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2024 (I) ILR-CUT-1143

CHAKRADHARI SHARAN SINGH, C.J & M.S.RAMAN, J.

W.A. NO. 1464 OF 2022

Dr. SWAPAN KUMAR KARAK ……Appellant

-V-

NATIONAL INSTITUTE OF TECHNOLOGY (NIT), ROURKELA & ORS. ……Respondents

SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013 – Section 18 r/w Sub-Rule(9) of Rule 26 of the first statute of the National Institute of Technology – Appellate authority in terms of Section 18 of the Act, for an action against an Assistant Professor in the National Institute of Technology – Held, the Board of Governors is the appellate authority U/s. 18(1) of the Act, as the employees of the NIT are governed by separate statutes.

For Appellant : Mr. Prafulla Kumar Rath, Sr.Adv. & Mr. S.B.Rath

For Respondents : Mr. Nirod Kumar Sahu, Mr. R.N. Mishra (AGA)

JUDGMENT Date of Judgment : 14.03.2024

CHAKRADHARI SHARAN SINGH, C.J.

1. The Appellant is working as an Assistant Professor in the National Institute of Technology (NIT), Rourkela. A girl student of the NIT made allegation of sexual harassment against the present appellant which led to an inquiry conducted by the Internal Complaints Committee (ICC). The ICC submitted its findings on 18.03.2019.

2. Based on the findings of the ICC, the Disciplinary Authority (DA) imposed the punishment of dismissal from service. The order imposing punishment of dismissal from the service came to be challenged by the appellant by filing writ petition registered as W.P.(C) No.5175 of 2020. The appellant had also preferred a writ petition giving rise to W.P.(C) No.2244 of 2020 questioning the findings of the report of the ICC. Both the writ petitions were taken up together and came to be disposed of by a common judgment dated 26.09.2022. By the said order, the learned Single Judge quashed the order of dismissal dated 20.01.2020 with a direction to the NIT to reinstate the appellant in service. As regards the finding of the ICC, the learned Single Judge has observed as under:-

> *"11(iv). It shall be open to the Petitioner to prefer appeal against the findings of ICC in accordance with law within a period of two weeks. In the event such appeal is preferred within the period aforesaid, the appellate authority shall consider condonation of delay in filing thereof in view of the pendency of the Writ Petition before this Court and in case, delay is condoned the appellate authority shall dispose of the appeal within a period of three weeks giving full opportunity of hearing to the Petitioner."*

3. Aggrieved by the said part of the order whereby the appellant has been asked to approach the appellate authority, the present writ appeal has been filed.

4. Mr. Prafulla Kumar Rath, learned Senior Counsel assisted by Mr. S.B. Rath, learned counsel appearing on behalf of the appellant has argued that the recommendation made by the ICC cannot be treated to be the recommendation made under sub-Section (2) of Section 13 or under clause (i) or clause (ii) of sub-Section (3) of Section 13 or sub-Section (1) or sub-Section (2) of Section 14 or Section 17 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (in short 'the 2013 Act') and, therefore, the appeal will not lie under the provision of the 2013 Act.

5. After having heard learned counsel appearing on behalf of the parties, we are of the view that the said observation made by the learned Single Judge does not require any interference.

6. It is seen that certain disputes arose as to who will be the appellate authority in terms of Section 18 of the 2013 Act. Section 18 reads thus:-

> *"18. Appeal-(1) Any person aggrieved from the recommendations made under sub-section (2) of section 13 or under clause (i) or clause (ii) of sub-section (3) of section 13 or sub-section (1) or sub-section (2) of section 14 or section 17 or non-implementation of such recommendations may prefer an appeal to the Court or tribunal in accordance with the provisions of the service rules applicable to the said person or where no such service rules exist then, without prejudice to provisions contained in any other law for the time being in force, the person aggrieved may prefer an appeal in such manner as may be prescribed.*
>
> *(2) The appeal under sub-section (1) shall be preferred within a period of ninety days of the recommendations."*

7. It is manifest from the language of Section 18 that the appellate authority for the purposes of Section 18 shall be as per the service rules applicable to the said person who is aggrieved by the recommendation of the ICC.

8. Our attention has been drawn to sub-rule (9) of Rule 26 of the First Statutes of the National Institute of Technology which reads as under:-

> *"9. A member of the staff aggrieved by any order imposing penalty passed by the Director against him shall be entitled to prefer an appeal to Board of Governors against the order and there shall be no further appeal from the decision of the Board."*

9. It is evident that under sub-rule (9), any member of the NIT, aggrieved by an order imposing penalty passed by the Director, is entitled to prefer an appeal before the Board of Governors.

10. In our view thus, the Board of Governors is the appellate authority under the rules governing service conditions of the appellant. Accordingly, he shall be treated to be the appellate authority for the purpose of preferring an appeal under Section 18(1) of the 2013 Act.

11. Our attention has also been drawn to certain office memorandum issued by the Government of India referring to Central Civil Services (Classification, Control and Appeal) Rules, 1965. In our view, the said office memorandum shall have no application in case of the employees of the NIT who are governed by separate statutes for the purpose of exercise of power under Section 18(1) of the 2013 Act as the service rules of the NIT staff specifically provide for appellate authority.

12. It goes without saying that the appellant shall have liberty to raise all the points before the appellate authority which had been raised in W.P.(C) No.2244 of 2020.

13. This appeal stands disposed of accordingly.

14. It is made clear that if the appeal is preferred within a period of 30 days from today, the appellate authority shall keep in mind the fact that the appellant was pursuing his remedy before this Court by filing the writ petition and the present writ appeal while considering the prayer for condonation of delay and decide it on merits.

15. Till filing of the appeal, the effect of the interim order passed by this Court on 06.03.2023 shall operate.

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2024 (I) ILR-CUT-1145

CHAKRADHARI SHARAN SINGH, C.J & M.S. RAMAN, J.

W.A. NO. 1873 OF 2023

MINATI MISHRA ……Appellant

-V-

THE STATE INFORMATION COMMISSIONER, ODISHA & ORS. ……Respondents

RIGHT TO INFORMATION ACT, 2005 – Section 20 – Penalty – Whether the Central Information Commission or State Information Commission can impose penalty upon the appellate authority under the Act? – Held, No – The penal provision U/s. 20 of the Act may apply to Public Information Officer.

For Appellant : Mr. Pravash Chandra Mohapatra
For Respondents : Mr. B.K. Dash, Mr. Akhand

JUDGMENT Date of Judgment : 14.03.2024

CHAKRADHARI SHARAN SINGH, C.J.

1. A short question which the present intra-Court appeal involves is as to whether penalty can be imposed or not in exercise of power under Section 20 of the

Right to Information Act, 2005 (in short, 'RTI Act') on an appellate authority under the RTI Act by the Central Information Commission or the State Information Commission, and whether such penalty can be imposed only on the Central Public Information Officer (CPIO) or the State Public Information Officer (SPIO). Section 20 of the RTI Act reads thus:

> "**20. Penalties**.—(1)Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees:
>
> Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him:
>
> Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be.
>
> (2) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause and persistently, failed to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall recommend for disciplinary action against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the service rules applicable to him." (Underscored the emphasis)

2. It is not in dispute that the appellant herein was not the Public Information Officer (PIO). The State Information Commissioner, Odisha, by an order dated 24.04.2023 imposed upon the appellant penalty of Rs.15,000/-, treating her as to be Ex-Public Information Officer. Putting to challenge the said order of the State Information Commissioner, the appellant preferred a writ petition before this Court giving rise to W.P.(C) No.20436 of 2023 on various grounds including the ground that she was not given adequate opportunity to present her case before the State Information Commissioner.

3. A learned Single Judge of this Court dismissed the writ application with a finding that notices were served upon the appellant but she did not appear before the State Information Commissioner and, therefore, the order of the State Information

Commissioner imposing penalty invoking Section 20 of the RTI Act could not be said to be in violation of the principles of natural justice.

4. The order dated 06.07.2023 passed by the learned Single Judge in W.P.(C) No. 20436 of 2023 is under challenge in the present intra-Court appeal. Learned Counsel appearing on behalf of the appellant has heavily relied on the language used in Section 20 of the RTI Act to contend that the said provision does not stipulate imposition of penalty on the appellate authority and such power to impose penalty can be exercised only against the Central Public Information Officer (CPIO) or the State Public Information Officer (SPIO).

5. Mr. Akhand, learned counsel appearing on behalf of respondent No.2 defending the order passed by the learned Single Judge has submitted that it is an admitted position that the appellant had failed to discharge her duty of appointing a designate Public Information Officer (PIO). He has taken us to the definition of 'public authority' falling under Section 2(h) of the RTI Act and has submitted that since the appellant was holding the post of Headmistress of the Government Girls' High School, Unit-4, Bhubaneswar, penalty could be imposed upon her in exercise of the power under Section 20 of the RTI Act. He has also drawn the Court's attention to sub-section 5 of Section 5 of the RTI Act and has submitted that since, because of the appellant the information could not be supplied to respondent No.2, imposition of penalty by the State Information Commissioner is justified.

6. Mr. B.K. Dash, learned counsel representing the respondent No.1-State Information Commissioner, Odisha does not dispute the legal position, as is evident from the language of Section 20 of the RTI Act itself, that penalty cannot be imposed on the appellate authority in exercise of the said power. He, however, submits that no such plea was taken before the State Information Commissioner or in the writ petition before the learned Single Judge that the appellant was the appellate authority under the RTI Act.

7. It is noteworthy at this juncture that our attention has been drawn to a communication dated 16.07.2011(Annexure-3) issued by the Inspector of Schools, Khurda Circle, Khurda, and which is addressed to the Headmaster/ Headmistress of all Govt./Aided/Block Grant High Schools, which reads as under:

> *"Sub- Appointment of P.I.O. and First Appellate Authority.*
> *Ref- S & M E Deptt. Letter No. 13235 dt. 6.7.11.*
>
> *Sir/Madam,*
> *As per order No-04 dated-31.05.2011 of Hon'ble information commission and letter No-13235 dated-06.07.2011 of Govt. of Orissa School and Mass Education Deptt, Bhubaneswar, the Headmaster/ Headmistress of all High schools and senior most teacher are here by appointed as First Appellate Authority and P.I.O of the respective Schools.*
>
> *You are therefore requested to act as First Appellate Authority and senior most teacher of your School to act as P.I.O as per R.T.I Rule. Name of the First Appellate Authority and P.I.O may please be intimated within 7 days.*

This may be treated as most urgent."

8. Learned counsel appearing on behalf of respondent No.2 also does not dispute the fact that being the Headmistress of the school, she could not has been treated to be the Public Information Officer (PIO). It is apparent from the said communication dated 16.07.2011 that it was a decision of the Government of Odisha, School and Mass Education Department that the Headmaster/Headmistress of such High Schools shall be the First Appellate Authority and the senior most teacher, the Public Information Officer of the respective schools. It is trite that the penal a statute has to be read strictly. On close reading of Section 20 of the RTI Act, it can be easily discerned that the Central Information Commission or the State Information Commission has power to impose penalty on Central Public Information Officer or State Public Information Officer and no other authority under the RTI Act. The reliance placed by the learned counsel for respondent No.2 on sub-sections 4 and 5 of Section 5 of the RTI Act is misconceived. Sub-sections 4 and 5 of Section 5 of the RTI Act read thus:

> "(4) The Central Public Information Officer or State Public Information Officer, as the case may be, may seek the assistance of any other officer as he or she considers it necessary for the proper discharge of his or her duties.
>
> (5) Any officer, whose assistance has been sought under sub-section (4), shall render all assistance to the Central Public Information Officer or State Public Information Officer, as the case may be, seeking his or her assistance and for the purposes of any contravention of the provisions of this Act, such other officer shall be treated as a Central Public Information Officer or State Public Information Officer, as the case may be."

9. It is evident on reading of the above provisions, the Central Public Information Officer or the State Public Information Officer may seek assistance of any other Officer, in exercise of his function under sub-section 4 of Section 5, as he or she considers necessary for proper discharge of his or her duties. In the context of sub-section 4, sub-section 5 provides that if any Officer, whose assistance has been sought under sub-section 4, shall be under obligation to render all assistance to the Central Public Information Officer or the State Public Information Officer, as the case may be, and for contravention of any of the provisions of the Act, such officer, whose assistance has been sought, shall also be treated as the Central Public Information officer or the State Public Information Officer, as the case may be.

10. A plain reading of sub-sections 4 and 5 of Section 5 of the RTI Act leads us to the only irresistible conclusion that a person who is required by the Central Public Information Officer (CPIO) or State Public Information Officer (SPIO) to render assistance for furnishing information under the RTI Act, such person shall be treated as the Central Public Information Officer (CPIO) or the State Public Information Officer (SPIO), and if he or she does not render assistance on demand by the Public Information Officer under sub-section 4, since he or she is to be treated to be a Public Information Officer, the penal provision under Section 20 of the RTI Act may

apply to him/her. It is not the case here that any assistance was sought by the Public Information Officer from the appellant and, therefore, she was to be treated as Public Information Officer within the meaning of sub-section 5 of Section 5 of the RTI Act.

11. We are of the definite opinion, based on reading of Section 20 and Section 5(5) of the RTI Act that the State Information Commissioner could not have exercised power under Section 20 of the Act, by imposing penalty upon the appellant who was the appellate authority under the RTI Act as the Central Information Commission or the State Information Commission is not vested with such power.

12. Accordingly, the order dated 24.04.2023 passed by the State Information Commissioner, Odisha in Complaint Case No.96 of 2022 is hereby set aside. Consequently, the order dated 06.07.2023 passed by the learned Single Judge in W.P.(C). No. 20436 of 2023 is also set aside.

13. The appeal is, accordingly, allowed. There shall be no order as to costs.

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2024 (I) ILR-CUT-1149

CHAKRADHARI SHARAN SINGH, C.J & ARINDAM SINHA, J.

W.A. NO. 484 OF 2021

UNION OF INDIA & ORS. ……Appellants

-V-

SIBA NARAYAN NAIK ……Respondent

SERVICE LAW – Order of dismissal passed by the disciplinary authority & same was confirmed by the appellate authority due to long unauthorized absence from service – Whether the impugned order required any interference? – Held, No – The over-stayal of the respondent beyond leave, without intimation of his whereabouts to his superiors during the intervening period, is a serious misconduct for a member of a disciplined force like CISF, which cannot be countenanced. (Para 16)

Case Laws Relied on and Referred to :-

1. (2020) 10 SCC 654 : State of Madhya Pradesh v. Bherulal
2. (1998) 8 SCC 222 : State of Punjab v. Bakshish Singh

For Appellants : Mr. Gyanaloka Mohanty, Senior Panel Counsel
For Respondent : Mr. S. Behera

JUDGMENT Date of Judgment : 20.03.2024

CHAKRADHARI SHARAN SINGH, C.J.

