of the NDPS Act. Hence, contention of the learned counsel for the petitioner to the contrary does not merit consideration.

20. And, so far as non-compliance of Section 50 of the NDPS Act in the case at hand is concerned, admittedly the seizure being from a vehicle, Section 50 of the NDPS Act ex-facie is not attracted. For convenience of ready reference, Section 50 of NDPS Act is extracted hereunder;

> "**50. Conditions under which search of persons shall be conducted.-**
>
> (1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall if such person so requires, take such persons without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.
>
> (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).
>
> (3) The Gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for such, forthwith discharge the person but otherwise shall direct that search be made.
>
> (4) No female shall be searched by anyone excepting a female.
>
> [(5) When an officer duly authorized under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drugs or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973.
>
> (6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within a seventy-two hours send a copy there of to his immediate officer superior.]"

20.A. But, in the case at hand there are materials on record to indicate that the search of the petitioner and other accused was in fact conducted in the presence of the Executive Magistrate. And, he has been cited as C.W.-2 (Ashok Kumar Muduli). (Ref: Pages 12 and 13 of the charge sheet which was submitted by the learned counsel for the petitioner.)

20.B. Thus, the challenge to infraction of Section 50 of the NDPs Act also fails.

21. Even otherwise, it is apt to note, as stated by the Apex Court in the case of Vijay Singh Chandubha Jadeja vs. State of Gujurat (supra), infraction of Section 50 of the NDPS Act "is a matter of trial". In this context, paragraph- 31 of the said judgment is culled out hereunder;

> **"31**. …….. Needless to add that the qeustion whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf."

22. In the case at hand, the submission to invoke "presumption" under Section 114(g) of the Evidence Act is found to be untenable.

23. It is apt to reiterate the conduct of the petitioner which was noted herein above that on being accosted **the petitioner who was in the bolero vehicle from which the contraband was seized was trying to run away into the jungle along with driver but was nabbed.**

24. The judgments relied on by the learned counsel for the petitioner have no application in the facts of the present case save and expect the judgment of the Apex Court in the case of Vijay Singh Chandubha Jadeja vs. State of Gujurat (supra) on which reliance has been placed by the petitioner selectively.

25. On a careful examination of materials on record, it comes to the fore that the co-accused who have been released on bail were on a motor cycle. And, the allegation against them was of escorting the Bolero from which the contraband was seized. And admittedly, no contraband was seized from their possession. Hence, it cannot be said that they were in conscious and exclusive possession of contraband. (Ref: **Avtar Singh and others vs. State of Punjab: (2002) 7 SCC 419**).

26. Therefore, the petitioner cannot be said to be at par with the co-accused and hence reliance on the judgment of the Apex Court in the case of Satender Kumar Antil (supra), more particularly paragraph-71 thereof which is extracted hereunder is misconceived;

> **"71**. Uniformity and certainty in the decisions of the court are the foundations of judicial dispensation. Persons accused with same offense shall never be treated differently either by the same court or by the same or different courts. Such an action though by an exercise of discretion despite being a judicial one would be a grave affront to Articles 14 and 15 of the Constitution of India."

In the facts of the case, this Court is of the considered view that since ex-facie the petitioner is not similarly circumstanced with the co-accused, since released, claim of parity is thoroughly misconceived.

27. It is trite law that a judgment is not to be applied mechanically and be treated as "Euclid's Theorem". In citing catena of judgments bereft of its context the cardinal principles of interpretation of judgment have been lost sight of. (Ref: ***Haryana Financial Corporation V. Jagdamba Oil Mills*** reported in ***(2002) 3 SCC 496).***

28. On the basis of materials on record, this Court is of the prima facie view that the contraband beyond the commercial quantity was seized from the conscious and exclusive possession of the petitioner.

29. Considering the rigors of Section 37 of the NDPS Act, and the twin guidelines which govern the consideration of bail in a case under the Special Act where negation is the rule (**Ref: State of M.P. vrs. Kajad** reported in **(2001) 7 SCC 673)** and also in view of the fact that the petitioner is a flight risk, this Court is not inclined to entertain this bail application at this stage.

30. It is emphasized that the observations made herein are only for the purpose of consideration of BLAPL. And, it ought not to be construed as expressing any opinion, with regard to petitioner's complicity, which has to be independently adjudicated in the impending trial.

31. Learned Court in seisin is requested to expedite the trial.

32. Accordingly, the BLAPL stands disposed of.

—— o ——

2023 (III) ILR – CUT - 270

BIRAJA PRASANNA SATAPATHY, J.

W.P.(C) NO. 27282 OF 2021

SIBA NAYAK ……..Petitioner

.V.

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

REGULARIZATION – The petitioner participated in the selection process for recruitment to the post of sweeper, after his name was duly sponsored by the employment exchange pursuant to the letter issued by the Principal Ravenshaw college – The petitioner is continuing as against a sanctioned post as a daily wager since 1999, claim for regularization – Held, it is the view of this court that the petitioner eligible and entitled for absorption or regularization as against the post. (Para 7 to 7.2)

Case Laws Relied on and Referred to :-

1. 2016(1) ILR (CUT)-373 : Dr. Prasanna Kumar Mishra Vs. State of Odisha & Ors.
2. 2023 SCC Online SC 393 : Government of Tamil Nadu & Anr. Vs. Tamil Nadu Makkal Nala Paniyalargal & Ors.
3. 2021 SCC Online SC 899 : Union of India & Ors. Vs.Ilmo Devi & Anr.

For Petitioner : M/s. B. Pujhari

For Opp. Parties : M/s. S. Rath, ASC
M/s.V. Moahpatra, Sarada P. Sarangi, A. Pattnaik, S. Sahu.

JUDGMENT Date of Hearing: 21.06.2023 : Date of Judgment: 14.07.2023

BIRAJA PRASANNA SATAPATHY, J.

1. The present Writ Petition has been filed challenging the order dt.04.08.2021 so passed by the Opp. Party No.3 wherein prayer of the Petitioner for regularisation of his service was rejected.

2. It is the case of the Petitioner that the Petitioner while continuing as a Sweeper on daily wage basis participated in the selection process for recruitment to the post of "Sweeper", after his name was duly sponsored by the Employment Exchange pursuant to the letter issued by the then Principal Ravenshaw College vide letter dt.26.05.1999 under Annexure-10.

3. It is contended that after being recommended by the Employment Exchange, the Petitioner in terms of Annexure-11 participated in the interview so held on 12.06.1999. But in spite of coming out successful, the Petitioner was not provided with the appointment because of the letter issued by the Director, Higher Education, the Opp. Party No.2 vide letter dt.21.06.1999 under Annexure-12. But the fact remains that the Petitioner taking into account his continuance as a Sweeper on daily wage basis, he was allowed to continue as such in the establishment of Ravenshaw College which subsequently was declared as an autonomous University.

3.1. Learned counsel appearing for the Petitioner contended that challenging the action of the Director in issuing the communication dt.21.06.1999, some of the candidates who had also participated in the selection process on their names being sponsored by the Employment Exchange, they approached this Court in OJC No.7544 of 1999. The said Writ Petition was disposed of vide order dt.23.07.1999 by holding therein that since the restrain order was issued by the Director vide his letter dt.21.06.1999 is no more in force, there is no impediment for consideration of the case of the Petitioners therein. Pursuant to the said order passed by this Court on 23.07.1999, the Petitioners in OJC No.7544 of 1999 were engaged as against the post in which they had participated in the selection process. But the Petitioner since was not a party to the said writ petition, his claim was not considered and he was allowed to continue on daily wage basis.

3.2. It is contended that after providing engagement to the Petitioners in OJC No.7544 of 1999, when the case of the Petitioner was not considered, the Petitioner seeking his regularisation approached this Court in W.P.(C) No.33688 of 2020. This Court vides its order dt.23.12.2020 under Annexure-9 disposed of the Writ Petition with a direction on the present Opp. Party No.3 to take a decision on the Petitioner's claim for regularisation. As the said order was not complied with, the Petitioner filed CONTC No.3719 of 2021. This Court when allowed further time for compliance of the order, Opp. Party No.3 without proper appreciation of the Petitioner's claim, rejected the prayer for regularisation vide the impugned order dt.04.08.2021 under Annexure-1.

3.3. Learned counsel for the Petitioner contended that taking into account his long continuance as a Sweeper on daily wage basis from the year 1997 and qualifying the recruitment undertaken by the College pursuant to the letter issued by the College on 26.5.1999 under Annexure-10, the Petitioner is otherwise eligible and entitled for his regularisation. But without proper appreciation of his claim and his long continuance, Opp. Party No.3 rejected the claim and hence the present Writ Petition.

3.4. In support of his submission, Mr.B. Pujhari, learned counsel appearing on behalf of Mr. S. Pal, learned counsel relied on the decisions of the Hon'ble Apex Court in the case of (available at Paragraph 4.2) and of this Court in the case of Dr. Prasanna Kumar Mishra Vs. State of Odisha & Others (2016) 1 ILR (CUT)-373 and judgment dt.17.02.2023 passed in WPC(OAC) No.373 of 2019 and batch.

> ***3.5****. Hon'ble Apex Court in the case of* ***Uma Devi*** *in Para44 has held as follows:-*
>
> ***"44****. 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 wages are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not subjudice, need not be reopened based on this judgement, 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."*

3.6. Similarly Hon'ble Apex Court in the case of ***M.L. Keshari*** in Para- 8 and 13 has held as follows:-

> ***"8****. Umadevi (3) casts a duty upon the Government or instrumentality concerned, to take steps to regularise the services of those irregularly appointed employees who had served for more than ten years without the benefit or protection of any interim orders of courts or tribunals, as a one-time measure. Umadevi (3) directed that such onetime measure must be set in motion within six months from the date of its decision (rendered on 10-4-2006).*
>
> ***13****. The Division Bench of the High Court has directed that the cases of the respondents should be considered in accordance with law. The only further direction that needs to be given, in view of Umadevi (3), is that the Zila Panchayat, Gadag should not undertake an exercise within six months, as a general one-time regularisation exercise, to find out whether there are dailywage/casual/adhoc employees serving the Zila Panchayat and if so whether such employees (including the respondents) fulfil the requirements mentioned in para-53 of Umadevi (3). If they fulfill them, their services have to be regularised. If such an exercise has already been undertaken by ignoring or omitting the cases of Respondents 1 to 3 because of the pendency of these cases, then their cases shall have to be considered in continuation of the said one-time exercise within three months. It is needless to say that if the respondents do not fulfill the requirements of para 53 of Umadevi (3), their services need not be regularised. If the employees who have completed ten years' service do not possess the educational qualifications*

prescribed for the post, at the time of their appointment, they may be considered for regularisation in suitable lower posts."

3.7. In the case of ***Nihal Singh*** in Para-35 to 38, Apex Court has held as follows:-

*"**35**. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with 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 tin 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. 21. In the first instances, the petitioner and the other Election Commissioners were appointed when the work of the Commission did not warrant their appointment. The reason given by Respondent 1 (Union of India), that on account of the Constitution (61" Amendment) Act reducing the voting age and the Constitution (64th Amendment) and (65 Amendment) Bills relating to election to the Panchayats and Nagar Paliks, the work of the Commission was expected to increase and, therefore, there was need for more Election Commissioners, cuts notice. As has been pointed out by Respondent 2, the work relating to revision of electoral roll on account of the reduction of voting age was completed in all the States except Assam by the end of July 1989 itself, and at the Conference of the Chief Electoral Officers at Tirupati. Respondent 2 had declared that the entire preparatory work relating to the conduct of the then ensuing general elections to the Lok Sahba would be completed by August in the whole of the country except Assam. Further the Constitution (64th and 65th Amendment) Bills had already fallen in Parliament before the appointments. In fact, what was needed was more secretarial staff for which the Commission was pressing, and not more Election Commissioners. What instead was done was to appoint the petitioner and the other Election Commissioner on 16.01.1989. Admittedly, further the view of the Chief Election Commissioner was not ascertained before making the said appointments. In fact, he was presented with them for the first time in the afternoon of the same day i.e, 16-10-1989.*

***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 finance 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 on a 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.*

***37**. We are of the opinion that neither the Government of Punjab nor these public sector banks can continue such a practice consistent with their obligations to function in accordance with the Constitution. Umadevi (3) judgment cannot become a licence for exploitation by the State and its instrumentalities.*

38. *For all the abovementioned reasons, we are of the opinion that the appellants are entitled to be absorbed in the services of the State. The appeal is accordingly allowed. The judgments under appeal are set aside."*

3.8. In the case of ***Amarkanti Rai***, Hon'ble Apex Court in Para-8, 9, 11 to 14 has held as follows:-

"8. *Insofar as contention of the respondent that the appointment of the appellant was made by the Principal who is not a competent authority to make such appointment and is in violation of the Bihar State Universities Act and hence the appointment is illegal appointment, it is pertinent to note that the appointment of the appellant as night guard was done out of necessity and concern for the College. As noticed earlier, the Principal of the College vide letters dated 11-3-1988, 7-1-1993, 8-1- 2002 and 12-7-2004 recommended the case of the appellant for regularisation on the post of night guard and the University was thus well acquainted with the appointment of the appellant by the then Principal even though the Principal was not a competent authority to make such appointments and thus the appointment of the appellant and other employees was brought to the notice of the University in 1988. In spite of that, the process for termination was initiated only in the year 2001 and the appellant was reinstated w.ef. 3-1-2002 and was removed from services finally in the year 2007. As rightly contended by the learned counsel for the appellant, for a considerable time, the University never raised the issue that the appointment of the appellant by the Principal is ultra vires the rules of the BSU Act. Having regard to the various communications between the Principal and the University and also the educational authorities and the facts of the case, in our view, the appointment of the appellant cannot be termed to be illegal, but it can only be termed as irregular.*

9. *The Human Resources Development, Department of Bihar Government, vide its Letter dated 11-7-1989 intimated to the Registrar of all the Colleges that as per the settlement dated 26-4-1989 held between Bihar State University and College Employees' Federation and the Government it was agreed that the services of the employees working in the educational institutions on the basis of prescribed staffing pattern are to be regularised. As per sanctioned staffing partien, in Ramashray Baleshwar College, there were two vacant posts of Class IV employees and the appellant was appointed against the same. Further, Resolution No. 989 dated 10-5-1991 issued by the Human Resources Development Department provides that employee working up to 10-5-1986 shall be adjusted against the vacancies arising in future. Although, the appellant was appointed in 1983 temporarily on the post that was not sanctioned by the State Government, as per the above communication of the Human Resources Development Department, it is evident that the State Government issued orders to regularise the services of the employees who worked up to 10-5-1986. In our considered view, the High Court ought to have examined the case of the appellant in the light of the various communications issued by the State Government and in the light of the circular, the appellant is eligible for consideration for regularisation.*

XXX XXX XXX

11. *Elaboration upon the principles laid down in Umadevi (3) Case and explaining the difference between irregular and illegal appointments in State of Karnataka Vs. M.L Kesari, this Court held as under (ML Kesari case SSC p 250, para 7) 7. It is evident from the above that there is an exception to the general principles against 'regularisation enunciated in Umadevi (3). if the following conditions are fulfilled: (i)*

The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years. (ii) The appointment of such employee should not be illegal, even if irregular Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possesses the prescribed minimum qualifications, the appointments will be considered to be illegal., But where the persons employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."