I.A. No.1188 of 2021

1. This application has been filed for condonation of delay of 109 days in preferring the present intra-Court appeal. There is a delay of 109 days. An objection has been filed on behalf of the respondent and relying on the Supreme Court decision in the case of ***State of Madhya Pradesh v. Bherulal (2020) 10 SCC 654***, it has been submitted that as the appellants have not been able to explain each and every delay, this application seeking condonation of delay deserves to be dismissed.

2. It has been stated in the application seeking condonation of delay that after the impugned order was passed by the learned Single Judge on 09.02.2021, the same was sent to the Headquarters for necessary legal opinion of the higher authorities as well as the Law Ministry whereupon it was decided to file the present appeal.

3. In the present facts and circumstances, in our opinion, the delay deserves to be condoned in the interests of justice as the appellants have been able to explain the period of delay and the justification put forth by the appellants is acceptable to the Court. The delay stands condoned, accordingly.

4. The application is, accordingly, allowed.

W.A. No.484 of 2021

5. The appellants-Union of India and its officials of the Central Industrial Security Force (in short, 'CISF') have put to challenge the judgment and order dated 09.02.2021 passed by a learned Single Judge of this Court in W.P.(C) No.19809 of 2008 whereby an order of dismissal passed by the Disciplinary Authority against the respondent has been set aside. The orders passed by the appellate authority, revisional authority and the reviewing authority have also been set aside by the learned Single Judge. After having set aside the aforesaid orders, the learned Single Judge remitted the matter back to the Disciplinary Authority for a fresh inquiry in relation to the charges which were framed against the respondent.

6. Paragraphs 4 and 5 of the impugned order passed by the learned Single Judge, read thus:

> "4. On the claim of illegal orders being passed by the Appellate Authority, Revisional Authority and Reviewing Authority, Sri Mohanty, is, however, unable to resist the contention of the learned counsel for the petitioner that none of these Authorities have taken into account the medical supporting produced by the delinquent to at least have a de novo enquiry. For the admitted ex parte disposal of the Disciplinary Proceeding and for the material particulars disclosed in the writ petition through Annexure-2 series, this Court finds, the delinquent had a genuine reason in not appearing before the Disciplinary Authority at the relevant point of time.
>
> 5. It is in this view of the matter, this Court while disapproving the ex parte closure of the Disciplinary Proceeding further looking to the medical support with the petitioner completely preventing him attending the proceeding, interfering with the order at Annexure-6, sets aside the same. It is for the interference in Annexure-6 and setting aside the same, this Court directs for reopening of the Disciplinary Proceeding. As a consequence, this Court also interferes with the orders of the Appellate Authority, Revisional Authority as well as Reviewing Authority, which are all set aside.

> As the Disciplinary Proceeding is required to be re-opened, this Court while remitting the matter to the Disciplinary Authority for fresh enquiry involving the charges against the petitioner herein, directs the petitioner to submit his explanation to the charges levelled against him by the Disciplinary Authority as expeditiously as 5 possible, preferably within a period of four weeks. It is also open to the delinquent to refer to medical support preventing him to remain absent at particular time. Upon receipt of the explanation from the delinquent, the Disciplinary Authority shall fix the date and place of enquiry and intimate the same to the petitioner for his appearance, evidence and submission etc. The Disciplinary Proceeding will be disposed of afresh providing fullest opportunity to the delinquent and other parties involved therein and also keeping in view the observation of the Disciplinary Authority at paragraph-4, vide Annexure-6. For remittance of the matter with fresh disposal of the Disciplinary Proceeding, this Court observes petitioner's service position prior to holding him ex parte in the Disciplinary Proceeding shall be maintained and the financial benefits, if any, in the meantime shall ultimately be subject to the ultimate outcome in the Disciplinary Proceeding."

7. Mr. Gyanaloka Mohanty, learned Senior Panel Counsel appearing on behalf of the appellants assailing the impugned order has submitted that the respondent, a constable in CISF, admittedly, remained unauthorizedly absent from 01.02.1997 till issuance of the charge sheet under the provisions of the CISF Rules vide memo dated 19.09.1997 without any intimation to his officers superior to him. He did not respond to several calls/notices sent to him asking him to report back. He also did not attend the departmental inquiry, though he was aware of it. In the aforesaid background, the decision to impose punishment of dismissal from service was taken by the Disciplinary Authority by an order dated 14.05.1998, agreeing with the report of the Enquiry Officer. The Enquiry Officer, during the course of enquiry had issued three notices to the respondent to attend the inquiry but he did not turn up nor did he send any representative. In case he was unable to attend the enquiry for any reason, he should have informed the authorities. Despite ample opportunities granted to the respondent, he did not participate in the departmental proceedings, which finally culminated into imposition of punishment of dismissal from service by an order dated 14.05.1998. More than 8 years thereafter on 01.06.2006, he preferred an appeal against the order of dismissal which was dismissed by the appellate authority by an order dated 06.12.2006. He submits that the learned Single Judge ought not to have set aside the orders of dismissal passed by the Disciplinary Authority and the orders passed by the appellate authority, revisional authority and the reviewing authority, in view of the admitted facts of the case. He submits that the learned Single Judge has wrongly recorded the finding that the respondent had a genuine reason in not appearing before the Disciplinary Authority at the relevant point of time.

8. Mr. S. Behera, learned counsel appearing on behalf of the respondent, on the other hand, has submitted that despite the fact that he had produced before the appellate authority, the medical documents/ prescriptions in respect of his mental ailment, which he was suffering from and which had prevented him from participating in the departmental inquiry, the appellate authority without looking into

such documents dismissed the appeal, mainly on the ground of lapse of eight years from the date of order of dismissal. He has drawn the Court's attention to the order of dismissal dated 14.05.1998 whereby upon awarding penalty of dismissal from service, the Disciplinary Authority recorded that the entire leave period would be regularized separately and unauthorized absence period from 01.02.1997 till date was regularized by granting him EOL (without pay), without medical certificate. He has placed heavy reliance on the Supreme Court's decision in case of ***State of Punjab v. Bakshish Singh, reported in (1998) 8 SCC 222*** to contend that once the period of unauthorized absence stood regularized, the unauthorized absence would not be treated as misconduct. He has submitted that the learned Single Judge has rightly taken into account, the medical certificates submitted by the respondent along with his memo of appeal regarding his mental ailment.

9. Before dealing with the rival submissions advanced on behalf of the parties as noted above, we need to take note of the undisputed facts first. The respondent, at the relevant point of time was posted as a constable in the CISF Unit, ONGC Nazira, Dist-Sibsagar in the State of Assam. He had applied for 15 days leave on 13.01.1997 which was allowed by the Coy, Commander, CISF, ONGC(N), Nazira vide letter dated 10.01.1997 from 13.01.1997 to 31.01.1997. It was clearly mentioned in the leave certificate that the respondent had to join on duty after expiry of the leave period on 01.02.1997. Several calls/notices were sent to the respondent asking him to report back immediately, failing which departmental action would be taken. Finding no response from the respondent, departmental proceeding was initiated against him for overstaying the leave period, and thus, remaining absent unauthorizedly. He remained absent during the course of departmental inquiry because of which *ex parte* departmental inquiry was held by the enquiry officer, who submitted his report with the finding that the articles of charge against the respondent stood proved. From the order of the Disciplinary Authority, it transpires that in accordance with the extant rules, a copy of the inquiry report was supplied to the respondent on 16.03.1998. The Disciplinary Authority i.e. the Commandant, CISF, ONGC, Nazira passed the final order imposing penalty of dismissal from service on 14.05.1998 which is at Annexure-6 to the writ application. It is mentioned in the order of dismissal that the charge memo dated 08.12.1997 was received by the respondent, and that the enquiry officer had issued three enquiry notices to him to appear before the enquiry officer. First enquiry notice was returned back with the remarks that the addressee refused, hence redirected. The second enquiry notice was duly acknowledged by the respondent. The third inquiry notice was sent to him as well as to the local police station; despite that the respondent did not respond. Accordingly, agreeing with the finding of the enquiring officer, the Disciplinary Authority imposed punishment of dismissal from service. Nearly six years after the order of dismissal was passed, the respondent preferred an appeal by registered post to the Deputy Inspector General, General Industrial Security, CISF Unit, ONGC Nazira seeking quashing the order of dismissal from service. He took a plea in his

memo of appeal that because of his mental illness from 1997 to 18.04.2006, he could not participate in the departmental inquiry nor could he prefer any appeal against the order of dismissal. The memo of appeal was brought on record by way of Annexure-9 to the writ application. From the said document, it does not appear that he had annexed the medical prescriptions in support of his memo of appeal. Two months later, he sent a reminder to the appellate authority which has been brought on record by way of Annexure-10 to the writ application. The said letter dated 01.08.2006 of the respondent addressed to the appellate authority refers to enclosure of photostat copies of the medical certificates and fitness certificate. The appellate authority dismissed the appeal, mainly on the ground of delay. The revision application of respondent also stood dismissed as the revisional authority did not find any illegality in the order of the appellate authority dismissing the appeal on the ground of delay. The review application against the revisional order came to be dismissed by an order dated 25.09.2007 on the ground that since the appellant had exhausted statutory right of appeal and the rules did not permit for review.

10. It is the respondent's case, on the other hand, that because of mental disorder and financial crisis, he was unfit since 28.01.1997 and he was also absent from his native place as he had been to Ranchi for medical treatment. He was under the medical treatment with effect from 28.01.1997 to 18.04.2006. The medical prescriptions have been brought on record by way of Annexure-2 series. The medical prescriptions are of three dates i.e. 28.01.1997, 04.05.1997 and 09.01.2006. On 18.04.2006, according to the prescriptions, the doctor found the respondent fit for duty. There is pleading nor any material on record that he was never admitted in any hospital.

11. It is true that in the order of dismissal, it has been mentioned that the period of unauthorized absence from 01.02.1997 till passing of the order of dismissal is to be regularized by granting him EOL without pay. Such order was required to be passed by the Disciplinary Authority as to how the period, during which he remained absent from duty was to be treated. The period from 01.02.1997 till passing of the order on 14.05.1998 has been treated to be extraordinary leave period apparently, for finalizing the respondent's entitlements, consequent upon his dismissal from service. His misconduct of having remained absent unauthorizedly did not vanish because the period was regularized by granting his extraordinary leave.

12. The Supreme Court's decision in case of ***Bakshish*** (supra) has no application in the facts and circumstances of this case which is clearly distinguishable. In that case, after a regular departmental inquiry on the charge of unauthorized absence from duty, a police constable was dismissed from service. The order of dismissal was challenged by the delinquent in a suit. The trial Court decreed the suit, set aside the order of dismissal mainly on the ground that the disciplinary authority had regularized and treated the delinquent's absence as period of leave

without pay and thus, it could not be legally said that he was guilty of misconduct of unauthorized absence from duty. Further in that case, the Trial Court had recorded a finding that the delinquent's statements that he was not given an opportunity or personal hearing and his signatures were obtained under duress and the departmental proceeding were not controverted by the Disciplinary Authority.

13. After having affirmed the aforesaid finding of the trial Court, the first appellate Court proceeded to consider whether the absence of duty was a misconduct of the gravest kind so as to warrant the maximum penalty of dismissal from service or it was a mere misconduct for which lesser punishment would be appropriate. Having found that it was not a case of misconduct of the gravest kind, the first appellate court, in that case had remanded the case back to the disciplinary authority for passing an order afresh. The order of the first appellate Court was challenged in a second appeal in the High Court which was dismissed. When the matter came to the Supreme Court, the Supreme Court concluded that once it was found by the trial Court and also the first appellate Court that the charge of unauthorized absence from duty did not survive, the period of absence from duty having been regularized and converted into the leave without pay, the first appellate court could not have remanded the matter back to the punishing authority for passing a fresh order of punishment.

14. The question, whether an employee could be held guilty of misconduct of unauthorized absence despite regularization of his absence by grant of leave without pay, was not specifically in issue before the Supreme Court in case of ***Bakshish Singh*** (supra). In case of ***Bakshish Singh*** (supra), the Supreme Court noticed inconsistency in the approach of the first appellate court as on the hand it agreed with the trial court that the charge of misconduct did not survive after grant of leave, still the first appellate court remanded the case to the punishing authority for fresh consideration on the quantum of penalty. The order of the first appellate court remanding the matter to the disciplinary authority for passing fresh order on the quantum of punishment was not found to be fully inconsistent with Rule 33 of Order XLI of the CPC. The Supreme Court held in paragraphs 8 and 9 in ***Bakshish Singh*** (supra) as under:

> *"8. This provision gives very wide power to the appellate court to do complete justice between the parties and enables it to pass such decree or order as ought to have been passed or as the nature of the case may require notwithstanding that the party in whose favour the power is sought to be exercised has not filed any appeal or cross-objections.*
>
> *9. The discretion, however, has to be exercised with care and caution and that too in rare cases where there have been inconsistent findings and an order or decree has been passed which is wholly uncalled for in the circumstances of the case. The appellate court cannot, in the garb of exercising power under Order XLI Rule 33, enlarge the scope of the appeal. Whether this power would be exercised or not would depend upon the nature and facts of each case."*

15. Further, the Supreme Court in case of ***Bakshish Singh*** (supra) held in paragraph-11 as under:

> *"11. Applying the above principles to the instant case, it will be noticed that the trial court recorded a categorical finding of fact that a proper opportunity of hearing was not afforded to the respondent in the departmental proceedings and that his allegation that his signatures on certain papers during those proceedings were obtained under duress, was not controverted as the State of Punjab had led no evidence in defence. The trial court also recorded a finding that unauthorised absence from duty having been regularised by treating the period of absence as leave without pay, the charge of misconduct did not survive. It was with this finding that the suit was decreed. The lower appellate court confirmed the finding that since the period of unauthorised absence from duty was regularised, the charge did not survive but it did not say a word about the finding relating to the opportunity of hearing in the departmental proceedings. Since those findings were not specifically set aside and the lower appellate court was silent about them, the same shall be treated to have been affirmed. In the face of these findings, it was not open to the lower appellate court to remand the case to the punishing authority for passing a fresh order of punishment. The High Court before which the second appeal was filed by the State of Punjab, did not advert itself to this inconsistency as it dismissed the appeal summarily, which indirectly reflects that it allowed an inconsistent judgment to pass through its scrutiny."*

16. After having carefully gone through the Supreme Court's decision in case of ***Bakshish Singh*** (supra), we are of the considered view that this case is clearly distinguishable on the facts and law both. As has been noted hereinabove, the facts are not in dispute that the respondent remained absent from service unauthorizedly with effect from 01.02.1997 till the initiation of Departmental Proceeding in February, 1998. He did not participate in the Departmental Proceeding despite service of notice upon him. The enquiry officer found the charge of misconduct of unauthorized absence proved. The Disciplinary Authority, agreeing with the finding of the enquiry officer imposed punishment of dismissal from service on 14.05.1998. More than 8 years thereafter, the respondent preferred an appeal on 01.06.2006 before the Appellate Authority taking a plea of his mental illness and treatment therefor under a psychiatrist at Ranchi. There is no pleading or any document to demonstrate that the respondent was ever hospitalized for treatment in any hospital during the period when he overstayed the leave period. He did not bother to intimate his whereabouts to his superiors during the intervening period, which stretched up to around more than a year till the order of dismissal was passed on 14.05.1998. More than 8 years thereafter, he preferred the appeal against the order of the Disciplinary Authority, which, in Court's opinion, was rightly rejected by the Appellate Authority on the ground of delay. The overstayal of the respondent beyond leave and in the facts and circumstances of the case, as noted above, is a serious misconduct for a member of a disciplined force like CISF, which cannot be countenanced. The respondent was given adequate opportunity to participate in the departmental inquiry. It is difficult for this Court to accept the stand of the respondent that his ailment was of such nature that he could not even inform about it to his superior officials during the pendency of the Departmental Proceeding and for 8 years after the order of dismissal was passed.

17. In our view, thus, the impugned judgment of the learned Single Judge requires interference. This appeal is accordingly allowed. The impugned judgment and order dated 09.02.2021 passed by the learned Single Judge in W.P.(C) No.19809 of 2008 is hereby set aside. The writ petition i.e. W.P.(C) No.19809 of 2008 is dismissed. There shall be no order as to the costs.

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2024 (I) ILR-CUT-1156

CHAKRADHARI SHARAN SINGH, C.J & M.S.RAMAN, J.

O.J.C. NO.2130 OF 1999

SRI SHYAM SUNDAR MOHAPATRA ……Petitioner

-V-

COMMISSIONER OF ENDOWMENT, GOVT. OF ODISHA & ORS. ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – Articles 226, 227 – It is apparent from the pleadings of the parties that, factual disputes are involving in the present case – Whether the writ court has the jurisdiction to exercise the power under Articles 226/227 of the Constitution with regard to any disputes involved the question of facts – Held, No – Reason explained with reference to case laws. (Paras 11-11.2)

Case Laws Relied on and Referred to :-

1. (2018) 14 SCR 893 : Sanjay Kumar Jha Vrs. Prakash Chandra Chaudhary.
2. 2022 LiveLaw (SC) 182 : K. Kumar Gupta Vrs. Sri Markendaya and Sri Omkareswara Swamy Temple.
3. (2017) 2 SCC 797 : Harjas Rai Makhija Vrs. Pushparani Jain.
4. (2005) 7 SCC 605 : Bhaurao Dagdu Paralkar Vrs. State of Maharashtra.

For Petitioner : Mr. Prasanna Kumar Nanda

For Opp.Parties : Mr. Lalatendu Samantaray (AGA), Mr. Surya Prasad Mishra, Sr.Adv, Soumya Mishra, Mr. Amiya Kumar Mishra.

JUDGMENT Date of Hearing : 12.03.2024: Date of Judgment : 14.03.2024

M.S.RAMAN, J.

THE CHALLENGE:

This application under Article 226/227 of the Constitution of India questions the actions of the opposite parties in not affording opportunity to participate in the auction of the property of deity, Shree Sidheswar Mahadev, Cuttack, and consequent thereto, the petitioner prays for grant of the following relief(s):

> *"In the facts and circumstances narrated above, it is humbly prayed that your Lordships may be graciously pleased to issue rule NISI calling upon the opposite parties to show*

cause and on perusal of the causes shown, make the said rule absolute and be further pleased to:

(i) Issue a writ of certiorari or any other appropriate writ or order quashing the auction sale dated 26.12.1998 as per sale notice vide annexure-2 and declare the part sale of the properties dated 05.02.1999 pursuant to the auction vide Annexure-2 as void and illegal

And

(ii)issue a writ of mandamus directing the opposite parties to make fresh auction giving an opportunity to the petitioner to participate in the said auction and negotiation;

And

(iii) pass such other order/orders, direction/directions as would be deemed fit and proper in the facts and circumstances of the case;

And

for this act of kindness, the petitioner shall as in duty bound ever pray."

THE BACKDROP OF THE PRESENT PROCEEDING:

2. Shorn off unnecessary detail narration, suffice it to cull out facts necessary for adjudication of the present dispute.

2.1. The opposite party No.4 being the Hereditary Managing Trustee of the institution filed an application under Section 19 of the Odisha Hindu Religious Endowment Act, 1951 (in short "OHRE Act") before the Commissioner of Endowment-opposite party No.1, who accorded sanction to sell the schedule land in public auction keeping in view the offset price fixed by the said Authority. It was further conditioned in the sanction for alienation of the property that the opposite party No.4 was required to sell through public auction.

2.2. Against the order of the Commissioner of Endowment, an appeal was preferred before the Minister of Law which was registered as Appeal No.4/1993. The appellate Court confirmed the order of sale by order dated 07.02.1995. The appellate Court while confirming the order of sale also modified the order to the extent that the offset price would be reduced and the sale would be through auction and negotiation. On the basis of such observations, the opposite party No.l by order dated 09.04.1996 modified the offset price to Rs.15,00,000/- per acre.

2.3. Pursuant to the Orders dated 13.08.1993, 15.01.1997 and 25.061998 in O.A. No.120-II/1992 of the opposite party No.l, the opposite party No.4 gave a notice for sale of Ac.2.564 dec. of land situated at Sidheswar Sahi, by sale through public auction.

2.4. The petitioner intended to participate in the auction/ negotiation and decided to purchase the subject-land put to auction by the Trustee. As per the terms and condition (Clause-5) the petitioner made two Bank Drafts dated 24.12.1998 in the Indian Bank for sum of Rs.50,000/- each totalling Rs.1,00,000/- in favour of Shree Sidheswar Mahadev to deposit the same before the Hereditary Managing Trustee (opposite party No.4) as earnest money to participate in the auction and went to the

Office of the Hereditary Managing Trustee on 24.12.1998 to submit his sealed envelope addressed to the Hereditary Managing Trustee along with the- forwarding letter and Bank Drafts as described above.

2.5. It is alleged by the petitioner that when he visited the office of the opposite party No.4 to submit his papers along with Bank Draft of Rs.1,00,000/- towards earnest money, the same was declined to be received on the ground that the Hereditary Managing Trustee was out of Cuttack. Therefore, the petitioner went to the Office of Additional Assistant Commissioner of Endowment, Cuttack and submitted the required sealed cover and earnest money.

2.6. As per the terms and conditions of the notice, the auction was scheduled to take place on 26.12.1998 in the Office of Additional Assistant Commissioner and therefore, the petitioner went to the office of the opposite party No.2 on 26.12.1998 at 10.30 to participate in the public auction and negotiation. On the said date it could be made known that the Hereditary Managing Trustee (opposite party No.4), who usually resides outside the State, i.e., at New Delhi, has given a Power of Attorney in favour of opposite party No.5. The opposite party No.5, therefore, conducted the auction in absence of the opposite party No.4.

2.7. It is alleged that the opposite party No.5 colluded with the opposite party No.6 and some of their henchmen wanted to conduct the auction themselves and did not allow the petitioner to participate in the auction as a *bona fide* bidder. To protest such illegal auction of the opposite party Nos.4 and 5, the petitioner gave a letter on 28.12.1998 to the Additional Assistant Commissioner of Endowment demonstrating violation of terms and conditions and requested to cancel the auction and negotiation as it has been done in an unlawful manner violating the terms and conditions.

2.8. As no action was taken by the opposite party No.2 in spite of repeated requests in this regard and no action was taken on his letter dated 28.12.1998 the petitioner decided to move to the proper Court of law to redress his grievance and accordingly, on 04.01.1999 filed an application before the Additional Assistant Commissioner of Endowment, Cuttack (the opposite party No.2) for grant of urgent certified copies of the documents so that the petitioner can agitate his grievance in the proper Court.

2.9. In the meantime the opposite party No.5 could manage to sell some of the properties in favour the opposite party No.6 and others on 05.02.1999. The opposite party No.5 had sold on 05.02.1999 land measuring Ac.0.282 dec. out of Ac.2.564 dec. of land belonging to the deity.

2.10. It is also alleged by the petitioner that the opposite party Nos.4, 5 and 6 are related by blood and fraudulently colluded among themselves making systematic attempt to grab the entire property of the *Matha* (deity).

2.11. It is contended by the petitioner that he had every right to participate in the auction and negotiation and the opposite parties acted with *mala fide*, as a result of

which he was deprived of participating in the auction even though he fulfilled all the requisite formalities of the auction.

2.12. Being unsuccessful in his attempt to frustrate the effect of the auction sale, the petitioner has approached this Court by way of filing the present writ application.

THE REPLIES OF THE OPPOSITE PARTIES:

3. Refuting allegations and averments of the petitioner, the opposite party Nos.1 and 2 filed counter affidavit dated 09.03.1999 and submitted that the Commissioner of Endowments by Order dated 13.08.1994 passed in exercise of the powers conferred upon him under Section 19 of the OHRE Act permitted the Hereditary Trustee of the aforesaid Institution to alienate the properties by negotiation in presence of the Additional Assistant Commissioner of Endowments, Cuttack.

3.1. In consonance with the aforesaid orders advertisement by beat of drums was made inviting persons interested to purchase the lands. The terms and conditions of the negotiation were also fixed and approved by the Additional Assistant Commissioner of Endowment, Cuttack. According to the terms and conditions the interested buyers were to submit offer in a sealed envelope addressed to the Hereditary Trustee/Managing Trustee either by hand or by registered post.

3.2. On 24.12.1998 at about 4.00 P.M. the petitioner came to the Office of the said Commissioner and requested him to receive an envelope and a letter addressed to the Additional Assistant Commissioner of Endowments, Cuttack. In due course of business this deponent received the letter on 24.12.1998 at 4.00 P.M. and the said letter along with the envelope was entered in the diary on the same day. The Authority also directed that the letter was to be put up on the date of negotiation. It is further submitted by the opposite party Nos.1 and 2 that before receiving the letter, the petitioner was instructed to deliver the envelope to the Power of Attorney Holder of the Hereditary Trustee. The petitioner, however, intimated that he had already gone to the temple, but the Hereditary Trustee was found absent. However, the envelop bearing the Demand Drafts were returned to the petitioner on 26.12.1998, which was received back after making necessary endorsement.

4. Narrating the background history leading to auction of the property of deity, the opposite party Nos.4 and 5 filed counter affidavit dated 26.02.1999. It is affirmed that all steps required under the OHRE Act have been taken prior to auction sale of subject-property. Said opposite parties asserted that,

> *"That the averment made in paragraph 4 is not correct and is hereby denied. It is not a fact that the appellate authority while confirming the order of sale was pleased to modify the order to the extent that offset price shall be reduced and the auction sale shall take place by the opposite party No.4 through auction and negotiation is not correct. But appellate authority while disposing of the Appeal No.4/1993 by its Order dated 07.02.1995 has observed that*

'It is open to the appellant to make an attempt to transfer the land at the price fixed by the Commissioner of Endowments, opposite party No.1 and if no Bidder comes forward he can again move the Commissioner of Endowments for modification of the Order passed by the Commissioner dated 13.08.1993.' "

4.1. Disputing facts as averred by the petitioner, the opposite party Nos.4 and 5 have submitted that the General Power of Attorney Holder, the opposite party No.5, has issued notice and signed the terms and conditions approved by the Additional Assistant Commissioner, opposite party No.2, wherein it is specifically mentioned that the person intending to participate in the negotiation for purchase of schedule land had to obtain the terms and conditions from the Office of the opposite party No.4 and to submit the sealed offer either by hand or by Registered Post in the Office of the Hereditary Managing Trustee so as to reach him on or before 5.00 P.M. on 24.12.1998. Therefore, the allegation made by the petitioner that the Hereditary Managing Trustee was out of station for which he was forced to submit the sealed envelope along with Bank Draft to the opposite party No.2 was sheer improbable.

4.2. It is stated by the opposite party Nos.4 and 5 that the story of the petitioner that having obtained Bank Draft from Indian Bank at Chhatrapur, which is around 180 kilometres from Cuttack, could manage to travel and attempt to furnish required documents at the Office of Hereditary Trustee seems incongruous.

5. Other opposite parties have also filed their responses and denied and disputed the averments and contentions of the petitioner. They affirmed that sale deeds having been executed and upon demarcation by the competent authority being made, physical possession of the properties in question had already been delivered.

5.1. The conditions for submission of the bid document to participate in the auction being not fulfilled by the petitioner, the writ petition is misconceived and liable to be dismissed.

HEARING OF THE WRIT PETITION:

6. This matter was on board on 12.03.2024 under the heading "Admission". Since pleadings are complete and have been exchanged amongst the parties, and the matter being pending for the last 25 years, on the consent of counsel for respective parties, the matter has been finally heard. Heard Sri Prasanna Kumar Nanda, learned Advocate for the petitioner, Sri Surya Prasad Mishra, learned Senior Advocate appearing along with Sri Soumya Mishra, learned Advocate on behalf of the opposite party Nos.4 and 5 and Sri Amiya Kumar Mishra, learned Advocate for the opposite party No.6.

SUBMISSIONS AND ARGUMENTS OF RESPECTIVE PARTIES:

7. Sri Prasanna Kumar Nanda, learned Advocate for the petitioner submitted that the opposite parties being hand-in-glove, have acted fraudulently with *mala fides* to grab valuable property of the deity, Shree Sidheswar Mahadev. Depriving the petitioner to participate in the auction/negotiation even though bank draft with

sealed envelope was submitted to the Additional Assistant Commissioner of Endowments on 24.12.1998 before 5.00 P.M. would offend the principles of natural justice. As the opposite party Nos.4, 5 and 6, &c. are blood relatives, the sale of property by auction is an eye-wash. Therefore, this Court is required to show indulgence by cancelling auction/negotiation and allow the petitioner to participate in the negotiation.

8. Sri Surya Prasad Mishra, learned Senior Advocate for the opposite party Nos.4 and 5 supported by Sri Amiya Kumar Mishra, learned Advocate for the opposite party No.6 submitted that the conditions of auction sale being violated and the petitioner having not delivered the required documents with the opposite party No.4-Hereditary Managing Trustee of Shree Sidheswar Mahadev, within the period stipulated, there was no occasion for him to participate in the auction sale. His attempt to extend the period being frustrated, the petitioner has approached this Court with flimsy grounds by enumerating concocted story.