12. *Applying the ratio of Umadevi (3) case, this Court in Nihal Singh v. State of Punjab directed the absorption of the Special Police Officers in the services of the State of holding as under: (Nihal Singh Case, SCC pp. 79-80, paras- 35-36) "35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with 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 extracting work from persons such as the appellants herein for decades together itself would he 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 on a par with the police officers of similar rank employed by the State results in 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*

13. *In our view, the exception carved out in para 53 of Umadevi (3)3 is applicable to the facts of the present case. There is no material placed on record by the respondents that the appellant has been lacking any qualification or bore any blemish record during his employment for over two decades. It is pertinent to note that services of similarly situated persons on daily wages for regularisation viz. one Yatindra Kumar Mishra who was appointed on daily wages on the post of Clerk was regularised w.e.f. 1987. The appellant although initially working against unsanctioned post, the appellant was working continuously since 3-1-2002 against sanctioned post. Since there is no material placed on record regarding the details whether any other night guard was appointed against the sanctioned post, in the facts and circumstances of the case, we are inclined to award monetary benefits to be paid from 1.-1-2010. 14. Considering the facts and circumstances of the case that the appellant has served the University for more than 29. years of the post of night guard and that he has served the College on daily wages, in the interest of justice, the authorities are directed to regularise the services of the appellant retrospectively w.ef. 3-1-2002 (the date on which he rejoined the post as per the direction of the Registrar)."*

3.9. Similarly, this Court in the case of ***Dr. Prasanna Kumar Mishra vs. State of Odisha & Others*** reported in ***2016(1) ILR (CUT)-373*** in Para-22 has held as follows:-

> **"22**. In that view of the matter, this Court is of the considered view that the opposite parties should absorb the petitioner on regular basis against sanctioned vacant post taking into account the length of service rendered by him as a Lecturer in Mathematics in which he is continuing without insisting him to undergo the rigors of the selection procedure laid down under the BPUT Act and Rules framed thereunder reason being in the meantime the petitioner has become over aged and he has also been exploited for 20 years for no reasons though he has qualified in all the interviews conducted by the authority for his engagement on contractual basis. The petitioner being not a backdoor entrant to the service, the opposite party-University should extend all consequential benefits as due and admissible in accordance with law as expeditiously as possible preferably within a period of four months. The writ petition is allowed. No order to cost."

3.10. Placing reliance on the aforesaid decisions, this Court vide its judgment dated 17.02.2023 in WPC(OAC) Nos.373, 374 and 375 of 2019, while allowing similar claim directed the Opposite Parties to absorb the Petitioners therein in the regular establishment. This Court in Para-6.8 of the judgment dated 17.02.2023 has held as follows:-

> *"**6.8**. Therefore, placing reliance on the decisions of the Hon'ble Apex Court as well as of this Court as cited (supra) and taking into account the fact that the Petitioners who possess similar qualification as like Gram Panchayat Technical Assistants and the only difference being that the Petitioners were engaged as Technical Consultants and the other Diploma Engineers as Gram Panchayat Technical Assistants on being sponsored from out of the Panel, this Court is inclined to hold that the Petitioners are eligible and entitled for their absorption in the regular establishment. While holding so, this Court directs the Opp. Parties to absorb the Petitioners in the regular establishment within a period of three (3) months from the date of receipt of this order".*

4. Mr. V. Mohapatra, learned counsel appearing for Opp. Party Nos.3 to 5 on the other hand made his submission basing on the stand taken in the counter affidavit as well as reply affidavit filed to the rejoinder of the Petitioner.

4.1. It is the main contention of the learned counsel appearing for the Opp. Party Nos.3 to 5 that even though the Petitioner is continuing on daily wage basis since 1999, but he is not eligible and entitled for his regularisation as there is no such sanctioned post of Sweeper available in the establishment of Ravenshaw College/Ravenshaw University.

4.2. It is contended that since the Petitioner is continuing as against a non-sanctioned post and Government while creating various non-teaching posts for Ravenshaw University vide letter dt.06.04.2009 under Annexure-A/2 and vide letter dt.30.10.2018, under Annexure-B/2 has not created the post of (Sweeper), the Petitioner cannot be regularised as against the said post as the Petitioner is continuing as a Sweeper on daily wage basis since 1999.

4.3. Learned counsel appearing for the Opp. Party NO.3 to 5 also contended that since the post in which the Petitioner is continuing is not a sanctioned post, the decision relied on by the learned counsel appearing for the Petitioner in the case of Umadevi cannot be made applicable to this case. It is also contended that this Court has got no power to direct for creation/sanction of any post.

4.4. In support of his aforesaid submission, Mr. Mohapatra relied on a decision of the Hon'ble Apex Court in the case of ***Government Of Tamil Nadu and Another Vs. Tamil Nadu Makkal Nala Paniyalargal and Others, reported in 2023 SCC Online SC 393***. Hon'ble Apex Court in paragraph 47 of the said judgment held as follows :

> *There cannot be a quarrel with the proposition that the Courts cannot direct for creations of posts. In the case of Divisional Manager Aravali Gold Club v. Chander Hass, it has been held as under:-*
>
> *"15. The Court cannot direct the creation of posts. Creation ad sanction of posts is a prerogative of the executive or legislative authorities and the Court cannot arrogate to itself this purely executive or legislative function, and direct creation of posts in any organisation. This Court has time and again pointed out that the creation of a post is an executive or legislative function and it involves economic factors. Hence the Courts cannot take upon themselves the power of creation of a post. Therefore, the directions given by the High Court and the first appellate court to create the posts of tractor driver and regularise the services of the respondents against the said posts cannot be sustained and are hereby set aside."*

Mr. Mohapatra, learned counsel also relied on another decision of the Hon'ble Apex Court in the case of ***Union of India and Others Vs.Ilmo Devi and another,2021 SCC Online SC 899***. Hon'ble Apex Court in Paragraph 25 & 26 of the judgment has held as follows:

> ***25****. The observations made in paragraph 9 are on surmises and conjunctures. Even the observations made that they have worked continuously and for the whole day are also without any basis and for which there is no supporting evidence. In any case, the fact remains that the respondents served as part-time employees and were contingent paid staff. As observed above, there are no sanctioned posts in the Post Office in which the respondents were working, therefore, the directions issued by the High Court in the impugned judgment and order are not permissible in the judicial review under Article 226 of the Constitution. The High Court cannot, in exercise of the power under Article 226, issue a Mandamus to direct the Department to sanction and create the posts. The High Court, in exercise of the powers under Article 226 of the Constitution, also cannot direct the Government and/or the Department to formulate a particular regularization policy. Framing of any scheme is no function of the Court and is the sole prerogative of the Government. Even the creation and/or sanction of the posts is also the sole prerogative of the Government and the High Court, in exercise of the power under Article 226 of the Constitution, cannot issue Mandamus and/or direct to create and sanction the posts.*
>
> ***26.*** *Even the regularization policy to regularize the services of the employees working on temporary status and/or casual labourers is a policy decision and in judicial review*

the Court cannot issue Mandamus and/or issue mandatory directions to do so. In the case of R.S. Bhonde and Ors. (supra), it is observed and held by this Court that the status of permanency cannot be granted when there is no post. It is further observed that mere continuance every year of seasonal work during the period when work was available does not constitute a permanent status unless there exists a post and regularization is done

4.5. Mr. Mohapatra also contended that Hon'ble Apex Court in the case of Umadevi clearly directed for consideration of all such illegal recruitees as an one-time measure and since by the time Hon'ble Apex Court rendered the judgment in the case of Umadevi, the Petitioner had admittedly not completed 10 years of service, the benefit of the decision in Umadevi's case cannot be extended in favour of the Petitioner.

4.6. Making all such submissions, Mr. V. Mohapatra learned counsel appearing for Opp. Party Nos. 3 to 5 contended that the prayer of the Petitioner for his regularisation has been rightly rejected and it requires no interference of this Court.

5. Mr. S. Rath, learned Additional Standing Counsel on the other hand contended that since the impugned order has been passed by the authorities of Ravenshaw University, State has no role to play. However, he contends that basing on the requirement, State has sanctioned sufficient numbers of posts in different category at different point of time for such appointment in the University.

6. I have heard Mr. B. Pujhari, learned counsel on behalf of Mr. S.K. Pal, learned counsel appearing for the Petitioner, Mr. S. Rath, learned Additional Standing Counsel appearing for Opp. Party Nos.1 & 2 and Mr. V. Mohapatra, learned counsel appearing for Opp. Party Nos.3 to 5.

7. Having heard learned counsel for the parties and after going through the materials available on record, it is found that the Petitioner while continuing as a daily wager, pursuant to the letter issued by the College on 26.05.1999 under Annexure-10, the name of the Petitioner was recommended by the Employment Exchange as against the post of Sweeper in S.C category. On being so sponsored by the Employment Exchange, the Petitioner duly participated in the interview so held on 12.06.1999 in terms of Annexure-11. Even though the Petitioner took part in the selection process, but the Petitioner was not provided with the appointment in view of the letter issued by the Opp. Party No.2 on 21.06.1999 under Annexure-13. Vide the said letter Opp. Party No.2 restrained the Principal of the College from making any appointment as against Class-III & IV post in Ravenshaw College till he retires on 30.06.1999.

7.1. It is also found that communication issued by Opp. Party No.2 on 21.06.1999 was the subject-matter of challenge before this Court in OJC No.7544 of 1999. This Court vide order dt.23.08.1999 while disposing the matter held that since the period of restrain is already over on retirement of the previous Principal, there is no impediment for consideration of the Petitioners' case therein. On the face of such

order passed by this Court in OJC No.7544 of 1999, the Petitioner therein though were provided with engagement, but the Petitioner as found from the record was allowed to continue on daily wage basis. It is also found from the communication issued by the Principal under Annexure-10 that the Principal while calling for the names from the Employment Exchange indicated regarding availability of two posts of Sweeper in S.C category. The Petitioner having belong to SC category, participated in the selection process so held on 12.06.1999 in terms of Annexure-11, but the Petitioner was not provided with the appointment due to the restrain order issued under Annexur-12. Therefore, the stand taken by the Opp. Party Nos.3 to 5 that there is no such sanction of post of Sweeper, is not acceptable on the face of communication issued by the Principal 26.05.1999 under Annexure-10. Not only that in view of such long continuance of the Petitioner w.e.f 1999, in view of the decision of the Hon'ble Apex Court as cited (supra), it is to be held that the Petitioner is continuing as against a sanctioned post and the plea taken by the Opp. Parties 3 to5 that no such post has been sanctioned by the Government while sanctioning various posts for Ravenshaw University vide communication issued under Annexures-A/2 and B/2 has no relevancy to the case of the Petitioner. Therefore, taking into account the continuance of the Petitioner as a daily wager since 1997 and /or 1999, this court is of the view that the Petitioner is eligible for his regularisation in view of the decision of the Hon'ble Apex Court in the case of Umadevi as cited supra. The plea taken by Opp. Party Nos.3 to 5 that the decision in the case of Umadevi is an one-time measure, is not acceptable in view of the subsequent decision of the Hon'ble Apex Court in the case of ***M.L. Keshari as cited (surpa).***

7.2. In any view of the matter, it is the view of this Court that the Petitioner is eligible and entitled for his absorption and/or regularisation as against the post of Sweeper.

This Court while holding so is inclined to quash the impugned order dt.04.08.2022 under Annexure-1. While quashing the same, this Court directs opp. Party No.3 to regularise the services of the Petitioner as against the post of Sweeper within a period of two (2) months from the date of receipt of this order.

8. The Writ Petition is accordingly disposed of with the aforesaid observation and direction.

—— o ——

2023 (III) ILR – CUT- 280

BIRAJA PRASANNA SATAPATHY, J.

W.P.(C) NOS. 20940,21425,24708, 26700, 26702, 26703,26704,26705,26706, 26708,26709,28876 OF 2020 AND W.P.(C) NOS.24233, 30728 & 33966 OF 2021

PURNA CHANDRA BAG & ORS. ……..Petitioners

.V.

STATE OF ODISHA & ORS. ……Opp. Parties

CONSTITUTION OF INDIA, 1950 – Article 14 and 16 – Claim of Parity against pay – Petitioner are working as Accountant-cum-Support staff in different Block Offices of the state under OPEPA/OSEPA, claim pay parity with that of Accountant working in District Project Office and State Project Office – Held, the qualification prescribed for the engagement of the Accountants at the block level as well as in the district level and state level are similar, the rejection of the claim of petitioners to get the benefit of pay parity as per the considered view of this court is not legal and justified, the impugned order quashed.

For Petitioners : M/s. Subir Palit, Sr.Adv., Pami Rath, Sr.Adv., Jyanesh Mohanty, Sucheta Gumansingh, Akshaya Ku. Pandey, Sarathi Jyoti Mohanty

For Opp. Parties : M/s. R.N. Mishra, A.G.A (for Opp. party Nos.1 & 2) P.K. Mohanty, Sr.Counsel (for Opp. Party No. 3) Mr. P.K. Parhi, DSGI Mr. M.K.Pradhan, CGC (for Opp. Party No.4)

JUDGMENT Date of Hearing: 05.05.2023 : Date of Judgment: 02.08.2023

BIRAJA PRASANNA SATAPATHY,J.

1. Since the issue involve in all these Writ Petitions relates to extension of the benefit of the pay scale in favour of the Petitioners who are working as Accountant-cum-Support Staff in different block offices of the State under OPEPA/OSEPA with that of the Accountant working in District Project Office and State Project Office, all the matters were heard analogously and disposed of by the present common order.

2. For the sake of brevity, the Petition in W.P.(C) No.20940 of 2020 was treated as the lead case.

3. It is the case of the Petitioners that for development of primary education in the State of Odisha, Odisha Primary Education Programme Authority was created in the year 1996. The said authority originally named as "OPEPA" was renamed as Orissa School Education Programme Authority i.e. OSEPA. OPEPA was created in the year 1996 under a Central Government Scheme and as per the said Scheme,

Government of India, Ministry of Human Resources contributed 60% of the total requirement and balance 40% was contributed by the State of Orissa. Subsequently in the year 2005, the concept Sarva Siksha Abhiyan(SSA) was taken up by OPEPA for smooth functioning of Elementary Education in the State.

3.1. OPEPA was created in terms of the Memorandum of Association so framed for implementation of Primary Education Programme in the State. The object of OPEPA provided under Para-4 of the Memorandum of Association (MOA) stipulates that OPEPA shall act as an autonomous and independent body for implementation of the Orissa Primary Education Programme as outlined in the project document published by the Government of Odisha and its revised versions that may be prepared on the basis of joint review from time to time.

3.2. Similarly, the functions of the OPEPA as provided under Paragraph-5 of MOA provides that it is to be undertaken directly by the authority through its staff sponsored/supported by it through other institutions agencies or individuals. As provided under Paragraph-5 (m) OPEPA is to create academic, technical, administrative, managerial and other posts in the Authority and to make payments for the same in accordance with the Rules and Regulations of the Authority. As provided under Paragraph-5(n), OPEPA is to make rules and regulations for conduct of the affairs of the Authority/and add or amend, vary or rescind them from time to time.

3.3. As provided under Paragraph-6 of MOA, the income and property of the Authority however derived shall be applied towards promotion of the objects thereto as set forth in the Memorandum of Association. In respect of the expenditure of the grants made by the Government of Odisha or Govt. Of India to such limitation as these Governments may from time to time impose.