CONSIDERATION OF RIVAL CONTENTIONS:

9. The arguments and counter arguments boiled down to one aspect during the course of hearing that the petitioner is aggrieved by not affording him opportunity to participate in the auction sale of the property of the deity.

9.1. The petitioner has, in the rejoinder affidavit dated 12.03.1999, stated thus:

> *"For better appreciation of the matter, the extract portion of the Terms & Conditions vide Clause - 5 is quoted below:*
>
> *'(5)The offer should reach the Hereditary Managing Trustee on or before 5 p.m. on 24.12.1998. The offer should be submitted in plain paper giving details of name and address of the intending purchaser, earnest money deposited, the consideration amount to be paid and the time schedule for depositing the entire consideration money."*

9.2. Reading of the averments and contents of the writ petition it transpires that the petitioner visited the Office of the opposite party No.4 to submit necessary document along with Bank Draft of Rs.1,00,000/- towards earnest money, but the same was not received by anybody on the ground that the Hereditary Managing Trustee was out of Cuttack. However, such fact was disputed and denied by the opposite parties by stating that having obtained the bank drafts from Chhatrapur, which is around 180 kilometres from Cuttack, reaching at the Office of Hereditary Managing Trustee-opposite party No.4 was an improbable fact. As the petitioner failed to satisfy the terms of notice *vide* Clause 5, extracted herein above, he was rightly disentitled to participate in the auction.

10. This Court on 17.02.1999 while issuing notice in the present writ petition, passed the following interim Order:

> *"The sale of land in respect of Sri Sidheswar Mahadev, bije at Sidheswar Sahi, Cuttack, which is challenged in this application, shall not be made absolute and there shall be no further sale of the land belonging to the said deity without leave of this Court.*

Issue notice. Accept one set of process fee."

10.1. Again on 06.08.1999, aforesaid Order has been modified by observing thus:

"Heard the parties on the question of continuance of the interim Order dated 17.2.1999.

The petitioner has filed the writ application challenging the action of the opposite parties in holding an auction in respect of some of the properties of Shree Sidheswar Mahadev, Cuttack. Petitioner's case is that he was denied the opportunity of making an offer. It is his case that sealed envelopes containing offers were to be addressed to the Hereditary Managing Trustee of the institution and was to be delivered by hand or by registered post. It is the case of the petitioner that he went to the house of Hereditary Managing Trustee and found him absent and thereafter handed over the offer including the draft for the earnest money to the Addl. Asst. Commissioner of Endowments, Cuttack.

2. During the course of hearing of the writ application and Misc. Cases, it was noticed that the drafts were prepared at a place which is far away from Cuttack. The stand of the petitioner that he obtained the draft much earlier to the scheduled time was doubted. The officials of the concerned bank were noticed to indicate as to at what time the draft had been issued. That was felt necessary because the drafts were of issued on the last date for making the offer, at a Bank situated at quite a long distance from Cuttack No definite time was indicated by the Bank official in the affidavit filed before this Court.

3. It is pointed out by Mr. S. Mishra (2) and Mr. B. Ray, learned counsel for some of the opposite parties that after the auction, five sale deeds have been registered and 15 sale deeds have been executed awaiting registration covering a total area of Ac.1.249 out of Ac.2.564. It is their stand that the registration could not be done because of the interim order. It is further stated that consideration money has already been paid.

4. Learned counsel for the petitioner states that his initial offer in the sealed cover was Rs.15.05 lakhs per acre, and settlement was made at Rs.15.17 lakhs per acre which is more than the amounts offered by him. But now the petitioner is willing to offer Rs.20 lakhs.

Sri S. Mishra, (2) appearing for opposite party no.6 pointed out that the Bank draft was not given in sealed cover. This aspect is disputed by the petitioner.

5. From the above recital it is clear that lot of factual controversies are involved. In that view of the matter, we do not think it necessary to allow the interim order dated 17.02.1999 to continue and the same is modified to the extent that any action taken in pursuance of the auction held shall be subject to the result of the writ application.

Call this matter after four weeks for final disposal as agreed to by learned counsel for parties."

10.2. As it is apparent from the pleadings of the parties and the aforesaid Order of this Court, factual disputes are involved in the present case, more especially when the petitioner has alleged fraud, collusion and *mala fides*.

11. In *Sanjay Kumar Jha Vrs. Prakash Chandra Chaudhary, (2018) 14 SCR 893*, it has been observed as follows with respect to jurisdiction of writ Court to exercise power under Article 226/227 of the Constitution of India in the presence of disputed questions of fact:

> *"13.* ***It is well settled that in proceedings under Article 226 of the Constitution of India the High Court does not adjudicate, upon affidavits, disputed questions of fact****. In arriving at the finding that the land offered by respondent Prakash Chandra Chaudhary was located within Giriyama Mauza of Falka Block the learned Single Bench embarked upon adjudication of a hotly disputed factual issue, which the High Court, while exercising its writ jurisdiction, does not do.*
> ***
> *16.* ***It is well settled that in proceedings under Article 226 of the Constitution of India, the High Court cannot sit as a Court of Appeal over the findings recorded by a competent administrative authority, nor re-appreciate evidence for itself to correct the error of fact, that does not go to the root of jurisdiction. The High Court does not ordinarily interfere with the findings of fact based on evidence and substitute its own findings, which the High Court has done in this case. ****"

11.1. It has also been observed in the case of *K. Kumar Gupta Vrs. Sri Markendaya and Sri Omkareswara Swamy Temple, 2022 LiveLaw (SC) 182* that,

> *"8.1 Once the appellant was found to be the highest bidder in a public auction in which 45 persons had participated and thereafter when the sale was confirmed in his favour and even the sale deed was executed, unless and until it was found that there was any material irregularity and/or illegality in holding the public auction and/or auction/sale was vitiated by any fraud or collusion, it is not open to set aside the auction or sale in favour of a highest bidder on the basis of some representations made by third parties, who did not even participate in the auction proceedings and did not make any offer. In this context, we rely on the following observations of this Court in the case of Jasbhai Motibhai Desai Vrs. Roshan Kumar, Haji Bashir Ahmed and Ors., (1976) 1 SCC 671 made in paragraphs 34, 37 and 49, which are as under:*
>
> *'34. This Court has laid down in a number of decisions that in order to have the locus standi to invoke the extraordinary jurisdiction under Article 226, an applicant should ordinarily be one who has a personal or individual right in the subject-matter of the application, though in the case of some of the writs like habeas corpus or quo warranto this rule is relaxed or modified. In other words, as a general rule, infringement of some legal right or prejudice to some legal interest inhering in the petitioner is necessary to give him a locus standi in the matter, (see State of Orissa Vrs. Madan Gopal Rungta, AIR 1952 SC 12; Calcutta Gas Co. Vrs. State of W.B., AIR 1962 SC 1044; Ram Umeshwari Suthoo Vrs. Member, Board of Revenue, Orissa, (1967) 1 SCA 413; Gadde Venkateswara Rao Vrs. Government of A.P., AIR 1966 SC 828; State of Orissa Vrs. Rajasaheb Chandanmall, (1973) 3 SCC 739; Satyanarayana Sinha Dr Vrs. S. Lal & Co., (1973) 2 SCC 696).*
>
> *37. It will be seen that in the context of locus standi to apply for a writ of certiorari, an applicant may ordinarily fall in any of these categories:*
>
> *(i) 'person aggrieved';*
> *(ii) stranger';*
> *(iii)busy-body or meddlesome interloper.*
>
> *Persons in the last category are easily distinguishable from those coming under the first two categories. Such persons interfere in things which do not concern them. They masquerade as crusaders for justice. They pretend to act in the name of pro bono publico, though they have no interest of the public or even of their own to protect. They indulge in the pastime of meddling with the judicial process either by force of habit or*

from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity; while the ulterior intent of some applicants in this category, may be no more than spoking the wheels of administration. The High Court should do well to reject the applications of such busybodies at the threshold.

49. ***It is true that in the ultimate analysis, the jurisdiction under Article 226 in general, and certiorari in particular is discretionary****. But in a country like India where writ petitions are instituted in the High Courts by the thousand, many of them frivolous, a strict ascertainment, at the outset, of the standing of the petitioner to invoke this extraordinary jurisdiction, must be insisted upon. The broad guidelines indicated by us, coupled with other well-established self-devised rules of practice, such as the availability of an alternative remedy, the conduct of the petitioner etc. can go a long way to help the courts in weeding out a large number of writ petitions at the initial stage with consequent saving of public time and money."*

In the aforesaid decision, it was also observed that despite adequate opportunity, if a person has not lodged any objection at an appropriate stage and time, he could not be said to have been in fact, grieved.'

8.2 It is also required to be noted that the sale was confirmed in favour of the appellant by the Commissioner, Endowments Department after obtaining the report of the Assistant Commissioner. Therefore, we are of the opinion that in the aforesaid facts and circumstances of the case, the High Court ought not to have ordered re-auction of the land in question after a period of 23 years of confirmation of the sale and execution of the sale deed in favour of the auction purchaser by observing that the value of the property might have been much more, otherwise, the object and purpose of holding the public auction and the sanctity of the public auction will be frustrated. Unless there is concrete material and it is established that there was any fraud and/or collusion or the land in question was sold at a throw away price, the sale pursuant to the public auction cannot be set aside at the instance of strangers to the auction proceeding. The sale pursuant to the public auction can be set aside in an eventuality where it is found on the basis of material on record that the property had been sold away at a throw away price and/or on a wholly inadequate consideration because of the fraud and/or collusion and/or after any material irregularity and/or illegality is found in conducing/holding the public auction. After the public auction is held and the highest bid is received and the property is sold in a public auction in favour of a highest bidder, such a sale cannot be set aside on the basis of some offer made by third parties subsequently and that too when they did not participate in the auction proceedings and made any offer and/or the offer is made only for the sake of making it and without any serious intent. In the present case, as observed hereinabove, though Shri Jagat Kumar immediately after finalising the auction stated that he is ready and willing to pay a higher price, however, subsequently, he backed out. If the auction/sale pursuant to the public auction is set aside on the basis of the such frivolous and irresponsible representations made by such persons then the sanctity of a public auction would be frustrated and the rights of a genuine bidder would be adversely affected.

8.3 Further, the Division Bench of the High Court ought to have appreciated that the objector– Shri L. Kantha Rao, who did not participate in the auction proceedings and submit any bid can be said to be a fence sitter having no stakes on his shoulder and had simply come forward just to nullify the registered sale deed executed in favour of the appellant by adopting an indirect method of making a public offer by way of filing a 'Public Interest Litigation' before the High Court. The so-called lucrative offer initially

made by Shri Jagat Kumar and the subsequent offer made by Shri L. Kantha Rao appears to be made only to frustrate the auction proceedings with a mala fide intent. ***As observed hereinabove, if there was any error in the decision-making process adopted by the authority, the remedy available was to question the sale deed in an appropriate proceeding available under the law and not by filing a petition under Article 226 of the Constitution of India.****"*

11.2. In the present case this Court has already observed in Order dated 06.08.1999 that there are factual disputes involved in the matter. Whether on 24.12.1998 the petitioner had complied with terms of Clause 5 of the auction notice as stated in the rejoinder affidavit filed. Further whether the petitioner had, in fact, travelled around 180 kilometres after obtaining drafts from the Bank at Chhatrapur and went to the Office of the Hereditary Managing Trustee. Whether such attempt is made within the time stipulated in the terms of notice. Whether there was fraud/collusion in the auction process. And so on so forth. Since factual adjudication is required to be made, which is not to be gone into by the writ Court in exercise of power under Article 226/227 of the Constitution of India, in view of ratio of judgments rendered by the Hon'ble Court(s), this Court is not persuaded to accede to the prayer(s) of the petitioner.

CONCLUSION:

12. Alleging fraudulent and collusive transaction in the conduct of sale by auction of the property of Shree Sidheswar Mahadev, without any substantial material particulars, save and except saying that the petitioner having not found the opposite party No.4-Hereditary Managing Trustee in his office on the last date for submission of documents, i.e., 24.12.1998, approached the opposite party No.2 for submission of sealed envelope with bank drafts to participate in the auction would not be sufficient for this Court to inquire into such grave allegation. It appears such allegation is an attempt to frustrate the auction and based on surmise.

12.1. As is manifest from the counter affidavit of the opposite party Nos.4 and 5, the auction/negotiation sale made in favour of the opposite party No.6 as against thirty six intending purchasers. The said opposite parties also clarified that the opposite party No. 4 filed a petition before the Commissioner of Endowments for modification of the Order dated 13.081993 which was disposed of by the said Authority-opposite party No.l by his Order dated 09.04.1996, whereby the Order dated 13.08.1993 was modified by reducing the offset price from Rs.20,00,000/- per acre to Rs.15,00,000/- per acre. Again in compliance of the Order dated 09.04.1996 of the Endowment Commissioner-Opposite Party No.l, the opposite party No.4 conducted another auction in the Office of the Additional Assistant Commissioner-opposite party No.2 on 13.08.1996, but on the same date nobody came forward to take part in the auction at the offset price fixed by the Endowment Commissioner-opposite party No.l at Rs.15,00,000/- per acre. Thereafter, the Minister initiated suo motu Revision proceeding to examine the correctness of the valuation made the Commissioner of Endowments, opposite party No. 1, in reducing the offset price

from Rs.20,00,000/- to Rs.15,00,000/- and while disposing of the aforementioned suo motu Revision proceeding the Minister remanded the matter back to the Commissioner of Endowment-opposite party No.l to enquire into the matter in accordance with the Order in the Endowment Appeal No. 4/1993 and to pass appropriate order.

12.2. In the presence of such factual aspects, it is difficult for this Court to render any finding as to fraudulent or clandestine dealings in the conduct of sale by auction.

12.3. In *Harjas Rai Makhija Vrs. Pushparani Jain, (2017) 2 SCC 797*, Supreme Court highlighted that there must be a specific allegation of fraud. When there is an allegation of fraud, it must be enquired into. It is only after evidence is led coupled with intent to deceive that a conclusion of fraud could be arrived at. A mere concealment or non-disclosure without intent to deceive or a bald allegation of fraud without proof and intent to deceive would not render a decree obtained by a party as fraudulent. To conclude in a blanket manner that in every case where relevant facts are not disclosed, the decree obtained would be fraudulent would be stretching the principle to a vanishing point. Referring to the decision of the Supreme Court in *Bhaurao Dagdu Paralkar Vrs. State of Maharashtra, (2005) 7 SCC 605*, and other cases, the Hon'ble Supreme Court held that it is clear that fraud has a definite meaning in law. It must be proved and not merely alleged and inferred. Therefore, to constitute fraud there must be an intent to deceive. When an allegation of fraud is made, it must be enquired into. Enquiry would necessarily mean granting reasonable opportunity of hearing to the party accused of committing fraud. Evidence must be led and thereafter fraud must be proved. No conclusion of fraud can be drawn on mere allegation and by way of inference.

12.4. At this juncture it may be worthwhile to refer to Section 73 of the OHRE Act, which gives scope to raise issues before the competent forum:

> *"73. Bar of suits in respect of administration of religious institutions.—*
>
> *(1) No suit or other legal proceeding in respect of the administration of a religious institution or in respect of any other matter or dispute for determining or deciding which provision is made in this Act shall be instituted in any Court of law, except under, and in conformity with, the provisions of this Act.*
>
> *(2) Nothing contained in this Section shall affect the right of the Trustee appointed under the Act of a religious institution to institute a suit to enforce the pecuniary or property rights of the institution or the rights of such institution as a beneficiary."*

12.5. Under such premises, it is apt for this Court not to exercise the power conferred under Article 226/227 of the Constitution of India.

13. The factual position as of date, as conceded by the counsel for the both sides, is that pursuant to sanction under Section 19 of the OHRE Act, sale by auction was conducted and the purchaser(s) have been delivered with physical possession. In view of reasons ascribed with discussions made above this Court is not inclined to

interfere with the sale by auction conducted on 26.12.1998 pursuant to notice in Annexure-2 and the sale of property alleged to have been made on 05.02.1999.

14. As it is objected to by the opposite parties that the petitioner had not sought to submit bank drafts along with sealed envelope in the Office of the opposite party No.4-Hereditary Managing Trustee, there being non-compliance of terms of the notice for auction, the petitioner cannot be allowed to agitate factual contentions before this Court in the writ proceedings.

15. In the result, this writ petition stands dismissed, but in the circumstances, there shall be no order as to costs.

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2024 (I) ILR-CUT-1167

Dr. B.R.SARANGI, J & G. SATAPATHY, J

W.P.(C) NO. 32512 OF 2023

M/s. SWOSTI POWERCON, BARGARH .....Petitioner

-V-

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

CONSTITUTION OF INDIA, 1950 – Article 226 – Judicial Review – Whether the court can exercise the power of Judicial Review in tender process of the State? – Held, Yes – There is absolutely no bar to interfere with the tender process, unless it satisfy the tests of arbitrariness, unreasonableness, discrimination, malafide and biasness. (Para 21)

Case Laws Relied on and Referred to :-

1. (2007) 14 SCC 517 : Jagdish Mandal v. State of Orissa.
2. (2001) 8 SCC 491 : Union of India v. Dinesh Engineering Corporation.
3. 2017 SCC OnLine Ori 473 : Ajay Kumar Jain v. State of Odisha.
4. (1993) 1 SCC 445 : Sterling Computer Limited v. M/s. M & N Publications Limited.
5. (2007) 8 SCC 1 : Reliance Energy Limited v. Maharashtra State Road Development Corpration Ltd.
6. 2016 (II) OLR 735 : Chittaranjan Mishra v. State of Odisha.
7. (2012) 8 SCC 216 : Michigan Rubber (India) Limitd v. State of Karnataka & Ors.
8. (2008) 5 SCC 772 : S.S. and Company v. Orissa Mining Corporation Limited.
9. 2017 SCC OnLine Ori 485 : Jagruti Welfare Organization v. State of Odisha.

For Petitioner : M/s. Ipsit Aurobindo Acharya & C.K. Rout.

For Opp.Parties : Mr. P.P. Mohanty, A.G.A,
Mr. Ashok Ku.Panigrahi & Ankita Panigrahi

JUDGMENT Date of Hearing & Judgment : 05.03.2024

Dr. B.R.SARANGI, J.

M/s. Swosti Powercon, Bargarh, a proprietorship firm, represented through its sole proprietor, has filed this writ petition seeking to quash the order dated 19.09.2023 rejecting his bid communicated through e-mail vide Annexure-3 series, and to direct the opposite parties to consider the HT License certificate along with the bid of the petitioner correctly as per website copy in https://eiceletricity odisha.nic.in, as mentioned in the representation vide Annexure-5 series, and also to allow the petitioner to participate in the bid and to issue LOA/Work Order in its favour in the event of success in the bid.

2. The factual matrix of the case, in brief, is that the Executive Engineer, Sonepur Lift Irrigation Division-opposite party no.3 issued tender call notice on 01.08.2023 in respect of 90 numbers of packages for the work "Installation and Energisation of (Revival) River Lift Irrigation Projects with Supply of all materials on Turnkey basis". The estimated cost for each package, EMD amount and cost of bid documents were mentioned in the Detailed Tender Call Notice dated 01.08.2023. The last date to submit the bids was fixed to 24.08.2023 and the date and time for opening of tender was mentioned as 25.08.2023 at 11.00 AM. As per the conditions stipulated in the tender call notice, the petitioner, having the required eligibility criteria, applied for the same. The petitioner was having the H.T. License bearing No. 3104, which was valid till 05.11.2023, i.e. for the period of more than one month from 25.08.2023 (date of opening of tender). The petitioner submitted its bids for 12 different numbers of packages under DTCN dated 01.08.2023 including the present package. It had also entered into an agreement with another contractor for the civil work part under the package, as allowed in terms of the DTCN dated 01.08.2023. The petitioner had submitted the Electrical (HT) License-HT 3104 issued by the Electrical Licensing Board Odisha (ELBO)-opposite party no.4 dated 13.12.2021, which was valid till 05.11.2023. As per the conditions stipulated in the tender document, the petitioner applied for the work in question, but opposite party no.3 issued an e-mail on 19.09.2023 stating that its bid has not been accepted. On 19.09.2023, rejection order was uploaded on the portal wherein the reason for rejection of the bid of the petitioner was mentioned "Invalid HT License submitted". Hence, this writ petition.

3. Mr. I.A. Acharya, learned counsel appearing for the petitioner contended that the bid identification no. OLIC-SNP 01/2023-24 dated 01.08.2023 clearly indicates the date and time for opening of tender in the office of the Executive Engineer, L.I. Division, Subarnapur on 25.08.2023 at 11.00 Hrs. Clause-2.2 of the said bid identification prescribes eligibility that the contractor should have valid civil license of requisite class as per the Tender Call Notice and valid H.T. license issued by ELBO and validity of both the licenses should be for a period at least one month from the date of the opening of the tender. It is contended that if the advertisement shows the date of opening of the tender as 25.08.2023, the validity of the licenses should be till 25.09.2023. Learned counsel for the petitioner brought to the notice of

this Court with regard to the Electrical Contractor License granted in favour of the petitioner, wherein the validity period has been prescribed as 05.11.2023. Therefore, it is contended that by the time the advertisement was issued, the petitioner had valid H.T. license and, as such, it has been mentioned in N.B. of the said license that the contractor license is treated to be valid if and only if certificates/permits of all the above staff are valid. Thereby, it is contended that since the petitioner has possessed valid Electrical Contractor License, rejection of the bid of the petitioner on the ground of submission of invalid H.T. License under Annexure-3 series dated 19.09.2023 cannot be sustained in the eye of law. Learned counsel for the petitioner contended that the Electrical Contractor License contains two notes, i.e. "(i) Contractor License is treated to be valid if and only if certificates/ permits of all the above staff are valid and (ii) This document is not valid unless it is checked/ verified with official website: https://eiceletricityodisha.nic.in." Therefore, while considering the bid submitted by the petitioner, the opposite parties should have taken into consideration the above mentioned notes while examining the license granted in favour of the petitioner. But, without taking the same into consideration, the impugned rejection cannot be sustained on the flimsy ground "Invalid HT License submitted". Thereby, there is absolutely non-application of mind by the tendering authority. It is thus contended that in exercise of powers under judicial review, this Court can interfere with such arbitrary rejection of the bid submitted by the petitioner, who compiled the terms and conditions in letter and spirit, and allow the petitioner to participate in the bid process, so far as twelve works are concerned for which the petitioner had submitted its bid.

4. Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State-opposite parties contended that since the tender inviting authority, i.e., Orissa Lift Irrigation Corporation is a public sector undertaking of the State Odisha and an independent body, and the impugned action having been taken by such organisation, the State has no role to play, so far as tender in question is concerned.

5. Mr. A.K. Panigrahi, learned counsel appearing for opposite parties no.2 and 3 raised objection with regard to maintainability of the writ petition stating inter alia that the matters/disputes relating to the contract cannot be agitated nor the alleged terms of the contract can be enforced through writ jurisdiction under Article 226 of the Constitution of India. He contended that since the petitioner does not possess valid license, as per the eligibility, the authority is well justified in rejecting the bid of the petitioner. Under clause 3.10, it has been provided that conditional tenders are liable for rejection. Similarly, as per clause 3.13 in case of any discrepancies in the description of the items in the Tender Call Notice, the same can only be resolved by the Executive Engineer/Superintending Engineer, OLIC, whose view is final, binding and conclusive for the purpose of the contract. Any incomplete bid submitted is liable to be rejected as per clause 3.14 of the DTCN. As the bid of the petitioner has been rejected on the ground that H.T. license submitted by the petitioner is invalid, any representation filed to that extent cannot be sustained. Therefore, he prayed for dismissal of the writ petition.

6. Though notice has been issued to opposite party no.4 and A.D. has returned after valid service, as is evident from the office note dated 12.10.2023, but since nobody entered appearance on behalf of opposite party no.4, this Court adjourned the matter. However, learned counsel appearing for both the petitioner and opposite parties no.2 and 3 contended that since opposite party no.4 is the license granting authority and there is no dispute with regard to the license granted by such authority, there is no need for participation of opposite party no.4 in the proceeding itself. Thereby, with the consent of learned counsel for the parties, the matter is taken up to be decided at the stage of admission.

7. This Court heard Mr. I.A. Acharya, learned counsel appearing for the petitioner; Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State-opposite party no.1 and Mr. A.K. Panigrahi, learned counsel appearing for opposite parties no. 2 and 3. With the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

8. Before delving into the merits of the case, for a just and proper adjudication of the case, the relevant provisions of the tender document are quoted hereunder:-

"ODISHA LIFT IRRIGATION CORPORATION LTD. OFFICE OF THE EXECUTIVE ENGINEER LIFT IRRIGATION DIVISION, SUBARNAPUR.

Procuremet Officer	Bid Identificatio n No.	Availability of Tender On-Line for Bidding		Last date & time of seeking tender clarification	Date & Time of Opening of tender in the office of the Executive Engineer, L.I. Division, Subarnapur
1	2	3	4	5	6
Executive Engineer, L.I. Division, subarnapur	OLIC-SNP-01/2023-24	16-08-23 at 11.00 Hrs	24-08-2023 at 17.00 Hrs	23-08-23 at 17.00 Hrs.	25-08-23 at 11.00 Hrs.

"Section-II
IMPORTANT INFORMATION FOR CONTRACTOR

2.1 The Bid documents consisting of plans, specification, schedule of quantities/rates and set of terms & condition of contract and other necessary documents can be Seen in the website www.tendersodisha.gov.in.

2.2 Eigibility: (1) The contractor should have valid Civil license of requisite class as per the Tender call Notice and valid H.T. license issued by ELBO and validity of both the licenses should be for a period at least 1 month from the date of the opening of the tender. (ii) In case the Contractor has only the Civil or Electrical license, then he has to make joint venture agreement with other Contractor and the joint venture agreement should be registered in any registration office only. However the Electrical Contractor will hand over the Electrical installation to TPWODL. (iii) in case of joint venture candidate no Price preference and other financial benefits allowed to SC/ST contractor/Engineer Contractor/ Physical Handicapped Contractor. (iv) The contractor should have valid GST Registration certificate and PAN issued by I.T. Department.

2.3 No hard copy document be submitted to the undersigned.

2.6 The last date seeking clarification towards "e" Procurement portal using his/her DSC up to 17.00 Hrs of Dt. 23.08.2023. through e-challan"

"SECTION-IV

GENERAL TERMS AND CONDITIONS

4.1 Method of submission of tender documents

xxx xxx xxx

The scanned copy of following documents should be uploaded with a tender

(i) xxx xxx xxx

(iv) Valid Electrical (H.T.) License issued by E.L.B.O."

"GOVERNMENT OF ODISHA
ENERGY DEPRTMENT
Electrical Licensing Board of Odisha (ELBO), BHUBANESWAR
FORM-D
(Regulation 25-26-28)
ELECTRICAL CONTRACTOR LICENSE

I do hereby certify that electrical contractor license granted to SWOSTI POWERCON has been renewed on this day to carry out electrical work upto specified voltage level in the State of Odisha under Electrical Licensing Board, Regulation, Odisha 2014 for the purpose of Regulation 29(1) of the Central Electrical Authority (Measuring Relating to Saftey & Electricity Authority (Measures Relating to Safety & Electric Supply) Regulations, 2010 (as amended).

Name of the Farm	**- SWOSTI POWERCON**
Name of the Proprietor	**-DEVKANAN SAHU**
Authorized Representative	**-**
Business Address	**BARGARH, BARGARH, BARGARH**
Date of Birth	**25/03/1989**
Mobile No.	**9438408911**
Email Id	**-ceo@swostipowercon.com**
Type of Contractor License	**HT**
Contractor License No.	**3104**
In Operative Period	**06.11.2021 to 29.11.2021**
Date of Issue	**13/12/2021**
Validity Period	**05/11/2023**

Allowed to carry out electrical works upto 33KV

S.NO	Category	SCC No.	Name	Valid Till
1	Supervisor EHT	281	PRAMOD KUMAR PRADHAN	30/11/2023

Sl. No.	Category	Permit CODES	Permit No.	Name	Valid Till
1.	Lineman MV	BAR	1468	Muktendu Shekhar Dash	27/08/2022
2.	Wireman MV	BOU	88	Ganapati Ray	05/07/2024
3.	Workman HT	BAR	736	Bijaya Kumar Ghibela	21/08/2024

N.B: Contractor License is treated to be valid if and only if certificates/ permits of all the above staffs are valid.