3.4. As provided under Para-7 of MOA State Government and the Central Government shall jointly appoint one or more persons to review the work and progress of the Authority and to hold enquiries into the affairs thereof and report thereon in such a manner as the Government may stipulate and upon receipt of any such report, the Government may jointly take such action and issue such directions as they may consider necessary in respect of any of the matters dealt within the report and the Authority shall be bound to comply with such directions. In addition, the Central Government or the State Government may at any time issue directives on matters of policy to the Authority and the latter shall be bound to promptly comply with such directives. Where there is divergence of views between the State Government and the Central Government, the views of the Central Government would prevail.

3.5. As provided under Rule-3 of Rules and Regulations of OPEPA, it shall come into force from the date on which OPEPA is registered under the Societies Registration Act as applicable to the State of Orissa.

3.6. As provided under Rule-34 of the Rules & Regulation, it shall be the responsibility of the Executive Committee to endeavour to achieve the objects of the authority and to discharge all its functions. The Executive Committee shall exercise all administrative, financial and academic authority in this behalf including powers to create posts of all descriptions and make appointments thereon in accordance with the regulations. Similarly as provided under Rule-35, the Executive Committee shall have under its control the management of all the affairs and funds of the Authority, Rule 36 of the Rules confers power on the Executive Committee, to frame Regulations with the approval of the State Government and to frame bye-laws for the conduct of activities of the Authority in functioning as per its stated objectives.

3.7. As provided under Regulatins-45 of the Rules & Regulation, subject to any specific direction of the Authority and keeping in view the overall advice of the Central Government and the State Government, the Executive Committee shall have powers to frame and amend regulations not inconsistent with these Rules for administration and management of the affairs of the Authority and without prejudice to the generality of these provision such Regulation may provide for the following matters.

> (i) Service matters pertaining to Officers and staffs including creation of posts, qualifications, selection procedure, service condition, pay and emoluments, disciplinary controls as well as classification, controls and Appeal Rules.

3.8. In order to implement the Rules, guidelines were also framed and as per the said guideline, it was provided that while creating the posts and formulating the service and financial conditions, scale of pay in respect of the posts to be created by the Executive Committee shall correspond either to the Central Government or the State Government scale of pay. With the aforesaid provisions as contained under Rule 34 of the Rules & Regulation, the Executive Committee in its 26th meeting held on 16.02.2010 vide item No.9 decided for engagement of Block Level Accountant for BRCs with the condition that the designation of post will be Accountant-cum-Data Entry Operator and qualification as well as consolidated remuneration may be equal for both the Block Level Accountant with that of District Project Office.

3.9. Basing on the decision taken by the Executive Committee in its 26th Meeting held on 16.02.2010 under Annexure-18, Opp. Party No.2 vide letter dt.07.12.2011 under Annexure-1, addressed to Opp. Party No.3, accorded the approval for creation of various contractual posts for strengthening of 314 BRCs to URCs during the year 2011-12. But while issuing such a direction, the post approved by the Executive Committee with the designation Accountant-cum-Data Entry Operator was notified as Accountant-cum-Support staff. Basing on the direction issued under Annexure-1,Collector-cum-Chairman, Sarva Siksha Abhiyan of different districts issued respective advertisements to fill up various posts under Sarva Siksha Abhiyan which also includes the post of Accountant-cum-Support staff in BRCs.

3.10. The Petitioners in all these Writ Petitions basing on such advertisement issued by the concerned Collector-cum-Chairman, Sarva Siksha Abhiyan of different districts were duly selected and appointed as Accountant-cum-support Staff with consolidated remuneration of Rs.5,200/-.

3.11. Subsequent to such appointment of the Petitioners as Accountant-cum-Support Staff in different BRCs, the Executive Committee in its proceeding of the 30th meeting held on 06.03.2014 under Annexure-4 vide Item No.6.4 approved to extend the benefit enjoyed by OPEPA employees as per the OPEPA Service Rules & Regulations 1996 to the MIS-cum-Planning Coordinator, Block Level Accountant and Attendant-cum-Watchman at the BRC level.

3.12. In spite of such decision taken by the Executive Committee with regard to extension of the benefit enjoyed by the OPEPA employees in favour of the Block Level Accountant working in different BRCs, though was not extended, but vide Annexure-7 while providing information under R.T.I, it was indicated that all types of leave availed by the employees working under the OPEPA are also applicable to the employees working under block level. When the benefit availed by similarly situated Accountant working in the State Project office and District Project office was not extended in favour of the petitioners who were also discharging similar nature of duty on the face of the decision taken by the Executive Committee under Annexure-4 as well as Annexure-18, some of the Block Level Accountant working in different BRCs approached this Court in different Writ Petitions claiming parity of the remuneration with that of the Accountant working in State Project office and District Project office.

3.13. This Court when disposed of the matters with a direction on the Opp. Party No.3 to take a decision on such claim of the Petitioners with regard to payment of equal remuneration, Opp. Party No.3 without proper appreciation of the claim, rejected the same vide order dt.10.07.2020. The said order of rejection is under challenge by the Petitioners in W.P.(C) No.20940 of 2022. The Petitioners in the other batch of Writ Petitions though have not approached this Court seeking pay parity, but in view of the rejection of similar claim of the Petitioners in W.P(C) No.20940 of 2020, the Petitioners in the connected batch of Writ Petitions have prayed for pay parity with that of the Accountants working in State Project Office and District Project Office.

4. Mr. Subir Palit, learned Senior Counsel appearing for the Petitioners in W.P.(C) No.20940 of 2020 along with Ms. Pami Rath , learned Sr. Counsel appearing for the petitioners in W.P.(C) No 24708 of 2020 and batch vehemently contended that in view of the guideline framed by the OPEPA in its Memorandum of Association and in view of the decisions taken by the Executive Committee in the proceeding of the 26th meeting held on dt.16.2.2010 under Annexure-18 vide Item No.9 and proceeded of the meeting held under Annexure-4 dt.06.03.2014 vide Item No.6.4, the petitioners who are working as Accountant-cum-Support Staff in

different BRCs are eligible and entitled to get the benefit of pay parity with that of the Accountants working in the State Project office and District Project Office.

4.1. Both the learned Sr. Counsels appearing for the Petitioners contended that vide Item No.9 of the proceeding of the meeting held on 16.02.2010 under Annexure-18, the Executive Committee for the purpose of engagement of Block Level Accountant in BRCs, the approved the same with the condition that for the posts of Accountant-cum-Data Entry Operator, the qualification and consolidated remuneration may be equal to those working as Accountants in each District Project Offices. In view of such decision taken by the Executive Committee, Opp. Party No.2 while issuing the communication on dt. 07.12.2011 under Annexure- 1 should not have described said post as Accountant-cum-Support Staff in place of Accountant-cum-Data Entry Operator with consolidated remuneration of Rs.5200/-.

4.2. It is contended that because of such wrong committed by the Opp. Party No.2 while issuing Annexure-1, Collector-cum-Chairman, Sarva Siksha Abhiyan of different districts while issuing the advertisement described the post as Accountant-cum-Support Staff with consolidated remuneration of Rs.5200/- per month, while led to discrimination in between the Accountants working in Block Level and District Level as well as State level.

4.3. It is also contended that as provided under Regulation 45(a) of the Rules and Regulation, the Executive Committee shall have the power to create posts, prescribe the qualification, selection, procedure, service conditions, pay and emoluments. The Executive Committee in the proceeding of its 26th meeting held on 16.02.2010 vide Item No.9, while deciding for engagement of Block Level Accountant for BRCs, approved that the designation of the post will be Accountant-cum-Data-Entry Operator and the qualification and consolidated remuneration may be equal to those working as Accountants in each District Project Office.

4.4. It is also contended that in view of the decisions taken by the Executive Committee in its 26th meeting held on 16.02.2010, the remuneration to be paid to the Block Level Accountant should be equal to those working as Accountants in District Project Office. But on the face of such decisions of the Executive Committee taken in its 26th meeting held on 16.02.2010, the remuneration allowed to the petitioners in their capacity as Accountant-cum-Support staff since was not equal to that of the remuneration paid to the Accountants working in State and District Project office, a number of Block Level Accountants approached this Court claiming parity of their remuneration with that of Accountants working in State and District Project Office. Even though this Court directed Opp. Party No.3 to take a decision on the claim, but Opp. Party No.3 without proper appreciation of the same, rejected the claim vide order dt.10.07.2020, which is impugned in W.P.(C) No.20940 of 2020.

4.5. Learned Sr. Counsels appearing for the Petitioners contended that in view of the provisions contained under Regulatin-45(a) of the 1996 Regulation and the

decision taken by the Executive Committee in its 26th meeting as well as 30th meeting held on 16.02.2010 and 06.03.2014 respectively, the petitioners are entitled to get the benefit of pay parity with that of the Accountants working in State and District Project Office. It is also contended that while the Petitioners in all these cases were initially appointed with consolidated remuneration of Rs.5,200/-, but the same was subsequently enhanced to Rs.8,049/- in the year 2016 and further enhanced to Rs.12,500/- on 13.03.2020. But similarly situated Accountant working in District and State level are getting higher remuneration than that of the Petitioners. While the Accountants working in the District Project office are getting remuneration of Rs.22,805/- per month and a Peon/Sweeper working in State Project Office with qualification of Matriculation is getting remuneration of Rs.18,873/-, the Petitioners having similar qualification with that of the Accountant working in District Project Office are getting consolidated remuneration of Rs.12,500/- at present.

4.6. It is also contended by the learned Sr. Counsels appearing for the Petitioners that the remuneration paid to the Petitioners is also less than the minimum wages prescribed for High skilled employees of the Government. It is accordingly contended that the Petitioners are eligible and entitled to get the benefit of pay parity with that of the Accountant working in the District Project Office and State Project Office. The rejection of such claim by the Opp. Party No.3 vide order dt.10.07.2020 is therefore not sustainable in the eye of law and liable for interference of this Court.

5. Mr. P.K. Mohanty, learned Sr. Counsel appearing for Opp. Party No.3 made his submission basing on the stand taken in the counter so filed in W.P.(C) No.20940 of 2020.

It is contended by the learned Sr. Counsel that the engagement of staff at Block level of OSEPA is different from the engagement of staff of OSEPA working in District Project Office and State Project Office. It is also contended that since the employees working in the District Project Office and State Project Office are getting their salary under the Head "MER" Project, the Petitioners working at the block level are getting their salary under the Head Academic Support' through BRC/URC within the approved budget of PAB, Government of India. New Delhi.

5.1. It is also contended that the posts held by the Petitioners i.e. Accountant-cum-Support Staff is not similar to that of the Accountants working in the District Project Office and State Project Office.

5.2. It is also contended that without allocation of budget and funds as per the decision of PAB of the Central Government, it is not within the power of Opp. Party No.3 to extend pay parity as claimed by the Petitioners. It is also contended that for payment of remuneration to the employee working under OSEPA while the Central Government is providing 60% of the requirements, State Government is providing the balance 40%. Taking into account the funds provided by the Central Government

and the State Government @ 60% and 40%, Opp. Party No.3 is making the payment to the employees working in the State Project Office as well as District Project Office and employees working at the Block level by making necessary allocation of the funds.

5.3. Learned Sr. Counsel accordingly contended that in absence of allocation of required funds by the Central Government as well as by the State Government, the claim of the Petitioners cannot be entertained and it was rightly rejected by Opp. Party No.3 vide order dt.10.07.2020.

6. To the aforesaid submissions of the learned Sr. Counsel appearing for OPEPA/OSEPA, learned Sr. Counsels appearing for the Petitioners in the batch of Writ Petitions contended that in view of the provisions contained under Regulation-45(a) of the 1996 Regulation and the decisions taken by the Executive Committee in its meeting dt. 16.02.2010 and dt.06.03.2014, the stand taken by Opp. Party No.3 is not legally tenable. It is also contended that the decisions taken by the Executive Committee in its 30th meeting dt.06.03.2014 though was carried out in case of employees working in State Project Office and District Project Office, but the same is yet to be implemented in respect of the Petitioners who are working at the block level. However, taking into account the fact that the prescribed qualification for engagement of Accountant at block level and that of the Accountant engaged in State level and District level being similar with similar nature of duty, the discrimination meted out to the Petitioners with regard to payment of remuneration, is not only illegal but also violative of Articles 14 & 16 of the Constitution of India.It is accordingly contended that the Petitioners in all these cases are eligible and entitled to get the benefit of pay partiy with that of the Accountants working in District level and State level with quashing of the order of rejection so made by the Opp. Party No.3 vide order dt.10.07.2020 so impugned in W.P.(C) No.20940 of 2020.

7. I have heard Mr. Subir Palit and Ms. Pami Rath, learned Sr. Counsels along with other counsels appearing for the Petitioners and Mr. P.K. Mohanty, learned Sr. Counsel appearing for Opp. Party No.3.

8. Having heard learned counsel for the parties and after going through the materials available on record, it is found that the Executive Committee in its 26th meeting held on 16.02.2010 though approved for creation of the posts of Accountant-cum-Data Entry Operator to be filled up at the block level, but the said post was designated as Accountant-cum-Support Staff by the Opp. Party No.2 while issuing the communication dt.07.02.2011 under Annexure-1. Basing on the said communication though it is not disputed that all the petitioners were engaged as Accountant-cum-Support Staff at the block level pursuant to the advertisement issued by the concerned Collector-cum-Chairman, Sarva Siksha Abhiyan in different districts, but taking into account the qualification prescribed for Accountant at the block level and that of the Accountant engaged in the State Project office and

District Project Office, this Court is of the view that the qualification prescribed for engagement of the Accountants at the block level as well as in the district level and State level are similar. It is also found from the record that as per Regulation-45(a) of the 1996 regulation, it has been clearly provided that the Scale of Pay in respect of the post to be created by the Executive Committee shall correspond either to the Central Government or State Government scale of pay. It is also found from the record that the Executive Committee in its 30th meeting held on 06.03.2014 vide Item No.6.4 also approved to extend the benefit enjoyed by the different employees as per OPEPA Employees Service Rules and Regulations 1996 to the block level Accountant engaged at BRCs level.

8.1. Therefore, in view of the provisions contained under Regulation-45(a) of the Rules & Regulation,1996 and the decision taken by the Executive Committee in the proceeding of the 30th meeting held on 06.03.2014, the rejection of the claim of the Petitioners to get the benefit of pay parity with that of the Accountants working in the State level and District level as per the considered view of this Court is not legal and justified. Therefore, this Court is inclined to quash the said rejection made by Opp. Party No.3 vide order dt.10.07.2020, which is impugned in WP(C) No.20940 of 2020 and quash the same.

8.2. However, taking into account the submissions made by the learned Sr. Counsel appearing for Opp. Party No.3 that unless funds allocated by the Central Government and State Government at the ratio of 60:40% is enhanced suitably, Opp. Party No.3 is not in a position to consider the claim of the Petitioners, this Court while disposing the Writ Petitions directs Opp. Party No.3 to reconsider the demand of the Petitioners and after such reconsideration, Opp. Party No.3 is directed to make necessary demand before the Central Government as well as the State Government for allocation of the required fund as per the available ratio. It is directed that Opp. Party No.3 shall re-consider the demand and make necessary claim before the Central Government as well as the State Government for allocation of funds within a period of two (2) months from the date of receipt of this order. It is further directed that on receipt of such demand from Opp. Party No.3, both Opp. Party Nos.2 & 4 shall take a lawful decision with regard to allocation of further fund on such demand so made by Opp. Party No.3 within a period of two(2) months from the date of receipt of such demand.