N.B: Please Note: This document is not valid unless it is checked/ verified with official webste: https://electricityodisha.nic.in"

List of BIDS Rejected against Tender Call Notice No. 01/23-24 dt 01.08.23 (Pacakage-57) L.I. Div-Subarnapur		
Sl. No.	Name of the Bidder	Reason of Rejection
1	SWOSTI POWERCON	Invalid HT Licence Submitted

9. In view of the aforesaid provisions, there is no doubt that pursuant to the conditions stipulated in the tender documents, the date and time for opening of the tender documents was fixed to 25.08.2023 at 11.00Hrs, provided the bid is submitted in terms of the conditions stipulated therein. As per the eligibility criteria stipulated in clause 2.2 (i), the contractor should have valid civil license of requisite class as per the tender call notice and valid H.T. license issued by ELBO and validity of both the licenses should be for a period at least one month from the date of the opening of the tender. Therefore, the date of opening of the tender being 25.08.2023, the period of validity of H.T. license should have been at least till 25.09.2023. As per clause 2.3, no hard copy document was to be submitted to the tendering authority. As per clause 4.1 under General Terms and Conditions, the petitioner was to submit the scanned copy of the valid electrical (H.T.) license issued by ELBO. In terms of such condition, the petitioner submitted the scanned copy of the valid electrical (H.T.) license issued by ELBO, as has been placed on record at page-76 of the brief, where the validity period has been prescribed as 05.11.2023, which covers the period 25.09.2023, i.e., a period of at least one month from the date of opening of the tender, i.e. 25.08.2023. Therefore, the petitioner has got valid electrical (H.T.) license with him. As per the notes mentioned in the said electrical contractor license, it has been mentioned that the contractor license is treated to be valid if and only if certificates/permits of all the above staff are valid. Similarly, second note specifies that the said document is not valid unless it is checked/ verified with official website: https://eiceletricityodisha.nic.in. Therefore, a bare reading of the license attached along with the bid document clearly indicates that the HT License No. 3104 issued by the Electrical Licensing Board of Odisha (ELBO) in the name of the petitioner- SWOSTI POWERCON is valid till 05.11.2023. On further verification of the aforesaid website in respect of contractor's license HT-3104 issued by the ELBO, it is found that the individual staff license is valid at least till 30.11.2023. Therefore, contractor's HT license is valid and it is eligible as per the provisions contained in the eligibility criteria of the DTCN dated 01.08.2023.

10. The HT license of the petitioner is valid till 05.11.2023, which is much more than one month period from the date of opening of the bid, i.e., 25.08.2023 and the said HT License was again renewed on 30.10.2023 by the opposite party no.4 till 05.11.2026, which has been placed on record as Annexure-6 at page-110 of the brief. Therefore, there is no question of breach of trust or contractual belief, rather

the present issue is one of incorrect reading of HT certificate by the opposite parties no.2 and 3. Thereby, the opposite parties no.2 and 3 have acted arbitrarily and unreasonable by misinterpreting the conditions stipulated in the tender documents, which violates Articles 14 and 19 of the Constitution of India. As such, it is neither incomplete tender, nor conditional tender, nor any discrepancy is there in the bid of the petitioner so as to contend "Invalid HT License submitted".

11. It is clearly mentioned that HT License being No. 3104 issued by the Electrical Licensing Board of Odisha in the name of the petitioner-SWOSTI Powercon was valid and the validity period was till 05.11.2023. The license further mentions the validity of individual staff, which has to be read along with the contractor's license. On verification of website in respect of Contractor's License, i.e. HT-3104 issued by ELBO, it is found that individual staff license was valid till 30.11.2023. Therefore, the Contractor's HT License was valid and eligible as per the eligibility criteria fixed in the DTCN dated 01.08.2023.

12. The contention raised by Mr. Panigrahi, learned counsel for opposite parties no.2 and 3 is that the petitioner uploaded the license, which was valid till 05.11.2023, but the permit of Muketendu Sekhar Dash, Lineman MV was not valid during that specific period (valid till 27.08.2022). So, as per the criteria mentioned in the license, the uploaded license of the bidder considered as invalid and accordingly rejected. Such contention has no leg to stand, because the opposite parties no.2 and 3 have only considered the 1st Note of the License and ignored the 2nd Note. Therefore, the opposite parties should have taken note of conjointly both the notes mentioned in the license and should have gone through the website to find out the correctness of the license submitted by the petitioner.

13. In view of such position, there is no need to go for further clarification, since the documents submitted by the petitioner were genuine and a bare reading of the same makes the petitioner eligible in respect of the tender in question. Mere reading of one part and ignoring of other part of a document, i.e., the license to the detriment of the petitioner cannot be sustained as it amounts to arbitrary, unreasonable and irrational exercise of power by the opposite parties no.2 and 3.

14. In ***Jagdish Mandal v. State of Orissa***, (2007) 14 SCC 517, at Paragraph-22, the apex Court observed as follows:-

> *"Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review*

will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold."

15. In ***Union of India v. Dinesh Engineering Corporation***, (2001) 8 SCC 491, the apex Court held that in Contractual matter like the Government Contract, the Public Authority needs to be rational and reasonable in their decision making process. At Paragraph-16, it has been held as follows:-

"16. But then as has been held by this Court in the very same judgment that a public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognised by courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law especially Article 14 of the Constitution. In the instant case, we have noticed that apart from rejecting the offer of the writ petitioner arbitrarily, the writ petitioner has now been virtually debarred from competing with the EDC in the supply of spare parts to be used in the governors by the Railways, ever since the year 1992, and during all this while we are told the Railways are making purchases without any tender on a proprietary basis only from the EDC which, in our opinion, is in flagrant violation of the constitutional mandate of Article 14. We are also of the opinion that the so-called policy of the Board creating monopoly of EDC suffers from the vice of non-application of mind, hence, it has to be quashed as has been done by the High Court."

16. In ***Ajay Kumar Jain v. State of Odisha***, 2017 SCC OnLine Ori 473, the apex Court at Paragraphs-23, 24, 25 and 26, observed as follows:-

"23. In the case of Union of India Vs. International Trading Co., reported in (2003) 5 SCC 437, Hon'ble Supreme Court at paragraph-23 has held as under:

"23. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interest of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country....." *(Emphasis supplied)*

24. In the case at hand, by the restriction imposed at the pre-bid stage, the right of the potential bidders, who are otherwise eligible to participate in the tender process, is being arbitrarily infringed. It certainly curtails the reasonable expectation of the intending eligible bidders to participate in the bidding process.

25. In the case of Association of Registration Plates Vs. Union of India and others, reported in (2005) 1 SCC 679, Hon'ble Supreme Court at paragraph-43 held as under:

"43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work, Article 14 of the Constitution prohibits the government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim fundamental right to carry on business with the government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the Bar (supra) is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on government in its dealings with tenderers and contractors. (emphasis supplied)

26. No purpose can certainly be served in nipping the contractors, who are otherwise eligible, at the threshold. There cannot be any fair competition, as there would be lesser participants, which is certainly detrimental to the public interest."

17. In ***Sterling Computer Limited v. M/s. M & N Publications Limited***, (1993) 1 SCC 445, the apex Court at Paragraphs 18 and 19 observed as follows:-

"18 While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process". In this connection reference may be made to the case of Chief Constable of the North Wales Police v. Evans, [1982] 3 All ER 141, where it was said that

'The purpose of judicial review- "... is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court."

By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the state. Courts have inherent limitations on the scope of any such enquiry. But at the same time as was said by the House of Lords in the aforesaid case, Chief Constable of the North Wales Police v. Evans (supra), the Courts can certainly examine whether 'decision making process" was reasonable, rational not arbitrary and violative of Article 14 of the Constitution.

19. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract. But, once the procedure adopted by an authority for purpose of entering into a contract is held to be against the mandate of Article 14 of the Constitution, the Courts cannot ignore such action saying that the authorities concerned must have some latitude or liberty in contractual matters and any interference by court amounts to encroachment on the exclusive right of the executive to take such decision."

18. In ***Reliance Energy Limited v. Maharashtra State Road Development Corporation Limited***, (2007) 8 SCC 1, the apex Court at Paragraphs 36, 37, 38 and 39 observed as follows:-

> *"36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free- standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". In includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine-Judges in the case of I.R. Coelho vs. State of Tamil Nadu. (2007) 2 SCC 1, Article 21/14 is the heart of the chapter on fundamental rights. It covers various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.*
>
> *37. In Union of India and another vs. International Trading Co. and another - (2003) 5 SCC 437, the Division Bench of this Court speaking through Pasayat, J. had held :*
>
> *"14. It is trite law that Article 14 of the Constitution applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.*
>
> *15. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the state, and non-arbitrariness in essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reasons, not whimsically for any ulterior*

purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness."

38. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".

39. In Reliance Airport Developers (P) Ltd. v. Airports Authority of India and others - (2006) 10 SCC 1, the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates his decision- making power and he must give effect to it otherwise it may result in illegality. The principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the bidders and other stakeholders, uncertainty and thereby breach of rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid down in the aforesaid judgment is that whenever a norm/benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above "certainty" is an important aspect of rule of law. In the case of Reliance Airport Developers (supra), the scoring system formed part of the evaluation process. The object of that system was to provide identification of factors, allocation of marks of each of the said factors and giving of marks had different stages. Objectivity was thus provided."

19. In ***Chittaranjan Mishra v. State of Odisha***, 2016 (II) OLR 735, in which one of us (Dr. Justice B.R. Sarangi) was the Author of the Judgment, this Court, at Paragraph-16, observed as follows:-

"16. In S.S. Company mentioned supra, on which reliance has been placed so far as locus standi of the petitioner is concerned, it has been held that if the tenderer did not satisfy the eligibility criteria, even in terms of the unamended clause, and consequently its tender was rejected thereunder, it could not assail the amendment made in the relevant clause in terms whereof it again failed to qualify. But, this is not a case where the petitioner had participated in the tender, rather by putting the conditions by enhancing the EMD and solvency amount, the petitioner has been precluded from participating in the tender itself. So far as the previous years tender conditions are concerned, such conditions were not there and, admittedly, in respect of other distribution systems, namely, PDS and SMP, such stringent conditions have not been put by the State authority and, consequentially, there was fair participation of the bidders in view of the terms and conditions mentioned in the previous years. But, by putting conditions, so far as EMD, solvency certificate and security deposits are concerned, the

petitioner being outstayed from the tender and in order to favour group of persons such stipulations have been made, it amounts to arbitrary and unreasonable exercise of powers. Consequentially, the petitioner has been discriminated and malafidely the benefit has been extended to such people. Thereby, the petitioner has got every locus to assail such terms and conditions. Therefore, the judgment referred to supra has no application to the present case."

In the said case, this Court, referring to ***Michigan Rubber (India) Limitd v. State of Karnataka and others***, (2012) 8 SCC 216, ***Tata Cellurar***; ***Dinesh Engineering*** (supra), ***S.S. and Company v. Orissa Mining Corporation Limited***, (2008) 5 SCC 772 interfered with the Tender Call Notice dated 29.02.2016, so far as it relates to the conditions for enhancement of Security Deposits, EMD and Solvency Certificate, being arbitrary, unreasonable, discriminatory and *mala fide* and, thereby, quashed the same.

20. In ***Jagruti Welfare Organization v. State of Odisha***, 2017 SCC OnLine Ori 485, this Court in Paragraphs 28, 29 and 37 observed as follows:-

"28. Admittedly, pursuant to the notice inviting tender (for short 'NIT'), four bidders had submitted their bids. Out of four bidders, two, namely, M/s. M.E. Infra Project Pvt. Ltd., Mumbai and M/s. Jyoti Build Tech. Pvt. Ltd., Lucknow could not deposit the EMD of Rs.60.00 lakh. Thus, the competition was reduced to two competitive bidders, namely, M/s. Global Waste Management Cell Pvt. Ltd., Mumbai and M/s. SRP Clean Enviro Engineers Pvt. Ltd., Banagalore. Both the aforesaid bidders have quoted exorbitantly high price, which is more than double/triple of what is being paid to RMKY at present. As has been discussed while answering Issue No. 2, CMC could not satisfactorily explain the reasonable nexus between the escalation in financial eligibility criteria and the object to be achieved, that is the scope of work.

29. Cumulative assessment of the discussions made above, it can safely be concluded that the action of the CMC in escalating the financial eligibility criteria as per Clause 4.2 (a) of the tender call notice is nothing but to eliminate the potential bidders like the petitioner. Participation of only two bidders suggests that there was no fair competition at all. CMC has every right to incorporate stringent condition in the tender call notice. But the same must have a reasonable nexus with the object to be achieved and more importantly, it must allow a fair competition giving scope to the potential bidders to compete. As observed by Hon'ble Apex Court in the case of Ram & Shyam Company (supra) at para-18, it has been held as follows:

"18. .....And at any rate disposal of the state property in public interest must be by such method as would grant an opportunity to the public at large to participate in it, the State reserving to itself the right to dispose it of as best subserve the public weal."

37. On a cumulative assessment of the case law, it can be safely concluded that the Court does not act as an appellate authority, but merely reviews the manner in which the administrative decision is taken. The Court does not have expertise to correct the administrative decision because it will amount to substituting its own decision without any necessary expertise which itself may be fallible. The scope of interference/judicial review is very limited and can be made in the case where the authorities have acted in a manner which is arbitrary, unreasonable, discriminatory and with mala fide intention to limit the scope of competition to a chosen few by eliminating the potential bidders from arena of competition and/or the decision so taken is against the public interest."

21. Therefore, in view of the settled principles of law, as discussed above, there is absolutely no bar to interfere with the tender process, unless it satisfies the tests of arbitrariness, unreasonableness, discrimination, *mala fide* and bias, in exercise of power under Judicial Review under Article 226 of the Constitution of India.

22. Considering the above facts and circumstances and in exercise of power of judicial review, the communication made by the opposite parties, rejecting the bid of the petitioner on the ground that "Invalid HT License submitted", cannot be sustained in the eye of law.

23. It is of relevance to mention here that due to the interim order passed by this Court, no further progress has been made for settlement of bids in respect of 12 packages, in respect of which the petitioner has submitted its applications. Therefore, this Court directs the opposite parties no. 2 and 3 to take into consideration the license submitted by the petitioner, being in order, and allow the petitioner to participate in the bid by taking follow up action in conformity with the provisions of law.

24. With the above observations and directions, the writ petition stands allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

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2024 (I) ILR-CUT-1179

Dr. B.R. SARANGI, J & G. SATAPATHY, J.

W.P(C) NO. 20652 OF 2023

CHANDAN SINGH ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

(A) TENDER MATTER – Black listing of the petitioner without affording any opportunity of hearing – Whether the impugned order of blacklisting is sustainable in the eyes of law? – Held, No – Such order cannot be passed without giving any opportunity of hearing to the party.