8.3. Since it is the view of this Court that the Petitioners working at block level are doing similar nature of duty as that of the Accountants working in the District level and State level with similar qualification, the said fact is to be borne in mind by both Opp. Party No.3 as well as by Opp. Party Nos.2 & 4 while taking a decision as directed hereinabove.

9. All the Writ Petitions are accordingly disposed of. Photocopy of this order be placed in the connected cases.

—— o ——

2023 (III) ILR – CUT- 288

SANJAY KUMAR MISHRA, J.

W.P.(C) NO.145 OF 2017

BHAKTABATSAL SWAIN .....Petitioner

.V.

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

INDO-TIBETAN BORDER POLICE FORCE ACT, 1992 – Section 142 – The petitioner was dismissed from service – The appeal preferred by the petitioner was rejected solely on the ground of alleged delay – There is no such period of limitation for preferring appeal U/s. 142 – Effect of – Held, the impugned memorandum of rejection set aside – This court remands the matter back to the authority concerned to consider the appeal. (Appeal 14-15)

For Petitioner : Mr. S.K. Samantaray

For Opp. Party: Mr. G. Mohanty, Central Govt. Counsel

JUDGMENT Date of Hearing & Judgment: 06.07.2023

SANJAY KUMAR MISHRA, J.

The Petitioner, who was working as Head Constable under the 41st Battalion, Indo-Tibetan Border Police Force (ITBPF), was dismissed from service with effect from 6th February, 2016, has preferred the Writ Petition challenging the said order of dismissal dated 6th February,2016, so also Office Memorandum dated 05.12.2016, as at Annexure-8, vide which the Appeal preferred by him was rejected solely on the ground of alleged delay.

2. The brief background facts which lead to filing of the present Writ Petition is that the Petitioner joined the ITBP Force in the year 1989 at Bareli and thereafter served at many places and lastly was posted at Khurda in the year 2010. While working at Khurda, he was directed to assist one Rabindranath Parida, Sub-Inspector, (Opposite Party No.5), who was discharging his duties as Cashier with effect from 23rd August, 2014. Although one Group-D employee was required to be attached to assist the Cashier, but for the reason best known to the authority concerned, the Petitioner was assigned with the said job with effect from 14.11.2014.

3. While working as such, several irregularities were committed by the Opposite Party No.5 making online transactions by utilizing the Bank Account Number of the Petitioner, who had given his account details to him on good faith. In view of such allegation, vide order dated 25th January, 2016 of the Commandant; it was proposed to enquire into the charges against the Petitioner. Accordingly,he was chargesheeted on 25.01.2016. Pursuant to the charge sheet, the Petitioner was tried by the Summery Force Court for the alleged offence committed under Section 38(e)

and Section 42 of the Indo-Tibetan Border Police Force Act, 1992,shortly, hereinafter, the Act, 1992. It has been alleged in the Writ Petition that when the Petitioner was chargesheeted, he was kept in the custody of Armed Guards, influenced and coerced to admit the guilt although he has not made any transaction with the bank and all transactions were made online by Opposite Party No.5, he being the Cashier. Pursuant to the charge sheet, an enquiry was conducted in a cavalier fashion and in complete violation of the Audi Alteram Partem Rule. The Petitioner was also kept in the custody of the armed commandos. He was influenced and coerced to admit the guilt and even not allowed to consult any lawyer or to take assistance of any competent defence assistant. However, one Inspector, namely, Sri N. Sanjeet was engaged to act as friend of the Petitioner. On the other hand, the Petitioner deposited the amount by selling the household articles and landed property. During the enquiry, the Petitioner was never allowed to take assistance of a lawyer as provided under Rule 157 of the Indo-Tibetan Border Police Force Rules, 1994, shortly, hereinafter, the Rules, 1994. Though said Rule provides that during a trial at a Summary Force Court, an accused may take the assistance of any person, including a legal practitioner, as he may consider necessary, but the said person will not examine or cross-examine the witnesses or address the Court. The Petitioner was found guilty of both the charges and sentenced to suffer rigorous imprisonment for four months in civil prison and was dismissed from service vide Order dated 6th February, 2016. On the very same day,he was taken to jail and all the statements, records and Court proceeding were seized by the Commandant. He was served with the said order of punishment and was informed that he may prefer an Appeal, if he so likes, within three months. Since the Petitioner was taken to jail custody, without the Court proceedings and reports, he could not prefer the Appeal nor could he consult any lawyer for legal advice without any documents on records, which were seized by the authorities and the Petitioner lost the right to Appeal in time.

4. It is further case of the Petitioner that even if after passing of the said order of punishment dated 6th February, 2016, he was taken to Khurda Sub-Jail and his belongings were seized including the material documents like charge sheet, Summery Force Court Proceeding and Statements of Witnesses and evidences. Enquiry Report and Defence Statement were also seized illegally, which virtually deprived the Petitioner to prefer an Appeal to the higher Authority effectively.

5. Ultimately, the Petitioner's wife and son consulted the advocate and visited the Commandant's Office on 27th February, 2016 and 29th February, 2016. But they were refused of the documents on the plea that the same will be sent to the Jail by post. Therefore, finding no way out, the wife of the Petitioner submitted an application for immediate supply of the documents to give her opportunity for filing an effective Appeal and submitted the same by speed post on 01.03.2016. However, because of inaction of the authority concerned, the Petitioner was compelled to approach this Court in W.P.(C) No.4473 of 2016, which was disposed of on 6th April, 2016 with the following order.

"06.04.2016

Heard Mr. Kanungo, learned counsel for the petitioner and Mr. Chimanka, learned Central Government Counsel.

The petitioner has prayed for a direction to the opposite party no.4 to supply the records/documents, so as to file the appeal.

The matter was listed on 4.4.2016. By the said order, learned Central Government Counsel was directed to supply the documents to the petitioner.

Learned Central Government Counsel submits that the documents have already been supplied to the petitioner.

In view of the same, ***the writ petition is disposed of with an observation that if the petitioner files an appeal challenging the punishment imposed by the authorities within a period of three days from today, the appellate authority shall do well to consider the interim application for release from the custody within a period of seven days thereafter****.*

Free copy of this order be handed over to learned Central Government Counsel.

Sd/-
(Dr. A.K. Rath, J.)"
(Emphasis supplied)

6. In view of the Order passed by this Court in W.P.(C) No.4473 of 2016, records and materials were supplied to the Petitioner in the Court itself. The said Writ Petition was disposed of with the direction to the Opposite Parties to dispose of the Appeal of the Petitioner, if the same is preferred within three days from the date of the said Order and to consider the interim application of the Petitioner for his release from the custody within a period of seven days thereafter. Pursuant to the said order, the Petitioner preferred an Appeal with the materials available with him along with certified copy of the order passed by this Court and his wife personally went to the Office of the Opposite Party No.3 to tender the said Appeal. However, as it was not received by the said Office, the Petitioner was compelled to send the same by Speed Post on 08.04.2016. Though there was a specific direction by this Court in W.P.(C) No.4473 of 2016 to take a decision on the application of the Petitioner within seven days of receipt of the Appeal, as no decision was taken in terms of the direction given by this Court, nor on the suspension of sentence, so as to release the Petitioner from the jail custody, he was constrained to approach this Court again in W.P.(C) No.7097 of 2016 along with Misc. Case No.6523 of 2016. This Court disposed of the said Writ Petition directing to release the Petitioner forthwith and also direction was given to the D.I.G. to take up the matter and dispose of the Appeal of the Petitioner in accordance with law.

7. Pursuant to the said direction of this Court, the Petitioner was released from jail custody on 30th April, 2016.However, the Memorandum of Appeal submitted by him on 8th April, 2016 was kept pending and the Petitioner was never called for hearing of the Appeal, for which again he was constrained to give reminder in form of an Appeal specifically referring to Section 142 of the Act, 1992 for pardon and

remission of punishment imposed on him in terms of order dated 6th February, 2016. However, the Appeal preferred by the Petitioner under Section 142 of the Act, 1992 was mechanically rejected by the Appellate Authority on the ground that the same is barred by limitation making a communication to the said effect vide Office Memorandum dated 5th December, 2016. Being aggrieved by the rejection order dated 5th December, 2016, so also the order of dismissal dated 6th February, 2016, the Petitioner has preferred the present Writ Petition with a prayer to set aside the said order as at Annexure-3 and to direct the Opposite Party Nos.1 to 4 to reinstate the Petitioner with all consequential benefits.

8. Being noticed, the Opposite Parties have filed their Counter Affidavit in support of the action taken by the authority concerned against the Petitioner to be legal and justified. In the Counter Affidavit, apart from detailing the charges proved against the Petitioner, a para-wise reply has been given in response to the averments made in the Writ Petition. While replying so, it has been admitted by the Opposite Parties that wife of the Petitioner had been to the Office of the Commandant, 41st Battalion,ITBPF on 1st March, 2016 for providing her copy of the charge sheet, reply of charge sheet, entire court proceedings and statement of witnesses, statement of SI and action taken, enquiry report and defence statement. However, it has been mentioned that a reply was given on 21st March,2016 to the wife of the Petitioner. There is no mention in the Counter Affidavit that on being so approached, the said documents were supplied to the wife of the Petitioner. Rather, the averments made in the Writ Petition to the effect that documents were supplied in the Court itself when W.P(C) No.4473 of 2016 was taken up for hearing, has not been disputed by the Opposite Parties in their Counter Affidavit. However, in response to the averments made in Para-20 of the Writ Petition, in Para-23 of the Counter Affidavit, it has been specifically averred that there was no intentional delay in adhering to the order of this Court dated 6th April, 2016. Rather, the Appeal preferred by the Petitioner was received by the Office of the Opposite Party No.3 on 10th April, 2016. The averments made in paragraph-23 being relevant for proper adjudication of the present lis, is extracted below:

> ***"23**. That the averments made in para 20 of the writ petition are not all correct and hence denied. The deponent respectfully submits that there is no intentional delay in adhering to the orders of Hon'ble High court of Orissa, Cuttack dated 06.04.2016,* ***an appeal of petitioner received in the office of Opposite party No.3 on 10.04.2016. It is pertinent to mention here that, as per the Rule 160 of ITBPF Rules, 1994, the Summary Force Court proceeding in the case of Petitioner was not received in the office of Opposite Party No.3 duly vetted by Judge Attorney General Dte Ge,ITBPF. Hence, Opposite Party No.3 vide fax Msg.No.636 dated 10.04.2016, requested JAG, Dte Gen, ITBPF (1) to review the SFC proceeding and advise DIG (BBSR) for further action****. (2) Action required on judgment of Hon'ble High Court of Orissa, Cuttack vide their judgment dated 06.04.2016. Hence, no decision had been taken by Opposite Party No.3 on the appeal of petitioner till filing W.P.(C) No.7097 of 2016."*
>
> *(Emphasis supplied)*

9. However, other allegations made in the Writ Petition have been denied in the Counter Affidavit. So far as dismissal of the Appeal of the Petitioner, averments made in paragraph-26 of the Counter Affidavit, being germane to the subject matter under consideration, are extracted below:

> "*That in reply to averments made in para-23 of the writ petition it is humbly submitted that the* ***appellate authority has dismissed the appeal of the Petitioner under Section 142 of the ITBPF Act, 1992 due to time barred***". (Emphasis supplied)

10. Learned Counsel for the Petitioner submits that though there is no such period of limitation to prefer an Appeal in terms of Section 142 of the said Act, 1992, the authority concerned, without any basis, mechanically rejected the application of the Petitioner solely on the ground of alleged delay in preferring the said Appeal. He draws attention of this Court to one of the impugned order i.e. Office Memorandum dated 5th December, 2016, the contents of which are extracted below:

> ***"Office Memorandum***
>
> *The appeal dated 04.10.2016 of No.890200454 Ex HC/GD Bhaktabatsal Swain against the punishment imposed to him by the Commandant 41st Bn in the Summary Force Court,examined in detail by the undersigned.*
>
> *As in the case of Summary Force Court, the sentence inflicted upon the accused is promulgated immediately after the conclusion (under the Rule 159 of ITBP Rules 1994) of proceedings. Therefore* ***in this particular matter the period of limitation got started just after the announcement of punishment i.e. on dated 06.02.2016*** *vide 41st Bn order No.ITBP/41st Bn/EC-2/SFC(BBS)/2016-199.* ***Appeal submitted after more than 08 months is time barred****. Accordingly the petition preferred by the accused personnel No.890200454 HV/GD Bhaktabatsal Swain under Section 142 of the ITBPF Act 1992* ***is dismissed as barred by the law of limitation****.*
>
> *Dy Inspector General*
> *SHQ (BBSR)*
> *I.T.B. Police Force."*
> *(Emphasis supplied)*

11. Learned Counsel for the Petitioner further submits, the Opposite Parties have not disputed the averments made in the Writ Petition that the Petitioner submitted the Appeal on 08.04.2016 through Speed Post. Rather, in the Counter Affidavit, it has been admitted that the same was received by the Office of the concerned authority on 10.04.2016. Mr. Samantaray further submits, the said Appeal was well within the period as indicated in the order of punishment dated 6th February, 2016, so also was also within the period granted by this Court in W.P.(C) No.4773 of 2016.However, the said Appeal of the Petitioner was summarily dismissed solely on the ground of alleged delay of eight months and is time barred. Such an observation in the impugned order is contrary to the admitted facts on record, so also beyond the provisions enshrined under Section 142 of the Act, 1992.

12. Learned Counsel for the Opposite Party Nos.1 to 4, reiterating the stand taken in the Counter Affidavit, submits that there is no illegality and irregularity in

the impugned order of punishment dated 6th February, 2016, which was rightly confirmed by Office Memorandum dated 5th December, 2016 by rejecting the Appeal preferred by the Petitioner under Section 142 of the Act, 1992 as the same was grossly time barred.

13. In view of such submissions made by the learned Counsel for the parties, at this juncture, it is apt to extract below Section 142 of the Act, 1992.

> ***"142. Pardon and remission***.-*When any person subject to this Act has been convicted by a Force Court of any offence, the Central Government or the Director-General or, in the case of a sentence, which he could have confirmed or which did not require confirmation,* ***an officer not below the rank of Additional Deputy Inspector-General within whose command such person at the time of conviction was serving, or the prescribed officer may****,—*
>
> *(a)* ***either with or without conditions which the person sentenced accepts, pardon the person or remit the whole or any part of the punishments awarded; or***
>
> *(b) mitigate the punishment awarded; or*
>
> *(c) commute such punishment for any less punishment or punishments mentioned in this Act; or*
>
> *(d) either with or without conditions which the person sentenced accepts, release the person on parole."* *(Emphasis supplied)*

14. Admittedly, there is no such period of limitation for preferring an Appeal in Section 142 of the Act, 1992. Further, a query being made, learned Counsel for the Opposite Party Nos.1 to 4 also failed to demonstrate from the pleadings on record made by the said Opposite Parties in their Counter Affidavit, so also from the Act, 1992 read with Rules, 1994 made there under as to provision prescribing specific period of limitation to prefer an Appeal under Section142 of the Act, 1992. Further, learned Counsel for the Opposite Parties also failed to satisfy this Court as to how there is a delay of eight months in preferring the Appeal as has been indicated in one of the impugned orders i.e. Office Memorandum dated 5th December, 2016. Rather, from the pleadings made by the learned counsel for the Petitioner, which has not been disputed in the Counter Affidavit, it is clear that the order of punishment was dated 6th February, 2016, whereas the Appeal was preferred on 08.04.2016, which was sent to the concerned authority by Speed Post and the same was duly received by the authority concerned on 10.04.2016, as has been admitted in the Counter Affidavit. Further, the said Appeal was also submitted within three months as permitted by the Authority, so also within three days i.e. the period granted by this Court vide order dated 06.04.2016 in W.P.(C) No.4773 of 2016. Hence, this Court is of the view that the Office Memorandum dated 5th December, 2016, vide which the Appeal of the Petitioner preferred under Section 142 of the Act, 1992 was rejected solely on the ground of alleged delay of eight months and is time barred, is liable to set aside.

15. Accordingly, Office Memorandum dated 5th December,2016 is set aside. Since the appeal preferred by the Petitioner under Section 142 of the Act, 1992 is

admittedly to be decided by the authority concerned on merit, without expressing any opinion as to legality and validity of the punishment order dated 6th February, 2016, as at Annexure-3, this Court remands the matter back to the authority concerned (Opposite Party No.3) to consider the Appeal dated 08.04.2016, as at Annexur-6 and Additional Memorandum dated 7.10.2016, as at Annexure-7, within a period of six weeks from the date of communication of the certified copy of this judgment.

16. Needless to mention here that the Petitioner be given a chance of personal hearing, before disposal of his Appeal, as directed above, including opportunity to produce further documents, if the Petitioner so prays.

17. With the aforesaid observation and direction the Writ Petition stands disposed of. However, there shall be no order as to cost.

—— o ——

2023 (III) ILR – CUT - 294

G. SATAPATHY, J.

CRLMC NO. 2818 OF 2021

RAJA @ RAJENDRA PRASAD SWAIN @ RAJENDRA PRATAP SWAIN …….Petitioner

.V.

UNION OF INDIA, R.P.F. ……..Opp. Party

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 469 – Period of Limitation – The Learned trial Court while passing the impugned order had neither noticed the accused person nor had condoned the delay by a speaking order – Effect of – Held, the impugned order taking cognizance of offences was therefore barred by limitation and as such whole subsequent proceeding was also bad in the eyes of law. (Para 11-12)

(B) CODE OF CRIMINAL PROCEDURE, 1973 – Section 473 – Scope and ambit of power U/s. 473 of Cr.PC – Discussed with reference to case laws. (Para 9-12)

Case Laws Relied on and Referred to :-

1. Criminal Revision No. 909 of 2018 : Sushil Kumar Modi Vs. State of Bihar.
2. (2023) SCC Online Madras 869 : Ezhilarsan Vs. State.
3. 2000 SCC (Cri.) 125 : State of Himachal Pradesh Vs. Tara Dutt & Anr.
4. AIR 2008 (SC)787: Sanapareddy Maheedhar Seshagiri & Anr. Vs. State of Andhra Pradesh.
5. (2008) 13 SCC 229 : P.K. Choudhury Vs. Commander, 48 BRTF (GREF)
6. AIR 1936 PC 253(1936 SCC On line PC 41) : Nazir Ahmed Vs. King Emperor.

For Petitioner : Mr.G.K. Mohanty

For Opp. Party : Mr. U.R. Jena

JUDGMENT Date of Judgment : 21.08.2023

G. SATAPATHY, J.

1. This is an application U/S. 482 of the code of criminal procedure, 1973 (in short the "Code") by the Petitioner praying to quash the order passed on 09.07.2019 by the learned JMFC, Sundergarh in Railway Misc. Case No. 01 of 2019 taking cognizance of offence punishable U/S. 174(a) of the Railway Act, 1989 (in short the "Act") and consequently, the criminal proceeding arising therein against him.

2. An overview of the facts involved in this case are on 03.08.2016 at about 6.50 hours, around 150 supporters of Biju Janata Dala, Athagarh came to Rajathagarh Railway Station and squatted in front of the engine of train AKC-101, TLHR BOBRN and train No-IREL respectively and obstructed the moment of trains protesting against the action of Chhattisgarh Government for construction of Barrage over River Mahanadi. According to the agitators, it was a Railroko, but the Inspector RPF, Dhenkanal namely B. Singh alleging against the Petitioner to be the leader of agitators and claiming the agitators to have made the Railroko under the leadership of the Petitioner filed a complaint initially on 28.02.2019 before learned JMFC, Sundargarh. In such complaint, the Inspector of RPF claims that soon after the Railroko, the Manager Rajathagarh Railway Station lodged an FIR which was registered as C3C-134/16 for commission of offence U/S. 174(a) of the Act against Raja Rajendra Prasad Swain (Petitioner), the local MLA of Athagarh and others. On the basis of such FIR, he conducted enquiry in which he examined and recorded the statement of witnesses, collected copy of Station Diary and other materials, which culminated in filing of complaint by him.

3. On being satisfied with the complaint, the learned JMFC, Sundergarh by the impugned order took cognizance of offence U/S. 174(a) of the Act and issued summons against the Petitioner, but before appearance of the Petitioner, the learned JMFC, Sundergarh transferred the case to JMFC, Angul on the ground that the later Court has been notified to try Magistrate Triable cases relating to MPs and MLAs for offences relating to Revenue District of Dhenkanal and some other Districts and thereafter, the learned JMFC, Angul, issued summons to the Petitioner for appearance. While the matter stood thus, the Petitioner approached this Court for the relief indicated in the first paragraph.

4. The petitioner seeks the relief indicated supra mainly on two grounds. Firstly, no offence is made out against him and secondly, the Officers submitting the PR was incompetent/not authorized by the act to do so. In support of aforesaid pleas, Mr. G.K.Mohanty, learned Sr. Counsel appearing for the Petitioner has relied upon the decision of the Patna High Court in ***Sushil Kumar Modi Vrs. State of Bihar; Criminal Revision No. 909 of 2018, disposed of on 18.06.2019.*** Accordingly,

Mr.Mohanty learned Senior Counsel has prayed to quash the criminal proceeding against the petitioner.

5. In repelling the aforesaid submission of the learned Sr. counsel, Mr. U.R. Jena, learned counsel for the Union of India, RPF by relying upon the decision in ***Ezhilarsan Vrs. State; (2023) SCC Online Madras 869*** submits that a bare perusal of the allegation on record would go to disclose the commission of offence U/S.174(a) of the Act and thereby, the Petitioner being issued with summons in a complaint lodged by Officer authorized by the Central Government, the aforesaid proceeding cannot be quashed in exercise of power U/S. 482 of the Cr.P.C.

6. Adverting to the rival contentions, this Court has no hesitation to hold that the pleas advanced by the Petitioner are not sustainable in the eye of law in view of the fact that the Government of India (Bharat Sarkar) Ministry of Railways (Rail Mantralaya) (Railway Board) vide No. 2004/TG-V/5/5 Delhi dated 11.08.2004 in commercial circular No.28 has made it clear about issue of notification by Ministry of Law and Justice on 17.05.2004 defining the Authorized Officer as 'all the Officers of and above the Rank of Assistant Sub-Inspector in Railway Protection Force' and appointing on 01.07.2004 as the date on which the said act would come into force. In view of the aforesaid circular, the present complaint being undisputedly instituted by a Inspector of RPF, cannot be considered to have been lodged by a authorized officer/incompetent person. In addition, a bare perusal of allegation on record would disclose about Railroko made by the supporters of Biju Janata Dal, Athagarh under the leadership of the Petitioner which itself discloses the prima facie ingredients of the offence, but the same is subject to proof for determining the culpability of the Petitioner for the offence. This is because this Court cannot appreciate the materials on record at this stage in absence of any trial to find out the culpability of the Petitioner for the offence and, thereby, this proceeding cannot be quashed against the Petitioner qua the offence in exercise of power U/S. 482 Cr.P.C. on the two grounds as advanced by learned Sr. Counsel.

7. On the other hand, this Court while going through the admitted facts of the case found the plea of limitation in favour of the Petitioner which cannot be withheld inasmuch as merely because the Petitioner has not raised such plea would not deprive this Court to address such plea as available in Law, since the enactment of Section 482 of the Cr.P.C. is itself with an object to make such orders to give effect to any order under Cr.P.C, or prevent abuse of the process of any Court or otherwise to secure the ends of justice. On the aforesaid analogy, this Court now proceeds to examine the plea found in favour of the Petitioner in the succeeding paragraph.

8. The period limitation for taking cognizance starts from the date of offence as provided under Section 469 of the Cr.P.C. While counting the said period, the date of offence is to be excluded as per sub-section 2 of Section 469 of the Cr.P.C. Neither the offence alleged against the Petitioner is a continuing offence nor would

the provision of Section 472 of the Cr.P.C come into play. Albeit, the learned Magistrate is empowered to take cognizance of an offence in exercise of power U/S. 473 of the Cr.P.C. after the expiry of the period of limitation, but it has to be satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary to do in the interest of justice. The impugned order does not show that the learned JMFC has applied its mind on this question of law nor is there any disclosure in the impugned order that the learned Magistrate has condoned the delay as it was necessary to do so in the interest of justice.

9. The scope and ambit of powers U/S. 473 of the Cr.P.C. was considered by the Apex Court in ***State of Himachal Pradesh Vrs. Tara Dutt & Another; 2000 SCC (Cri.) 125*** and in ***Sanapareddy Maheedhar Seshagiri & Anr. v. State of Andhra Pradesh;AIR 2008 (SC)787***. The Apex Court has observed therein as follows:-

> ***"Section 473 confers power on the court taking cognizance after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and that it is necessary so to do in the interest of justice. Obviously, therefore in respect of the offences for which a period of limitation has been provided in Section 468, the power has been conferred on the court taking cognizance to extend the said period of limitation where a proper and satisfactory explanation of the delay is available and where the Court taking cognizance finds that it would be in the interest of justice. This discretion conferred on the Court has to be exercised judicially and on well-recognized principles. This being a discretion conferred on the court taking cognizance, wherever the court exercises this discretion, the same must be by a speaking order, indicating the satisfaction of the court that the delay was satisfactorily explained and condonation of the same was in the interest of justice. In the absence of a positive order to that effect it may not be permissible for a superior court to come to the conclusions that the court must be deemed to have taken cognizance by condoning the delay whenever the cognizance was barred and yet the court took cognizance and proceeded with the trial of the offence."***

10. Undisputedly, the date of occurrence of offence according to the prosecution case was 03.08.2016, but complaint was instituted on 09.07.2019 after 2 years 11 months 6 days, but the offence U/S. 174(a) of Act prescribes punishment of imprisonment up to 2 years or a fine of Rs. 2000/- or both, but in this case, the learned trial Court had taken cognizance of offence after the expiry of the prescribed period of limitation, which is of course two years because the offence U/S 174(a) of the Act is punishable up to imprisonment for two years and the learned Magistrate took cognizance of offence without addressing the necessary conditions as required U/S 473 of the Code which are subjective satisfaction of the Court with regard to explanation of delay or necessity to do in the interest of justice. In such situation, a question also automatically arises whether a right, which has accrued in favour of the accused in case cognizance of offence is taken after the statutory period of limitation, can be set at naught by necessary implication of deemed condonation of

delay, but in the humble opinion of this Court, the accused in the circumstances is required to be noticed before taking cognizance of offence. This question has been answered by Apex Court in the case of ***P.K. Choudhury Vrs. Commander, 48 BRTF (GREF); (2008) 13 SCC 229***, wherein the Apex Court has held as under:-

> *"10. The learned Judicial Magistrate did not apply his mind on the said averments. It did not issue any notice upon the appellant to show cause as to why the delay shall not be condoned. Before condoning the delay, the appellant was not heard. In* ***State of Maharastra Vrs. Sharadchandra Vinayak Dongre (1995) 1 SCC 42*** *this Court has held:*
>
> *"5. In our view, the High Court was perfectly justified in holding that the delay, if any, for launching the prosecution, could not have been condoned without notice to the respondents and behind their back and without recording any reasons for condonation of the delay. However, having come to that conclusion, it would have been appropriate for the High Court, without going into the merits of the case to have remitted the case to the trial Court, with a direction to decide the application for condonation of delay afresh after hearing both sides. The High Court, however, did not adopt that course and proceeded further to hold that the trial Court could not have taken cognizance of the offence in view of the application filed by the prosecution seeking permission of the Court to file a supplementary charge-sheet on the basis of an incomplete charge-sheet and quashed the order of the CJM dated 21.11.1986 on this ground also. This view of the High Court, in the facts and circumstances of the case is patently erroneous.*

11. Besides, *in* ***Sharadchandra (supra),*** *the Apex court has held* that delay in launching the prosecution cannot be condoned without notice to the accused**.** In the case at hand, the learned trial court while passing the impugned order had neither noticed the accused person nor had condoned the delay by a speaking order. Additionally, the prosecution had not filed any application to condone the delay nor the complaint made by the Inspector RPF contains any explanation for condoning the delay and there was no order passed by the learned JMFC to consider that it was necessary so to do in the interest of justice to condone the delay. The impugned order taking cognizance of offences was, therefore, barred by limitation and, as such, whole subsequent proceeding was also bad in the eye of law.

12. In the circumstance it appears that mere issuance of process against accused does not automatically condone the delay in taking cognizance of offence. Additionally, this Court is also conscious of the fact that when a statue, while conferring power, prescribes mode of exercise of that power, the power has to be exercised in that manner, or not at all. This view was first expressed in Privy Council's decision in ***Nazir Ahmed Vs. King Emperor; AIR 1936 PC 253(1936 SCC On line PC 41).*** It therefore, very clear that "where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all". Why this Court is reminding this principle is because that the learned J.M.F.C., Sundergarh while taking cognizance of offence had ignored to address the issue of limitation and simply took cognizance of offence and issued process against the accused-petitioner ignoring the valuable right of accused-petitioner which cannot be

rectified since cognizance of offence after the statutory period is otherwise an abuse of process of Court and to secure the ends of justice, the impugned order taking cognizance of offence together with the criminal proceeding being unsustainable, is required to be quashed.

13. In the result, the CRLMC stands allowed on contest, but in the circumstance there is no order as to costs. Consequently, the criminal proceeding in Railway Misc. Case No. 01 of 2019 now pending before the learned J.M.F.C., Angul together with order taking cognizance of offence is hereby quashed.

—— o ——

2023 (III) ILR – CUT - 299

G. SATAPATHY, J.

BLAPL NO. 6743 OF 2023

KHAGESWAR PATRA ……Petitioner

.V.