(B) CONSTITUTION OF INDIA, 1950 – Article 226 – Scope of Judicial review in the decision of state and its instrumentalities – Held, if the state or its instrumentalities takes any decision without affording any opportunity of hearing, then sole decision is subject to Judicial review on grounds of principles of natural Justice, doctrine of proportionality, arbitrariness and discrimination under Article 14 of the Constitution of India.

Case Laws Relied on and Referred to :-

1. Manu/OR/0992/2023 : Raps Infratech Pvt. Ltd. v. State of Odisha & Ors.
2. (1975) 1 SCC 70 : Urusian Equipment & Chemicals Ltd. v. State of West Bengal.
3. (2021) 2 SCC 551 : UMC Technologies Pvt. Ltd v. Food Corporation of India & Anr.
4. (2004) 13 SCC 342 : Lt. Governor Delhi v. HC Narinder Singh.
5. MANU/PH/0459/2016 : 2016 (3) SCT 494 : Omax Engineering Works v. State of Haryana.
6. MANU/SC/0921/2010 : (2010) 13 SCC 427 : Oryx Fisheries Pvt. Ltd. v. Union of India.
7. MANU/SC/0682/2010 : (2010) 9 SCC 496 : Kranti Associates Pvt.Ltd. V. Masood Ahmed Khan.
8. MANU/SC/0657/2014 : AIR 2014 SC 3371 : Gorkha Security Services v. Government of NCT of Delhi.
9. AIR 1995 SC 1057 : Nova Steel (India) Ltd v. M.C.D. and Ors.
10. (2006) 11 SCC 548 : AIR 2007 SC 437 : Mr. B.S.N. Joshi & Sons Ltd v. Nair Coal Services Ltd. & Ors.
11. 2016 (II) ILR CUT-37: TELSA Transformers Limited v. Odisha Power Transmission Corporation Limited.
12. AIR 2014 SC 3371 : Gorkha Security Services v. Government (NCT of Delhi).
13. (2023) 4 SCR 445 : Isolators and Isolators v. Madhya Pradesh Madhya Kshetra Vidyut Vitran Co. Ltd.
14. (2014) 14 SCC 731 : Kulja Industries Limited v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Ltd. & Ors.

For Petitioner : Mr.Prabodha Chandra Nayak, & R.K.Rout.

For Opp.Parties : Mr.P.P.Mohanty, AGA and M/s. P.K.Bhuyan & S.Mishra.

JUDGMENT Date of Judgment : 15.03.2024

Dr. B.R.SARANGI, J.

The petitioner, by means of this writ petition, seeks to quash the order dated 22.06.2023 passed by opposite party no.3 under Annexure-1 in blacklisting and debarring the petitioner to participate in any tender of Water Corporation of Odisha and also to declare the decision making process of opposite party no.2 in blocking the portal registration under Annexure-7 as unreasonable, unfair and violative of Article 19(1)(g) of the Constitution of India.

2. The factual matrix of the case, in precise, is that the petitioner, who is a Degree Engineer Contractor, participated in the tender process, pursuant to Tender Call Notice No. WATCO (W)-14(2)/2023-24 dated 24.05.2023 and WATCO (W)-14(1)/2023-24 issued by opposite party no.3 for the work *"Design, Construction, Testing & Commissioning of 1 No.5.00 Lakh Litre Capacity RCC ESR (25 MTR Staging) with All Ancillary work & Piping arrangement at LIC Colony under DMA-II for implementation of 24X7 Water Supply to Nimapara NAC."* and *"Design, Construction, Testing & Commissioning of 1 No. 5.00 Lakh Litre Capacity RCC ESR (25 MTR Staging) with all ancillary work and Piping Arrangement at Dibya Jiban Sangha under DMA-IV for implementation of 24X7 Water Supply to Nimapara NAC"*. Even though the petitioner participated in such bidding process by submitting all the documents in e-tender process on 12.06.2023, his technical bid was rejected by the tender evaluation committee on 22.06.2023 and accordingly the

petitioner received a mail that his ongoing work has been terminated and he has been blacklisted and debarred to participate in any tender of WATCO-opposite party no.3 on the ground of furnishing forged documents regarding experience certificate for the work in question. Hence, this writ petition.

3. Mr. P.C. Nayak, learned counsel appearing for the petitioner vehemently contended that blacklisting and debarment of the petitioner to participate in future tender of WATCO, without giving any opportunity of hearing and without complying the principle of natural justice, cannot be sustained in the eye of law. It is further contended that clause 6.25 of the DTCN stipulates that the blacklisting may be done as per the Appendix-XXXIV of OPWD Code which prescribes the modalities of blacklisting. It is further contended that Appendix-XXXIV of OPWD Code requires that due inquiry has to be done after issuing show cause notice to the petitioner, but the same having not been complied with, the impugned order under Annexure-1 in blacklisting and debarring the petitioner to participate in any tender of WATCO in future, cannot be sustained in the eye of law. It is further contended that the action of opposite party no.2 in blocking the portal registration of the petitioner under Annexure-7, cannot also be sustained in the eye of law. In order to substantiate his contention, learned counsel for the petitioner has placed reliance on the judgment of this Court in the case of ***Raps Infratech Pvt. Ltd. v. State of Odisha and others***, [W.P.(C) No. 19439 of 2023 decided on 11.08.2023, reported in Manu/OR/0992/2023], of which one of us (Dr. Justice B. R.Sarangi) was the author.

4. Mr. P.P. Mohanty, learned Addl. Government Advocate appearing for opposite party no.1-State contended that the matter relates to WATCO and, as such, the tender floating authority being opposite parties no.2 and 3, the State has no role to play. As such, if any action has been taken by opposite parties no.2 and 3, the validity of such action is under challenge in the present writ petition.

5. Mr. P.K. Bhuyan, learned counsel appearing for opposite parties no.2 and 3-WATCO vehemently contended that the action taken by the authority is well justified, because the petitioner had forged the documents in the process of tender and when the same was detected during technical bid evaluation, the impugned action has been taken in blacklisting the petitioner. Consequentially no illegality or irregularity has been committed by the authority while passing the order impugned so as to call for interference by this Court at this stage.

6. This Court heard Mr. P.C. Nayak, learned counsel appearing for the petitioner; Mr. P.P. Mohanty, learned Addl. Government Advocate appearing for the opposite party no.1-State and Mr. P.K. Bhuyan, learned counsel appearing for opposite parties no.2 and 3 in hybrid mode and perused the records. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties the writ petition is being disposed of finally at the stage of admission.

7. For a just and proper adjudication of the case, the relevant clauses of the tender documents as well as OPWD code are quoted hereunder:-

"6.25 Black Listing:

A Contractor may be blacklisted 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. As per said amendment the Contractor may be blacklisted.

a) Misbehavior/threatening of Departmental & 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."

"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.

B. The registration certificate of blacklisted contractor shall remain automatically suspended while allowing him to complete all his ongoing work(s) unless otherwise rescinded by the competent authority on grounds of breach of conditions of agreement.

C. The name(s) of partners and allied concerns of the blacklisted contractors shall also be communicated to all concerned. Care shall be taken to see that the contractor blacklisted and his partners do not transact any business with Government under a different name or title.

D. Once the blacklisting order is issued it shall not be revoked ordinarily unless:

(i) On review in later date, the Chief Engineer is of the opinion that there is sufficient justification to revoke the order of blacklisting, or
(ii) In respect of the same offense, the accused has been honourably acquitted by court of law.

The concerned Chief Engineer will obtain order from the concerned Administrative Department before revoking the order of blacklisting. The order of revocation shall also be communicated to all concerned.

E. The Chief Engineer and Administrative Department shall maintain a list of blacklisted contractor. Updated list of blacklisted contractors shall be communicated to all concerned by the Chief Engineers on a quarterly basis.

F. Checklist as per Annexure-I, shall be furnished by the concerned Chief Engineer for blacklisting the contractor.

G. Checklist as per Annexure-II, shall be furnished by the concerned Chief Engineer for revoking blacklisting order.

Explanation: (i) Action taken under this rule shall be in addition to any action taken under Rule 11 of PWD Contractor's Registration Rules,1967 (Appendix-VIII of OPWD Code, Vol.-II). On revocation of order of blacklisting, registration certificate of the contractor shall valid automatically, if not otherwise become invalid which shall be recorded in the registration certificate by the revoking authority.

(ii) The ground mentioned above for blacklisting of contractor shall be deemed to be deleted from the grounds for cancellation/suspension of registration certificate U/R-11(a) of PWD Contractor's Registration Rules, 1967 (Appendix VIII of OPWD Code, Vol.-II)."

8. The petitioner has assailed the office order dated 22.06.2023 passed by opposite party no.3 under Annexure-1, which reads as under:-

"Whereas M/s Chandan Singh, 'A' Class Engineering Contractor, Indira Nagar Semiliguda, Koraput, has furnished forged documents regarding experience certificate for the following works 1) "Design, Construction, Testing & commissioning of 1 no. 5.00 lakh Litre capacity RCC ESR (25mtr staging) with all ancillary work & piping arrangement at Dibya Jiban Sangha under DMA-IV for Implementation of 24x7 water supply to Nimapara NAC" & "Design, Construction, Testing & commissioning of 1 no. 5.00 lakh Litre capacity RCC ESR (25mtr staging) with all ancillary work & piping arrangement at LIC Colony under DMA-III for Implementation of 24x7 water supply to Nimapara NAC" 2) "Construction of Intake well and pump house at Satnadhar Sundargarh for 24 X 7 and DFT water supply to Sundargarh Town"' and whereas his contract for the work "Construction of Intake well and pump house a Satnadhar Sundargarh for 24 X 7 and DFT water supply to Sundargarh Town" has been terminated, he is hereby black listed & debarred to participate in any tender of WATCO in future."

9. On perusal of the aforementioned office order, it is made clear that the petitioner has been debarred to participate in the bid and, as such, he has been blacklisted for indefinite period. Such blacklisting and debarment, which is for indefinite period, has been done without following the procedure envisaged in Appendix-XXXIV of OPWD Code, which provides a detailed procedure for blacklisting of a contractor. Though under sub-clause (f) of Clause 6.25 it has been

prescribed that the contractor may be blacklisted for submission of false/fabricated/ forged documents for consideration of a tender, but that should be after following the modalities prescribed under the OPDW Code. Nothing has been placed on record by the WATCO, by filing the counter affidavit, that the modalities have been followed for blacklisting the contractor. In absence of any modalities being followed in accordance with the terms and conditions of the contract itself, blacklisting of the petitioner for an indefinite period shows the arbitrary and unreasonableness exercise of power by opposite party no.3.

10. In ***Urusian Equipment & Chemicals Ltd. v. State of West Bengal***, (1975) 1 SCC 70, the apex Court at Paragraphs-12, 19 and 20 held as follows:-

> *12. Under Article 298 of the Constitution the Executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal, protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of black-listing, has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of black- listing. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.*
>
> *xxx xxx xxx*
>
> *19. Where the State is dealing with individuals in transactions of sales and purchase of goods, the two important factors are that an individual is entitled to trade with the Government and an individual is entitled to a fair and equal treatment with others. A duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice. A body may 'be under a duty to give fair consideration to the facts and to consider the representations but not to disclose to those persons details of information in its possession. Sometimes duty to act fairly can also be sustained without providing opportunity for an oral hearing. It win depend upon the nature of the interest to be affected, the circumstances in which a power is exercised the nature of sanctions involved therein.*
>
> *20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent, his case before he is put on the blacklist."*

11. In ***UMC Technologies Private Limited v. Food Corporation of India and another***, (2021) 2 SCC 551, the apex Court at paragraph-13 of the judgment observed that *"at the outset, it must be noted that it is the first principle of civilised*

jurisprudence that a person against whom any action is sought to be taken or whose right or interests are being affected should be given a reasonable opportunity to defend himself."

12. As a prelude it may be apposite to say that an order of "blacklisting" has the effect of depriving a person of equality of opportunity in the matter of public contracts and by blacklisting a person, the State acts to the prejudice of a person and in such eventuality, such an action is to have support of legality. Thus, fairness and equality in State action is highly solicited.

The position regarding "blacklisting" as set at rest emanated from dicta of Courts is this, that:-

> *(i) Prior to taking decision to blacklist a contractor, which has adverse impact to carry on business as envisaged under Article 19(1)(g) of the Constitution of India, the contractee-Government is required to adhere to the one of the statutory principles of natural justice, being "AUDI ALTERAM PARTEM";*
>
> *(ii) At the time of evaluation of any entity of being blacklisted, doctrine of proportionality has weight;*
>
> *(iii) If at all it is decided to "blacklist" an entity/contractor, the same cannot be "permanent";*
>
> *(iv) Show-cause Notice inviting reply must show in clear terms the reason(s) based thereof and the person to be affected and/or against whom adverse civil consequences would ensue, has to be afforded adequate reasonable and effective opportunity to demonstrate his case/plight prior to decision to "blacklist" him is taken. Nonetheless, with word of caution, there is no inviolable rule that a personal hearing of the affected party must precede every decision of the contractee-Government, vide**, Patel Engineering Ltd. Vrs. Union of India,** (2012) 11 SCC 257.*

13. In ***Lt. Governor Delhi v. HC Narinder Singh***, (2004) 13 SCC 342, though it relates to a service jurisprudence, the apex Court at paragraph-4 observed as follows:-

> *4. Reading of the show-cause notice suggests as if it is in continuation of the departmental proceedings. Lack of devotion to duty is mentioned as the reason for the proposed action which was the subject-matter of the earlier proceedings as well. The second proposed action based on the same cause of action proposing to deny promotion or reversion is contemplated under the impugned show-cause notice. Second penalty based on the same cause of action would amount to double jeopardy. The Tribunal, was, therefore, right in law in annulling such an action. We are not expressing any opinion on the ambit or scope of any rule.*

14. In ***Omax Engineering Works v. State of Haryana,*** MANU/PH/0459/2016 : 2016 (3) SCT 494, the High Court of Punjab and Haryana, at paragraphs 21 and 28 observed as follows:-

> *21. In our view, in a case such as this, where the second show cause notice is identical in every respect to the first show cause notice and where the first show cause notice was taken to its logical conclusion and the decision taken therein has attained finality, a second show cause notice is impermissible on the principle embodied in the Latin maxim*

'interest reipublicae ut sit finis litium' and on the principle of cause of action/estoppel. These principles in turn are based on an important aspect of public policy.

28. The contention that the second impugned order is nothing but an additional order in respect of the first show cause notice requires merely to be stated to be rejected. The proceedings relating to the first show cause notice did not indicate that the issue of blcaklisting was not to be taken up or considered. Nor do the proceedings indicate any intention to deal with the issue of blcaklisting separately and/or subsequently. The record reveals that the first show cause notice was dealt with, considered and disposed of in its entirety without reserving any part or aspect thereof for further and/or separate consideration."