DIRECTORATE OF ENFORCEMENT, GOVERNMENT OF INDIA, BHUBANESWAR ……Opp. Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 r/w section 45(1) of Prevention of Money Laundering Act, 2002 – Commission of offences punishable U/s.341/328/324/354-C/370/386/387/388/389/419/420/465/506/120 -B of IPC and U/s. 66-E /67 of the IT Act 2000 and U/s.3 of PML Act – The petitioner has not charge sheeted for predicate offence even after completion of investigation, whether the petitioner can released on bail? – Held, Yes – The petitioner has successfully demonstrated his case for compliance of section 45(1) of PML Act – The bail application stands allowed with certain terms and condition. (Para 16-18)

Case Laws Relied on and Referred to :-

1. (2022) SCC Online SC 929 : Vijay Madanlal Choudhary & Ors. Vs. Union of India & Ors.
2. (2022) SCC Online SC 825 : Satender Kumar Antil Vs. Central Bureau of Investigation & Anr.
3. Criminal Appeal No. 391-392/2018 : Adjudicating Authority Vs. Sri Ajay Kumar Gupta & Ors.
4. Criminal Appeal No. 1269 of 2017 : Directorate of Enforcement Vs. M/s. Obulapuran Mining Company Private Limited;
5. W.P. (c) No. 368 of 2021 : Indrani Patnaik & Anr. Vs. Enforcement Directorate & Ors.

For Petitioner : Mr. Y. Das, Sr.Adv., Mr. A. Patra

For Opp. Party : Mr. G. Agarwal, Adv. (E.D.)

JUDGMENT Date of Judgment : 31.08.2023

G. SATAPATHY, J.

1. This is a bail application U/S.439 of Cr.P.C. by the petitioner for grant of bail in connection with Enforcement Case Information Report (ECIR) Case No.BBZO/16/2022 corresponding to PMLA Case No.10 of 2022 for commission of offence Under Section 3 of the Prevention of Money Laundering Act, 2002 (in short "PMLA") which is punishable Under Section 4 PMLA pending in the file of learned Additional Sessions Judge-Cum-CBI Court-I, Bhubaneswar, Khurda.

2. An overview of the facts involved in this case are on 02.10.2022, one FIR was registered against the Petitioner and others vide Khandagiri PS Case No. 496 of 2022 for commission of offences punishable Under Sections 341 / 328 / 324 / 354-C/ 370 /386 /387/ 388/389/419/420/465/506/120-B of Indian Penal Code (in short IPC), 1860 and Under Section 66-E/67 of the Information Technology Act, 2000(In short the "IT Act"), but before registration of this case, another case was also registered against the co-accused persons for similar offences. In the FIR against the Petitioner and others, the Informant had alleged that the Petitioner who is stated to be a second hand car dealer and co-accused persons had extorted crores of Rupees from different rich people by blackmailing them to get their video footage containing objectionable and inappropriate photographs viral. The aforesaid two cases were investigated into by the local police, but in the course of investigation, the Assistant Director of Enforcement, Bhubaneswar claiming the offences alleged against the Petitioner and others to be scheduled offences as defined Under Section 2(1y) of the PMLA instituted a complaint against the Petitioner and others before the special Court under PMLA for commission of offence U/S. 3 of PMLA which is punishable U/S. 4 of PMLA. It is stated in the complaint that soon after registration of the aforesaid two police cases, ECIR Case No.BBZO/16/2022 was recorded against the Petitioner and others for commission of aforesaid offence under PMLA and the matter was investigated into by ED. It is also alleged in the complaint that the Petitioner and others had generated illegal income of Crores of Rupees through extortion by way of honey trapping rich and influential people and making their nude videos and threatening as well as blackmailing them for lodging false police cases and getting their nude videos viral in social media and, thereby, the income of the Petitioner and others are proceeds of crime as defined Under Section 2(1)(u) of the PMLA. This is how the complaint against the Petitioner and others came to be instituted for commission of offences Under Sections 3/4 of PMLA.

3. In the course of hearing of the bail application, this Court has heard Mr.Y. Dash, learned Sr. Counsel for the Petitioner and Mr. G.Agrawal, learned counsel for the ED extensively. In support of his contention, Mr. G.Agrawal, learned counsel for the ED has relied upon the decision in ***Vijay Madanlal Choudhary and others Vrs. Union of India and others; (2022) SCC Online SC 929*** in addition to his written objection to the bail application of the Petitioner, whereas Mr.Y.Dash, learned Sr.

Counsel for the Petitioner has relied upon a number of decisions for the relief of bail to the Petitioner. Both the parties have also filed their written notes of submission in support of their contentions.

4. Admittedly, it is the second journey of the Petitioner to this Court for grant of bail. The earlier bail application of the Petitioner was turned down by this Court mainly after taking note of the provision contained in Section 45(1) of the PMLA and the allegations made against him, but the Petitioner was granted liberty therein to renew his prayer for bail after taking cognizance of offence. The provision as to bail is founded on the philosophy of protecting the most precious fundamental right of personal liberty of a person as guaranteed under Article 21 of our sacred Constitution. Grant or refusal of bail to a person accused of offence is the discretion of the Court, but such discretion should not be arbitrary or whimsical. The object of bail is primarily to prevent punishment in the form of imprisonment or incarceration of a person pending investigation or trial. Law is also well settled that deprivation of personal liberty of a person accused of offence at some times is considered as a punishment, unless such personal liberty is withheld according to the procedure established by law. The object of bail is neither punitive nor preventive; rather for protecting the individual liberty of a person who is undoubtedly accused of offences, but failing to protect the personal liberty of a person without any lawful excuse is just doing like mere lip service than exercising discretion in accordance with law. Personal liberty is one of the most essential requirements of the modern man as held by the Apex Court in a very recent decision in ***Satender Kumar Antil Vrs. Central Bureau of Investigation and another; (2022) SCC Online SC 825,*** wherein it has been held:-

> *"Liberty is one of the most essential requirements of the modern man. It is said to be the delicate fruit of a mature civilization. It is the very quintessence of civilized existence and the essential requirements of a modern man."*

5. In the above context of personal liberty, reverting back to consider the prayer of the Petitioner for grant of bail to him, it appears that Mr. G. Agrawal, learned counsel for the ED has opposed such prayer of the Petitioner mainly on two folds, firstly, the accusations and secondly, the rigor of Section 45(1) of PMLA, but Mr. Y. Dash, learned Sr. Counsel has tried to counter such submission of E.D. by drawing the attention of the Court to the first proviso appended to Section 45(1) of PMLA by contending *inter-alia* that the allegation sought to be brought against the accused is for a sum of less than one Crore Rupees.

6. Section 45(1) of the PMLA along with first proviso reads as under:-

> *"45.(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence (under this Act) shall be released on bail or on his own bond unless:-*
>
> *(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and*

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

Provided that a person, who is under the age of sixteen years or is a woman or is sick or infirm, or is accused either on his own or along with other co-accused of money laundering a sum of less than one crore rupees may be released on bail, if the Special Court so directs."

7. It is albeit submitted by learned counsel for the petitioner that the sentence to first proviso of Section 45(1) of PMLA "the accused either on his own or along with other co-accused of money laundering a sum of less than one crore rupees" allows some relaxation to the petitioner and he is thereby not required to satisfy the onerous conditions enumerated therein, but such sentence to the aforesaid proviso which was introduced for the first time by way of an amendment to the proviso is couched in unambiguous terms as "when the accusation of money laundering is either against sole accused or against more than one accused in a case for a sum of less than one crore rupees, the benefit of proviso would mainly be applicable to such accused or accused persons, but by no stretch of imagination, it is meant for an individual against whom the allegation of money laundering is less than one crore rupees, out of the allegation of money laundering for more than one crores along with co-accused persons in one case. In other words, the clause is not applicable to the person who is an accused either on his own as sole accused or along with other co-accused of money laundering a sum of more than one crore rupees in one case. It is, therefore, very clear that if there are more than one accused and the allegation of money laundering against one of the accused is less than one Crore, but more than one Crore jointly against all the accused, the benefit of this clause cannot be extended to one of the accused of money laundering a sum of less than one Crore Rupees in such case. A conspectus of complaint in the present case would go to reveal allegation against the petitioner and others of money laundering a sum of rupees more than one crores and thereby taking into consideration the individual allegation against the petitioner of money laundering a sum of less than one crore rupees out of the total money laundering for a sum of Rs.3,95,53,125/-, the benefit of first proviso to Section 45(1) of PMLA for the offence of money laundering a sum of less than one crore rupees cannot be extended to the petitioner and he is, thereby, not entitled to such benefit.

8. Mr.G.Agarwal, learned counsel for the E.D. has strenuously opposed the bail application of the petitioner on the ground of Section 45(1) of PMLA, but Mr.Y.Das, learned Senior Counsel for the petitioner has assiduously emphasized for the petitioner to have met the rigor of Section 45(1) of PMLA by contending *inter-alia* that since the petitioner was not charge-sheeted for predicate offence, the stipulation of Section 45(1) of PMLA could not operate as a bar to the release of the petitioner on bail.

9. In addressing the aforesaid rival contentions, this Court considers it apposite to refer to the case of ***Vijay Madanlal(supra),*** wherein at paragraphs-281, 400, 401 and 467(v)(d), the Apex Court has held as under:-

> "281. *All or whole of the crime property linked to scheduled offence need not be regarded as proceeds of crime, but all properties qualifying the definition of "proceeds of crime" under Section 2(1)(u) will necessarily be crime properties. Indeed, in the event of acquittal of the person concerned or being* ***absolved from allegation of criminal activity relating to scheduled offence****, and if it is established in the court of law that the crime property in the concerned case has been rightfully owned and possessed by him, such a property by no stretch of imagination can be termed as crime property and ex-consequenti proceeds of crime within the meaning of Section 2(1)(u) as it stands today. On the other hand, in the trial in connection with the scheduled offence, the Court would be obliged to direct return of such property as belonging to him. It would be then paradoxical to still regard such property as proceeds of crime despite such adjudication by a Court of competent jurisdiction. It is well within the jurisdiction of the concerned Court trying to scheduled offence to pronounce on that matter.*
>
> *"400. It is important to note that the twin conditions provided U/S. 45 of the 2002 Act, though restrict the right of the accused to grant of bail, but it cannot be said that the conditions provided* ***U/S. 45 impose absolute restraint on the grant of bail****. The discretion vests in the Court which is not arbitrary or irrational, but judicial, guided by the principles of law as provided U/S 45 of the 2002 Act. xx xx xx xx xx*
>
> *xx xx xx xx xx xx xx*
>
> *401. We are in agreement with the observations made by the Court in Ranjitsingh Brahmajeetsingh Sharma. The Court while dealing with the application for grant of bail need not delve deep into the merits of the case and only a view of the Court based on available material on record is required. The Court will not weigh the evidence to find the guilt of the accused which is, of course, the work of trial Court. The Court is only required to place its view based on probability on the basis of reasonable material collected during investigation and the said view will not be taken into consideration by the trial Court in recording its finding of the guilt or acquittal during trial which is based on the evidence adduced during the trial. As explained by this Court in Nimmagadda Prasad, the words used in Section 45 of the 2002 Act are "reasonable grounds for believing" which means the Court has to see only if there is a genuine case against the accused and the prosecution is not required to prove the charge beyond reasonable doubt.*
>
> *467(v)(d) The offence under Section 3 of the 2002 Act is dependent on illegal gain of property as a result of criminal activity relating to a scheduled offence. It is concerning the process or activity connected with such property, which constitutes the offence of money-laundering. The Authorities under the 2002 Act cannot prosecute any person* ***on notional basis or on the assumption that a scheduled offence has been committed****, unless it is so registered with the jurisdictional police and/or pending enquiry/trial including by way of criminal complaint before the competent forum.* ***If the person is finally discharged/ acquitted of the scheduled offence or the criminal case against him is quashed by the Court of competent jurisdiction****, there can be no offence of money-laundering against him or any one claiming such property being the property linked to stated scheduled offence through him."*

10. In another decision in ***Parvathi Kollur and another Vrs. State by Directorate of Enforcement; 2022 SCC Online SC 1975***, the Apex Court has once again reiterated that acquittal/discharge of the accused in predicate offence would have the natural consequence against the proceeding under PMLA in Paragraphs-9 and 10 of the decision in following words:-

"9. The result of the discussion aforesaid is that the view as taken by the Trial Court in this matter had been a justified view of the matter and the High Court was not right in setting aside the discharge order despite the fact that the accused No. 1 had already been acquitted in relation to the scheduled offence and the present appellants were not accused of any scheduled offence.

10. In view of the above, this appeal succeeds and is allowed. The impugned judgment and order dated 17.12.2020 is set aside and the order dated 04.01.2019 as passed by the Trial Court, allowing discharge application of the appellants, is restored."

11. What would be the effect of acquittal/discharge or a closure report against the accused for predicate offence on the proceeding in PMLA has been reiterated by the Apex Court in ***Adjudicating Authority Vrs. Sri Ajay Kumar Gupta and others; Criminal Appeal No. 391-392/2018*** decided on 2nd December, 2022 and the following order was passed therein by the Apex Court:-

"Issue notice which is accepted by learned counsel for the respondent.

Learned Solicitor General fairly states that since the proceedings before this Court arise from an order of attachment and there is acquittal in respect of predicate offence, the proceedings really would not survive.

In view of the aforesaid, the appeals filed by the Adjudicating Authority (PMLA) do not survive and are accordingly disposed of."

12. Similarly, in ***Directorate of Enforcement Vrs. M/s. Obulapuran Mining Company Private Limited; Criminal Appeal No. 1269 of 2017*** decided on 2nd December, 2022 the Apex Court was again of the view that the proceeding under the PMLA will not survive if a closure report in respect of the predicate offence is accepted. The order of Apex Court in the aforesaid case reads as under:-

"Issue notice which is accepted by the learned counsel for the State.

Learned Solicitor General fairly states that since there is a closure report in respect of a predicate offence which has been accepted, the present proceeding will not survive and consequently the ECIR No. CEZO/01/2007 stands quashed.

The application along with Special Leave Petition stands disposed of."

13. In an order passed on 27.07.2022 in ***W.P. (c) No. 368 of 2021*** (***Indrani Patnaik and another Vrs. Enforcement Directorate and others),*** the Apex Court after taking note of submissions about **discharge of the Petitioner therein from the scheduled offences** has been pleased to observe as under :-

"taking note of the submissions made by the learned Additional Solicitor General and in the interest of justice, we reserve the liberty for the respondents in seeking revival of these proceedings if the order discharging the petitioners is annulled or in any manner

varied, and if there be any legitimate ground to proceed under PMLA. Subject to the observations and liberty foregoing, this petition is allowed while quashing the proceeding in Complaint Case No. 05 of 2020 dated 10.01.2020 pending in the Court of Sessions Court, Khurda at Bhubaneswar cum Special Court under the Prevention of Money Laundering Act, 2002. All pending applications also stand disposed of."

14. A careful perusal of orders and precedent of the Apex Court as set out above leaves no manner of doubt the undeniable sequitur of the reasoning is that if there is an acquittal/discharge or closure report filed by the investigating agency after due investigation for predicate offence, the rigor of Section 45(1) of PMLA would not be attracted to refuse bail to the person accused of such offence under PMLA. Adverting to the case at hand, there appears no dispute that an FIR was registered against the petitioner in Khandagiri P.S. Case No. 496 of 2022 for predicate offence which was investigated into and the certified copy of charge sheet produced by the petitioner in the aforesaid case discloses the following "further evidence so far as collected is not sufficient to prosecute Khageswar Patra in this case" and the investigating officer after recording so in the charge sheet has submitted charge sheet against co-accused persons, but not against the petitioner which remains unchallenged till date, meaning thereby the effect of submission of closure report against the petitioner for predicate offence after due investigation. Further, the copy of charge sheet also discloses that the petitioner was never arrested for the predicate offence in Khandagiri P.S. Case No. 496 of 2022 as unambiguously revealed from Col. No. 12 of the charge sheet of such case.

15. The complaint under PMLA also refers to another FIR in Nayapalli P.S. FIR No. 646 of 2022, but the said FIR was registered against the co-accused persons, but not against the present petitioner and charge sheet was only submitted against co-accused Archana Nag. Besides, it is informed by learned counsel for the ED that the complaint in PMLA now stands posted for execution of warrant issued against co-accused, but the petitioner in the meanwhile has been detained in custody since 11.11.2022 and the case record against the petitioner has not been separated despite an application being made by him in this regard which was rejected by learned Special Judge CBI(I), Bhubaneswar. Moreover, the petitioner was subjected to custodial interrogation by the ED and the other reason that might delay the trial is the fact that co-accused is yet to be arrested. In such situation, it is quite uncertain as to when the trial will commence and how much time it will require for completion. In the aforesaid situation and on a cumulative assessment materials placed on record together with the petitioner having not charge sheeted for predicate offence, even after completion of investigation in Khandagiri P.S. Case No.496 of 2022, this Court has no hesitation to hold that the petitioner has successfully demonstrated his case for compliance of Section 45(1) of PMLA which stands complied with in the aforesaid situation.

16. While dealing bail application, three factors are mainly required and the accused is required to satisfy the tripod test:- (i) flight risk, (ii) tampering of

evidence and (iii) influencing of witnesses. In the circumstance of the case, the petitioner does not appear to be a flight risk and such apprehension can be arrested by directing the petitioner to surrender his Passport if any. Since the complaint has been filed, there appears little apprehension of tampering evidence by the petitioner and the third one i.e. influencing witnesses can be curbed by imposing appropriate conditions. Further, the petitioner has already remained in custody for more than nine months.

17. In view of the aforesaid situation and the discussion made in the foregoing paragraphs and taking into consideration the pretrial detention of the petitioner together with petitioner being not charge sheeted for predicate offence, this Court considers that the petitioner has made out a case for grant of bail.

18. The bail application of the petitioner stands allowed and the petitioner may be released on bail on furnishing bail bonds in the sum of Rs.2,00,000/-(Rupees Two lakhs) with two local solvent sureties each for the like amount to the satisfaction of the learned Court in seisin of the case, with following additional conditions:-

> (*i) the petitioner shall not commit any offence while on bail and he shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any Officer of ED or tamper with the evidence,*
>
> (*ii) The petitioner shall appear before the Court in seisin of the case on each and every date of posting without fail unless his attendance is dispensed with and* ***in case the Petitioner fails without sufficient cause to appear in the Court in accordance with the terms of the bail, the learned trial Court may proceed against the Petitioner for offence U/S.229-A of IPC in accordance with law,***
>
> *(iii) The petitioner shall deposit his Passport, if any, in the Court in seisin of the case till conclusion of trial, unless he is permitted to take back such Passport to use for specific purpose during the pendency of case.*
>
> *(iv) The Petitioner shall inform the Court as well as the ED as to his place of residence during the trial by providing his mobile number(s), residential address, e-mail, if any, and other documents in support of proof of residence.*
>
> *(v) In case the petitioner misuses the liberty of bail and in order to secure his presence, proclamation U/S.82 of Cr.P.C. is issued and the petitioner fails to appear before the Court on the date fixed in such proclamation, then, the learned trial Court is at liberty to initiate proceeding against him for offence U/S.174-A of the IPC in accordance with law.*
>
> *(vi) The Petitioner shall appear before the ED as and when required and shall cooperate with the ED in the present case.*

It is clarified that the Court in seisin of the case will be at liberty to cancel the bail of the Petitioner without further reference to this Court, if any of the above conditions are violated or a case for cancellation of bail is otherwise made out.

It is, however, made clear that nothing stated in the order shall be construed as a final expression or opinion on the merits of the case and the trial would proceed independently of the observation made above and such observation has been made purely for the purpose of adjudication of the present bail application.

Accordingly, the BLAPL stands disposed of.

—— o ——

2023 (III) ILR – CUT - 307

CHITTARANJAN DASH, J.

C.R.A NO. 51 OF 1997

SMT. BISESWARI BISWAL .....Appellant

.V.

BINODINI PADHY & ORS. .....Respondents

THE INDIAN PENAL CODE, 1860 – Section 427 – The ingredients necessary to prove the charge U/s. 427 of IPC is not established – Evidence laid before the trial court no where establishes that Respondent have caused the mischief – The Appellant lodged the complaint presuming that respondent have damaged the boundary wall of the Appellant – Effect of – Held, law is well settled that, presumption however strong, cannot take the place of proof. (Para 8-10)

For Appellant : Mr. J. Patnaik, Sr.Adv. Mr. H.M. Dhal, Mr. S.K. Patnaik, Mr. B.B. Ray.

For Respondents: Mr. S.P. Choudhury & Mr. L. Samantray

JUDGMENT Date of Hearing & Judgment: 22.08.2023

CHITTARANJAN DASH, J.

1. Heard learned counsel for the Parties.

2. Challenge in this Appeal is to the Judgment and order passed by the learned J.M.F.C., Koraput in 1CC Case No. 15 of 1985 wherein the learned court held the prosecution to have failed to establish the charge and acquitted the Respondent from the charges. Being aggrieved by the findings recorded in the impugned Judgment, the informant preferred the Appeal.

3. The main plank of the argument advanced by learned counsel for the Appellant against acquittal of the Respondents is that the court while assessing the evidence came to the conclusion that the Parties were in litigation since long with respect to the passage over which the boundary wall existed and there is no clear

evidence adduced before the Court with regard to the mischief alleged vis-à-vis the respondent.

4. Having heard the argument advanced by the learned counsel for the Appellant, this court examined the case in great detail. Perusal of the impugned judgment reveals that the Respondent/Accused was facing charge in the offence U/s. 427 IPC.

5. The prosecution examined four witnesses in all before the learned trial court, whereas, the defense examined none. The only document proved from the side of the Complainant is the certified copy of the Criminal Misc. Case No. 75 of 1985 of the Court of Executive Magistrate, Koraput.

6. The evidence emerges that the youngest son of the Complainant namely Debdullar Biswal had witnessed the incident whereas he has not been examined in the case. No explanation has also been forwarded by the Complainant as to his non-examination. The entire complaint is based on the narration made by the Complainant who gathered the information with regard to the alleged mischief from P.W.1, who admittedly was not present at the time of occurrence.

7. The P.W.3 is the chance witness to the occurrence, who stated to have seen four boys within the age group of 16-17 years breaking the wall of the Complainant. In course of the cross-examination, it is elicited that P.W.3 is not a resident of the locality where the alleged occurrence took place and he did not visit to the spot on earlier occasion. P.W.3 also deposed that he had never been in term with the Complainant and therefore, the sole evidence of the chance witness deposing four boys to have demolished the boundary wall cannot be attributed to the Respondents.

8. The testimony of P.W.4, who stated that on 21.03.1985, Binodini Padhy to have brought a crow bar and demolished the boundary wall bears no relevance in as much as the alleged occurrence is of 20th of March, 1985. In the entire gamut of prosecution evidence the last straw fail to the camels back when the Complainant failed to explain as to non-examination of the witnesses whom she appended in the list of witness in the Complaint Petition. It is for the above reason that the learned Trial Court held that there are series of litigations between the Complainant and Binodini Padhy-the Respondents relating to the plots where the boundary exists and in order to wreak her vengeance that the Complainant moved against the Respondents alleging she to have demolished the boundary wall. The Exhibit-A proved before the Trial Court that is the Order passed in Criminal Misc. Case No. 75 of 1985 of the Court of Executive Magistrate, Koraput unequivocally suggests that the land over which the boundary wall exists belong to the Respondents and the Complainant was prohibited from interfering with the right of passage enjoyed by the Respondents till a decree is passed by the Competent Civil Court.

9. The ingredients necessary to prove the charge U/s. 427 of IPC is whether the Respondents had intention to cause mischief and damage of property worth more

than rupees fifty. Evidence laid before the trial court nowhere establishes the Respondent to have caused the mischief.

10. The evidence is tell tale clear that the Appellant lodged the complaint presuming the respondent to have damaged the boundary wall of the Appellant whereas nothing could be brought in evidence vis-à-vis the Respondent showing him as the perpetrator of the mischief. Law is well settled that presumption, however, strong cannot take the place of proof. Consequently, while the factum as to damage of the boundary wall is established, nothing could be proved that the Respondents/Accused seen to have damaged the same. No other circumstances appearing in the evidence adduced through the witnesses to deduce the Respondents/Accused to have caused the mischief. In essence, the trial court rightly assessed the evidence and cannot be said to have misconstrued and/or failed to assess the testimony of the witnesses in the light of the charge. Therefore, there is absolutely no material to come to a different view than the one that the trial court has arrived at. Hence, this Court finds no reason to disturb the findings of the trial court. In that view of the matter, the Appeal fails and the same is dismissed being devoid of merit.

—— o ——

2023 (III) ILR – CUT-309

SIBO SANKAR MISHRA, J.

W.P.(C) NO. 21003 OF 2021

TAPAN KUMAR DAS .....Petitioner

.V.

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

NATURAL JUSTICE – Petitioner was terminated from service on the basis of certain allegation of irregularities committed by him – He was not subjected to any disciplinary proceeding – Whether such termination order is sustainable? – Held, No – This is a clear case of violation of natural Justice. (Para-11)

Case Laws Relied on and Referred to :-

1. W.P.(C)No.9514 of 2013 : Ganeshwar Hansda Vs. State of Odisha & Ors.
2. W.P.(C) No.15552 of 2012 : Santosh Kumar Pandu Vs. Collector-cum-DCP-MGNREGS, Rayagada & Ors.
3. W.P.(C) No.10146 of 2018 : Bichitrananda Barik Vs. State of Odisha & Ors.

For Petitioner : Mr. M.K. Mishra, Sr. Adv., Mr. T. Mishra, Mr. D.Tripathy Mr. P.K.Panigrahi, Mr. S.S. Parida, Mr. S. Das.

For Opp. Parties : Mr.N.K.Praharaj, AGA

JUDGMENT Date of Hearing: 13.09.2023 : Date of Judgment : 15.09.2023

SIBO SANKAR MISHRA, J.

1. By way of the Writ Petition, the Petitioner has raised its grievance that he was working as a Junior Engineer (Civil) on contractual basis. While serving as such he was terminated from service on 08.06.2020 on the basis of certain allegation of irregularities committed by him. He was not subjected to any disciplinary proceeding as mandated in the provision of OCS (CC & A) Rules, 1962, therefore, the unilateral termination order dated 08.06.2020 is directly in violation of the principle of natural justice.Against the aforementioned termination order, he had filed the Writ Petition bearing W.P.(C) No.29633 of 2020 and highlighted the same grievance. After hearing the parties in detailed, the learned Single Judge of this Court vide its order dated 09.11.2020 has been pleased to pass the following order:-

> "Referring to different documents as well as the Service Rules appended herein, Sri Pattnaik, learned counsel for the petitioner ultimately taking this Court to the findings of the enquiry report submitted by the Superintending Engineer contended that the report went against the present petitioner and some other persons, as finds place at page-32 of the brief. Further taking this Court to the development through Annexures-5 & 6, Sri Pattnaik alleged that the service of the petitioner has been taken away only on the basis of such enquiry report and without entering into any disciplinary proceeding involving the petitioner and/or giving opportunity to the petitioner before dismissing him from service. It is on the self same ground,the petitioner brought to the notice of this Court that the petitioner, vide Anenxure7 series has already submitted a protest to the Additional Chief Secretary, Rural Development Department as well as the Engineer-in-chief, which are pending consideration.
>
> For the allegation made in the writ petition in substantiating the case of the petitioner, this Court finds, such allegation in the first hand is required to be taken care of by the disciplinary authority inasmuch as the Additional Chief Secretary, Rural Development Department as well as the Engineer-in-chief. Keeping this in view and for pendency of the representation on the selfsame allegation, this Court in disposal of the writ petition directs O.Ps.1 & 2 to look into the grievance of the petitioner, vide Annexure-7 series and W.P.(C) NO.29633 OF 2020 2 take decision, as appropriate also taking into consideration the plea taken in the writ petition and also the support of documents appended therein by completing the entire exercise giving opportunity of hearing to the petitioner within a period of two months from the date of communication of this order by the petitioner."

2. The Petitioner reiterated his representation dated 24.06.2020 & 19.06.2020 before the Additional Chief Secretary, Rural Development Department & the Engineer-in-Chief, Rural Works Organization respectively. In compliance to the direction issued by this Court on 09.11.2020, it appears, the Engineer-in-Chief, Rural Works, Bhubaneswar asked the Petitioner to appear in person on 25.02.2021. The Petitioner was orally heard and thereafter an order dated 27.05.2021 was passed by the Additional Chief Secretary to Government rejecting the representation made by the Petitioner.

3. The Petitioner by way of the present Writ Petition is assailing the order dated 27.05.2021 at Annexure-12 and also the order of termination dated 08.06.2020 at Annexure-6.

4. The detailed counter affidavit to the Writ Petition has been filed by Opposite Party Nos.1 to 3 on 20.02.2023. The Petitioner by way of rejoinder dated 04.05.2023 reverted the contention raised by the Opposite Parties justifying the termination order in the counter affidavit.

5. The sole contention of the Petitioner is that the principle of natural justice is paramount in cases where penalty of removal from service is inflicted as the same is stigmatic. Therefore,preceding the termination at least he should have been heard. The Petitioner is not trying to justify his conduct or not adverting to the nature of allegation level against him of this stage.

6. The Petitioner also contended that for the selfsame allegation one Subodh Kumar Muduli JE (Contractual) was subjected to disciplinary proceeding drawn up against him, however, as against the Petitioner no disciplinary proceeding was initiated, rather he was straightway terminated from service.

7. To substantiate his argument, Mr. Mishra, learned Senior Counsel for the Petitioner strongly relied upon the Odisha Group-B Posts (Contractual Appointment) Rules, 2013. The Rule 14 of the said Rule, 2013 reads as follows:-

> "14. Conduct and Discipline:
>
> They shall be abide by the Odisha CivilServices Conduct Rules, 1959 and shall be subject to the Odisha Civil Services (Classification, Control and Appeal) Rules,1962."

On the basis of the aforementioned Rules, Mr. Mishra,learned Senior Counsel for the Petitioner contended that the termination order passed against the Petitioner should have been preceded an inquiry by giving the Petitioner sufficient opportunity to explain. Although record reveals that the entire departmental inquiry has been conducted to ascertain the allegation but the said inquiry appears to be a unilateral inquiry without affording any opportunity to the Petitioner to explain the allegation made againt him.

8. To buttress his argument, Mr. Mishra, learned Senior Counsel relied upon the judgment of this Court passed in W.P.(C) No.9514 of 2013 in the case of ***Ganeshwar Hansda Vs. State of Odisha and Ors.*** and he has strongly relied upon paragraphs-10, 11 & 18 of the said judgment, which has been reproduced below:-

> "10. In course of hearing, Mr. B. Senapati, learned Addl. Government Advocate laid emphasis on the proceedings of joint verification report dated 12.02.2013 and contended that because of such report, action has been taken against the petitioner. Though office order dated 16.04.2013 has relied upon the said inquiry report, nothing has been placed on record to indicate that such a report has ever been served on the petitioner calling upon him to give reply. Learned Addl.Government Advocate further contended that the

petitioner being not a government employee, the provisions of OCA (CCS) Rules may not have any application to the petitioner. But in absence of rules applicable to the employee, at least the provisions of natural justice has to be complied with.

11. In Bhagawan v. Ramchand,MANU/SC/0320/1965: AIR 1965 SC 1767, the apex Court held that the rule of law demand that the power to determine questions affecting rights of citizens would impose the limitation that the power should be exercised in conformity with theprinciples of natural justice.

18. In view of the aforesaid law laid down by the apex Court and applying to the same to the present context, if the opposite parties have relied upon the documents dated 18.01.2013 and also the joint verification report dated 12.02.2013, the same could have been confronted with the petitioner by providing him an opportunity of hearing and calling upon him to show cause. But such documents have been relied upon by the opposite parties while passing the order impugned dated 16.04.2013 and no reference has been made to those documents while show cause for disengagement was called for from the petitioner.Therefore, the petitioner had no occasion to explain such documents which have been relied upon in the order of disengagement dated 16.04.2013 passed by the authority concerned and more particularly when the notice of show cause was issued the petitioner had already been found guilty on the charges of misappropriation of public money, negligence in duty and misconduct.Once the authorities have prejudged the matter finding the petitioner guilty, calling upon him to show cause, pursuant to show cause notice, was an empty formality. Therefore, the consequential order dated 16.04.2013 passed by the authority on the basis of preliminary inquiry report dated 18.01.2013 and proceeding dated 12.02.2013 finding him guilty of misappropriation of government money, gross negligence in government duty and gross misconduct and unsatisfactory performance, is contrary to the notice of show cause issued on the charges of misappropriation of public money, negligence in duty and misconduct, where the authority had already prejudged the matter finding him guilty of the said charges."

In the same line, learned Senior counsel for the Petitioner has also relied upon the judgment passed in W.P.(C) No.15552 of 2012 in the case of **Santosh Kumar Pandu Vs. Collector-cum- DCP-MGNREGS, Rayagada and Ors.** and emphasized at paragraphs-13 & 17 of the said judgment, which reads as follows:-

"13. In A.P. State Federation of Coop. Spinning Mills Ltd. v. P.V. Swaminathan, MANU/SC/1173/2001: (2001) 10 SCC 83, the apex Court held that although the termination simpliciter of a tenure employee is permissible, the courts will review and set aside such termination where it is penal. And for this purpose even though the order itself is innocuously couched, the Court will consider the attendant circumstances, as well as the affidavit filed, to come to the conclusion that the termination was penal.

17. If the above meaning of "misconduct" is applied to the present context, nothing has been placed on record to indicate the manner and the way in which the petitioner has misconducted himself, save and except alleging that muster roll was prepared at the behest of the opposite parties no. 4 and 5 by the petitioner. But the Ombudsman in his enquiry report has specifically mentioned to take action against the opposite parties no. 4 and 5 and nothing has been stated about the petitioner.Thereby, this Court comes to a definite conclusion that in order to cause harassment, the petitioner,who was engaged on contractual basis for his livelihood, has been deprived of the same by issuing the impugned order of termination dated 31.07.2012 under Annexure-12, which is liable to

> be quashed and is hereby quashed. The Collector, Rayagada-opposite party no.1 is directed to forthwith reinstate the petitioner in service as before".

9. Per contra, Mr. Praharaj, learned counsel for the State adverting his counter affidavit contended that a detailed inquiry was conducted by the Superintending Engineer in Rural Works Circle, Sambalpur. At the time of said inquiry the Petitioner was also present and an opportunity was afforded to him to explain. The said inquiry culminated into an inter-departmental report dated 09.05.2020. Perusal of the said inquiry report indicates that it is unilateral report appears to have been submitted on the basis of site inspection and the explanation offered by the Petitioner is not even taken into consideration.

10. Mr. Praharaj, learned counsel for the Opposite Party-State while admitting to the contention of the Petitioner regarding the discrimination vis-à-vis Mr. Subodh Kumar Muduli has referred to paragraph-13 of the counter affidavit, which reads as follows:-

> "That as regards para-11 & 12 of the writ petition, it is humbly submitted that at the time of field investigation by the O.P. No-3 petitioner himself was preset in the work site and when the notice was issued for personal hearing in view of the direction of this Hon'ble Court dtd.09.11.2020 in W.P.(C) No.29633 of 2020, the petitioner was unable to produce a single document against the allegations and even petitioner did not feel it proper to file a written statement/objection before the O.P. No-2 during personal hearing. So, all the statements of petitioner has got no force to stand.
>
> It is pertinent to mention here that Sri.Muduli was given additional charge as Estimator in the PMGSY project under the name "construction of road from Kansar to Jamankira "PKG No.OR-08-108 under the office of the Executive Engineer, R.W. Division, Deogarh. The charges against Sri Muduli is quite different to that of the petitioner."

11. It is an admitted case on record that one Subodh Kumar Muduli JE (Contractual) and the present Petitioner both were involved in alleged irregularities. Although both of them are contractual employees governed under the same set up Rules, two different procedures has been adopted. In case of Mr. Muduli, a disciplinary proceeding has been drawn up whereas in the case of the Petitioner termination order has been passed without subjecting him to any inquiry or departmental proceeding. Therefore, this is a clear case of violation of natural justice.

12. A co-ordinate Bench of this Court while dealing with a case matching to the facts of the present case i.e. in W.P.(C) No.10146 of 2018 in the case of **Bichitrananda Barik Vrs. State of Odisha and others** have held that:-

> "9. A perusal of the impugned notice under Annexure-5 shows that the findings of the enquiry have been relied upon and apparently form the basis for issuing the impugned notice of disengagement. This Court is not impressed with the argument that being a contractual employee no rules or procedure are required to be followed before disengaging him. It is rather the settled position of law that even in case of a contractual employee the rules of natural justice are required to be followed to the hilt. In the instant

case, as already stated, the enquiry was conducted entirely behind the back of the petitioner, inasmuch as he was not given any opportunity to participate and to have his say therein."

13. On this ground alone, this Writ Petition is liable to be allowed.

14. For the foregoing reasons, the Writ Petition is allowed and the termination order dated 08.06.2020 at Annexure-6 and the subsequent order dated 27.05.2021 at Annexure-12 stands quashed. The Opposite Parties are at liberty to initiate departmental proceeding against the Petitioner by following procedure established under law, if so advised. It is made clear that this Court has not expressed any opinion on merits of the present case. Therefore, if the departmental proceeding is initiated against the Petitioner, the same shall be dealt with on its own merit without being influenced by the observation made in this judgment.

15. The Writ Petition is allowed accordingly.

—— o ——

2023 (III) ILR – CUT- 314

A.C. BEHERA, J.

C.R.A. NO.176 OF 1995

WIPRO LIMITED, BANPUR, CUTTACK ……..Appellant

.V.

PRASANNA KUMAR BARAL ……...Respondent

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 378(4) – Scope of Interference in the Judgment of Acquittal – Held, a Judgment of acquittal cannot be disturbed unless the findings of the learned trial court are perverse or unreasonable, because presumption of innocence is re-enforced by an order of acquittal passed by the learned Trial Court in favour of an accused. (Para-10)

(B) NEGOTIABLE INSTRUMENT ACT, 1881 – Sections 138(b) and (c) – Complainant not ascertaining that demand notice had been served on the accused – Whether the complaint is maintainable? – Held, No – Unless a notice is served in conformity with the proviso (b) and (c) appended to 135 of the Act, the complaint petition would not be maintainable under law. (Para-9)

Case Laws Relied on and Referred to :-

1. 1996 (II) OLR (S.C.) 216 : Bani Singh Vs. State of U.P.
2. (2003) 25 OCR(S.C.) 479 : Shakti Travel & Tours Vs. State of Bihar & Anr.

For Appellant : None
For Respondent : None

JUDGMENT Date of Hearing :12.09.2023:Date of Judgment :29.09.2023

A.C. BEHERA, J.

1. This is an appeal under Section 378(4) of the Cr.P.C., 1973, which has been preferred by the appellant against the judgment of acquittal of an accused from an offence under Section 138 of N.I. Act, passed on dated 03.02.1995 in I.C.C. No.55 of 1993 by the learned S.D.J.M.(Sadar), Cuttack.

2. Due to the absence of the learned counsels of both the sides to argue the appeal, when this appeal was called for hearing, as per the dictum of the Apex Court in ***1996 (II) OLR (S.C.)-216 : Bani Singh vrs. State of U.P***., this appeal has been taken up for its final disposal on merit on perusal of the materials and evidence available in the record.

3. The appellant and the respondent of this appeal were the complainant and accused respectively before the learned trial court below, i.e., before the learned S.D.J.M.(Sadar), Cuttack in I.C.C. No.55 of 1993.

The I.C.C. No.55 of 1993 was filed by the complainant/appellant against the accused/respondent by stating in its complaint petition that, the complainant being a company was running its business having its Head Office at Bombay and its one Branch at Bhanpur in the district of Cuttack. The accused is the proprietor of M/s.Premier Agency, Jaraka, Jajpur and used to purchase the articles from the Branch Office of the complaint and sale the same to his customers through his agencies. On 25.11.1992, the accused placed an order before the complainant for dispatching the articles. On that day, the complainant dispatched the articles to the accused as per invoice No.890 dated 25.11.1992 and the costs thereof was for Rs.22,200.25 Paise. In order to satisfy the part of the cost of the said articles, the accused issued a cheque bearing No.445074, i.e., dated 25.11.1992 for Rs.15,880.91 Paise to the complainant. The complainant presented the said cheque on dated 26.11.1992 before its banker, i.e., State Bank of India, Industrial Estate Branch, Cuttack for collection, but, the said cheque was not honoured and the same was dishonoured due to insufficient of funds in the account of the accused. So, the Bank of the complainant intimated the complainant about the same on dated 11.02.1993 through a cheque return memo. Thereafter, the complainant issued demand notice under Section 113(b) of the N.I. Act, 1881 to the accused through Registered Post on dated 23.02.1993 requesting the accused to pay the cheque amount within fifteen days. That, demand notice was received by the accused on dated 27.02.1993. When in spite of receiving the demand notice on dated 27.02.1993, the accused did not pay the cheque amount, then the complainant filed ICC No.55 of 1993 before the learned court below being the complainant against accused praying for penalizing the accused under Section 138 of the N.I. Act.

4. Having been noticed from the learned court below in ICC No.55 of 1993, the accused contested the said case by taking the plea that as he was continuing business transactions with the complainant, for which, the complainant had kept his some cheques for security purpose, but the complainant has utilized on of that cheques for the purpose of this case. So, this case against him (accused) is a false case. Further, plea of the accused in his defence was that, he(accused) had never issued any cheque to the complainant for any debt or liability. Any demand notice under Section 138(b) of the N.I. Act, 1881 has not been sent or served on him (accused), but, he has been implicated into the case falsely.

5. In order to establish the aforesaid case against the accused, the complainant had examined two witnesses from its side as P.Ws.1 and 2 but, defence had examined none of its behalf. Both the witnesses of the complainant, i.e. P.Ws.1 and 2 are the Supervisors of the complainant-company.

After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the learned trial court below acquitted the accused from the offence under Section 138 of the N.I. Act, 1881 vide judgment dated 03.02.1995 passed in ICC No.55 of 1993 on the ground that, the complaint petition of the complainant against the accused was not maintainable under law due to the failure of proving the service of demand notice under Section 138(b) of the N.I. Act, 1881 on the accused.

6. On being aggrieved with the aforesaid judgment of acquittal of the accused from an offence under Section 138 of the N.I. Act passed on 03.02.1995 in ICC No.55 of 1993, the complainant had preferred this appeal under Section 378(4) of the Cr.P.C., 1973 being the appellant against the accused by arraying him (accused) as respondent after taking several grounds in its appeal memo.

7. In para no.(g) of the complaint petition, it has been specifically indicated that, the accused had received the demand notice on 27.02.1993 but, in fact, no material or document was brought on behalf of the complainant into the record to establish about the receiving up of the so-called demand notice of the complainant by the accused on 27.02.1993.

8. P.W.1 has deposed in para nos.11 and 14 of his deposition by answering to the questions of the learned defence counsel that, “he had not given the demand notice to the accused. He had not ascertained from the post office regarding the service of demand notice on the accused.”

Likewise another witness of the complainant, i.e., P.W.2 has not deposed anything in his evidence about the service of any demand notice on the accused.

9. When it has been specifically stated in the complaint petition that, the so-called demand notice, which was said to have been issued by the complainant to the accused was received by the accused on 27.02.1993, to which the accused has flatly

denied by taking the plea that, no demand notice was issued to him and he has not received any demand notice, then at this juncture, it was obligatory on the part of the complainant to establish firmly by bringing materials into the record that, the accused had received the so-called demand notice on 27.02.1993. But, no such material has been placed in the record on behalf of the prosecution/complainant to show that, the accused had received the demand notice on 27.02.1993. Rather, the above evidence of the witnesses of the complainant, i.e., P.Ws.1 and 2 is going to show that, they have no knowledge at all, whether the accused had received the so-called demand notice issued under Section 138(b) of the N.I. Act. So, the above materials are going to show that, the findings and observations made by the learned trial court below about the non-proving of any service of demand notice under Section 138(b) of the N.I. Act on behalf of the complainant on the accused was not unreasonable and the acquittal of the accused from the offence under Section 138 of the N.I. Act passed by the learned trial court below cannot be held inacceptable under law.

On this aspect, it has been clarified by the Apex Court in ***(2003) 25 OCR(S.C.)-479 : Shakti Travel & Tours vrs. State of Bihar and another*** that, "N.I. Act, 1881 Section 138(b) and (c)- "complainant not ascertaining that demand notice had been served on the accused, the complaint not maintainable."

Therefore, unless a notice is served in conformity with the proviso (b) and (c) appended to Section 138 of the N.I. Act, 1881, the complaint petition filed by the complainant would not be maintainable under law.

10. It is settled propositions of law that, a judgment of acquittal cannot be disturbed unless the findings of the learned trial court below are perverse or unreasonable. Because presumption of innocence is reinforced by an order of acquittal passed by the learned trial court below in favour of an accused. So, there is double presumption of innocence in favour of an accused after his acquittal. Because, firstly the presumption of innocence that is available to him (accused) under the fundamental principle of criminal jurisprudence that, every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of innocence is further reinforced/reaffirmed and strengthened by the court. Thirdly, if two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the findings of an acquittal recorded by the trial court. Therefore, the scope of interference in an appeal against an acquittal like this appeal at hand is very limited.

When, as per the observations made above, the reasons assigned by the learned trial court below acquitting the accused/respondent from an offence under Section 138 of N.I. Act, 1881 in the impugned judgment are neither perverse nor unreasonable, then, at this juncture, the question of making an interference with the

judgment of acquittal passed by the learned court below through this appeal does not arise. So, there is no merit in the appeal of the appellant, the same must fail.

11. Therefore, the appeal filed by the appellant is dismissed on merit. Accordingly, the impugned judgment of acquittal passed by the learned trial court below on dated 03.02.1995 in ICC No.55 of 1993/Trial No.1509 of 1993 is confirmed.

12. Accordingly, the appeal is disposed of finally.

—— o ——