15. In ***Oryx Fisheries Pvt. Ltd. v. Union of India***, MANU/SC/0921/2010 : (2010) 13 SCC 427, where reliance has been placed on ***Kranti Associates Pvt.. Ltd. V. Masood Ahmed Khan***, MANU/SC/0682/2010 : (2010) 9 SCC 496, in paragraph-41 it was observed as follows:-

*"41. In **M/s Kranti Associates** (supra), this Court after considering various judgments formulated certain principles in para 51 of the judgment which are set out below*

a. In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

b. A quasi-judicial authority must record reasons in support of its conclusions.

c. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

d. Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

e. Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

f. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

g. Reasons facilitate the process of judicial review by superior Courts.

h. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.

i. Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

j. Insistence on reason is a requirement for both judicial accountability and transparency.

k. If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

l. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or `rubber-stamp reasons' is not to be equated with a valid decision making process.

m. It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-737).

n. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See (1994) 19 EHRR 553, at 562 para 29 and ***Anya vs. University of Oxford****, 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions". o. In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process".*

16. In ***Gorkha Security Services v. Government of NCT of Delhi***, MANU/ SC/0657/2014 : AIR 2014 SC 3371, it has been held that blacklisting causes civil death. Such a grave consequence, therefore, attracts exercise of power of judicial review.

17. In ***Nova Steel (India) Ltd v. M.C.D. and Ors***, AIR 1995 SC 1057 the apex Court held that the question of blacklisting of the contracts has been considered by the Courts time and again and it has categorically been held that such order cannot be passed without giving opportunity of hearing to the party.

18. In ***Mr. B.S.N. Joshi & Sons Ltd v. Nair Coal Services Ltd. & Ors***, (2006) 11 SCC 548 : AIR 2007 SC 437 and a long line of decisions, the ratio of that decision have been followed and applied principle of audi alteram partem to the process that may eventually culminate in the blacklisting of a contractor.

19. In ***TELSA Transformers Limited v. Odisha Power Transmission Corporation Limited***, 2016 (II) ILR CUT-37, this Court also taking into consideration the ratio of ***Gorkha Security Services v. Government (NCT of Delhi)***, AIR 2014 SC 3371 held that merely because clause in notice inviting tender empowers the department to impose such penalty that does not mean that such penalty can be imposed without putting defaulting contractor to notice to this effect.

20. In ***Isolators and Isolators v. Madhya Pradesh Madhya Kshetra Vidyut Vitran Co. Ltd.,*** (2023) 4 SCR 445, it has been laid down that finality attaching to the action of cancellation cannot be read as a due notice for imposition of penalty even if the respondents chose to employ the expression 'cancelled with imposition of penalty' in the orders. If at all penalty was considered to be leviable, the same could not have been carried out without affording adequate opportunity of response to the appellant. It is, thus, held in the said case that the action of the respondents in imposing penalty without even putting the appellant to notice as regards proposed action could not be approved.

21. In ***Kulja Industries Limited v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and others***, (2014) 14 SCC 731, the apex Court held, if State or its instrumentality takes decision on blacklisting then such decision is subject to judicial review on grounds of principles of natural justice, doctrine of proportionality, arbitrariness and discrimination under Article 14 of the Constitution of India.

22. Applying the aforementioned principles of law laid down by the apex Court to the present case, the impugned orders of blacklisting under Annexure-1 dated 22.06.2023 and blocking of portal registration under Annexure-7 cannot be sustained in the eye of law and the same are liable to be quashed and are hereby quashed.

23. The writ petition is thus allowed. But, however, there shall be no order as to costs.

—— o ——

2024 (I) ILR-CUT-1188

Dr. B.R.SARANGI, J & G. SATAPATHY, J.

W.P(C) NO. 22292 OF 2017 & W.P(C) NO. 9877 OF 2019

ASHOK KUMAR SAHU ……Petitioner

-V-

SECY, MIN. OF PERSONNEL, PUBLIC GRIEVANCE AND PENSION & ORS. ……Opp.Parties

&

W.P(C) NO. 9877 OF 2019

KASHINATH SAHOO -V- SECY, MIN. OF PERSONNEL, PG&P & ORS.

(A) IAS PAY RULE, 2007 – The authority had extended the benefit of two increment in consonance with the Rules applicable to the petitioner – But, on receipt of the clarification dated 14.01.2011 after retirement of petitioner the authority recovered the alleged excess amount and withdrawn the benefit of two increments extended in his favour – Whether the recovery of excess amount and withdrawn of increments is sustainable under law? – Held, No – Recovery of amount and withdrawn of benefit of two increments without complying the principle of natural justice is arbitrary, unreasonable and violates Articles 14 & 16 of the Constitution of India.

(B) INTERPRETATION OF STATUTE – Whether an executive instruction or office memorandum issued by the department can supersede the statutory provisions governing the field? – Held, No – The executive instruction may supplement not supplant to the statutory rules. (Para 19)

Case Laws Relied on and Referred to :-

1. AIR 1987 SC 1983 : 1987 Supp. SCC 748 : State of Madhya Pradesh v. Municipal Corporation, Indore.
2. (1994) 1 SCC 359 : Palghat Zilla Thandan Samudhaya Samrakshna Samiti v. State of Kerala.
3. AIR 1991 SC 772 : State of Madhya Pradesh v. G.S. Dal Flour Mill.
4. (2003) 1 SCC 506 : AIR 2003 SC 269 : Subhash Ramkumar Bind v. State of Maharashtra.
5. (2006) 6 SCC 395 : K.H. Siraj v. High Court of Kerala.
6. (2009) 12 SCC 49 : State of Rajasthan v. Jagdish Narain.
7. (2012) 11 SCC 247 : Vinod Kumar v. State of J&K.
8. (2011) 5 SCC 435 : Joint Action Committee of Airlines Pilots' Association v. Director of General of Civil Aviation.
9. (2002) 4 SCC 380 : Khet Singh v. Union of India.
10. AIR 1967 SC 1910 : Sant Ram Sharma v. State of Rajasthan.
11. (1994) 1 SCC 269 : Union of India v. Amrik Singh.
12. (2009) 7 SCC 205 : G.M. Uttanchal Jal Sansthan v. Laxmi Devi.
13. (2005) 5 SCC 561 : AIR 2005 SC 3066 : State of Kerala v P.N. Neelkandan Nair.

For Petitioner : Mr. Pitambar Acharya, Sr. Adv.,
M/s. Rath, A. Sathpathy, D. Panigrahy, G. Patra,
N. Jena & S.P. Behera

M/s. Bibhudendra Dash, P.K. Mohanty and N.C. Jena

For Opp.Parties : Mr. P.K.Parhi, DSGI with Mr. D.R.Bhokta & Mr. J.Nayak, CGCs.
Mr. S.N. Nayak, Addl. Standing Counsel.

JUDGMENT Date of Hearing : 28.03.2024 : Date of Judgment : 03.04.2024

Dr. B.R.SARANGI, J.

W.P.(C) No. 22292 of 2017 has been filed by Ashok Kumar Sahu with the following relief:-

> *"It is, therefore, humbly prayed that this Hon'ble Court may graciously be pleased to admit the writ petition, call for the records from the learned Tribunal and after hearing the parties be pleased to issue writ in the nature of certiorari by quashing the impugned order dated 22.6.2017 passed by the learned Tribunal in OA No.458/2012, under Annexure-4 as well as the clarification of the Central Government (Opp. party no. l) contained in letter dated 14.1.2011, under Annexure-2 and the impugned order dated 21.5.2011, under Annexure-3 inter alia withdrawing the benefits granted to the petitioner in consonance with IAS Pay Rules, 2007 as amended from time to time with the prayer to direct the opposite parties to fix up the pay of the petitioner in the Junior Administrative Grade and Selection Grade from the respective dates of the entitlement of the petitioner as provided under Rule 5(c) & (d) of IAS (Pay) Second Amendment Rules, 2008 along with the Schedule-1 of IAS(Pay) Amendment Rules, 2009 read with other relevant provisions of IAS (Pay) Rules in the facts and circumstances of the case:*
>
> *And/or pass any other order/orders/direction/directions as this Hon'ble Court may deem fit and proper to secure the ends of justice, equity and fair play.*"

Similarly, W.P.(C) No. 9877 of 2019 has been filed by Kashinath Sahoo with the following relief:-

> *"It is, therefore, humbly prayed that this Hon'ble Court may graciously be pleased to admit the writ petition, call for the records from the learned Tribunal and after hearing*

the parties be pleased to issue writ in the nature of certiorari by quashing the impugned order dated 25.02.2019 passed by the learned Tribunal in O.A.No.676 of 2012., under Annexure-3 as well as the clarification of the Central Government (Opp. party No.1) contained in letter dated 14.01.2011, under Annexure-2 and the impugned order dated 21.05.2011, under Annexure-3, inter alia withdrawing the benefits granted to the petitioner in consonance with IAS (Pay) Rules, 2007 as amended from time to time with the prayer to direct the opposite parties to fix up the pay of the petitioner in the Junior Administrative Grade and Selection Grade from the respective dates of the entitlement of the petitioner as provided under Rule 5(c) & 5(d) of IAS (Pay) 2nd Amendment Rules, 2008 along with the Schedule-I of IAS (Pay) Amendment Rules, 2009 read with other relevant provisions of IAS (Pay) Rules in the facts and circumstances of the case;

And any other order/orders, direction/ directions as this Hon'ble Court may deem fit and proper to secure ends of justice, equity and fair play."

In both the writ petitions, the petitioners had entered into the State Civil Service as members of Orissa Administrative Service ('OAS' in short) and got promoted to the Indian Administrative Service ('IAS' in short) and extended with the benefits in accordance with rules, but, subsequently, relying on the office memorandum, after their retirement, such benefit was directed to be withdrawn and recovery was made, which was confirmed by the Tribunal while disposing of O.A. No. 458 of 2012 (filed by Ashok Kumar Sahu) and O.A. No. 676 of 2012 (filed by Kashinath Sahoo). Therefore, both the writ petitions were heard together and are disposed of by this common judgment.

2. For a just and proper adjudication of both the writ petitions, the factual matrix of W.P.(C) No. 22292 of 2017 is taken into consideration. As it reveals from the record, the petitioner-Ashok Kumar Sahu, who is a retired I.A.S. officer, had entered into the State Civil Service as a member of Orissa Administrative Service on 22.12.1976. On 18.04.2006, he got promotion to the rank of Additional Secretary and, while working as such, he was promoted to the Indian Administrative Service w.e.f. 17.11.2006, in pursuance of notification no. 14015/17/200-AIS (I)-13, dated 17.11.2006, as per Indian Administrative Service (Appointment by Promotion) Regulation, 1955 in "Senior Time Scale" under Rule 4(3) read with Clause-2 of Section-1 of Schedule-II of the I.A.S. Pay Rules, 1954.

2.1. In pursuance of the notification dated 05.04.2007 of the General Administration Department, Govt. of Odisha, the petitioner was appointed to the "Junior Administrative Grade" (Non functional) w.e.f. 17.11.206. Subsequently, by another notification dated 07.11.2008 issued by the G.A. Department, Odisha, the petitioner was promoted to the "Selection Grade". Consequent upon implementation of the recommendations of the 6th Central Pay Commission, the IAS (Pay) Rules, 2007 was notified, which was partially amended on 19.09.2008 and was called "I.A.S. (Pay) Second Amendment Rules, 2008" (in short, Rules 2008).

2.2. The grievance of the petitioner is that although the State Govt. employees, that of Central Govt. employees, got their pay revision w.e.f. 01.01.2006, he got the benefit of pay revision in the State Scale w.e.f. the date of his promotion, i.e.,

17.11.2006. Pursuant to notification dated 15.01.2009, opposite party no.2 revised his pay scale in all the three grades of IAS taking into account the State Govt. Scale received by him till his promotion to IAS. Accordingly, his Basic Pay was fixed at Rs.14,875/- (pre-revised) in the "Senior Time Scale" of Pay of Rs.10,650-325-15,850/- (pre-revised) and at Rs.15,000/- (pre revised) w.e.f. 17.11.2006 in the "Junior Administrative Grade" scale of pay of Rs.12,750-375-16,500/- under Rule 4 (6 B) of the I.A.S. Pay Rules, 1954. Thereafter, he got the subsequent annual increments w.e.f. 01.11.2007 and 01.11.2008 and, accordingly, his pay was raised to Rs.15,750/-. Consequent upon his promotion to the "Selection Grade" of I.A.S., his pay was fixed at Rs.15,900/- (pre-revised) w.e.f. 07.11.2008 in the scale of pay in "Selection Grade" in I.A.S. of Rs.15,100-400-18,300/- and his date of next increment was on 01.11.2009. Subsequently, on exercise of his option to come over to the revised pay structure w.e.f. 01.01.2006, re-fixation of his pay was done as per Office Order dated 11.02.2009, which was partially modified vide Office Order dated 03.12.2009. The petitioner thereafter was promoted to "Super Time Scale" and he joined the promotional post on 14.01.2011. Accordingly, his pay was fixed at Rs. 60,960/- (Rs. 50,960/- + G.P. Rs. 10,000/-) w.e.f. 14.01.2011 (FN), i.e. the date of joining in the promotional post in PB-4 Rs.37,400-67,000/- with GP Rs. 10,000/- as per Office Order dated 28.02.2011.

2.3. The petitioner noticed that while re-fixing his pay, the principle of granting two additional increments @ 3% of the sum of Basic Pay and Grade Pay was not followed at the stage of the promotion from "Senior Time Scale" to "Junior Administrative Trade" and from "Junior Administrative Grade" to "Selection Grade", for which he made a representation on 31.03.2009. In the meantime, the Govt. of India, Ministry of Personnel vide Notification dated 15.04.2009 amended the IAS (Pay) Rules, 2007 by substituting paragraph (l) of the Schedule-I. But fact remains, while the petitioner was in State Civil Service as Additional Secretary (SAG) he was in PB-4, i.e. in the scale of Rs.37,400-67,000/- with G.P. Rs. 8,700/-, w.e.f. 18.04.2006 and he continued in that post till his promotion to IAS, i.e. 17.11.2006. As per the IAS (Pay) Amendment Rules, 2009, the petitioner was entitled to have his initial pay fixed by adding one increment, i.e., he was entitled to the Basic Pay of Rs.38,790/- with G.P. of Rs.8,700/- on his promotion to IAS w.e.f. 17.11.2006.

2.4. Accordingly, the petitioner made a representation to opposite party no.3 on 10.12.2009, pursuant to which, the State Government, vide its letter dated 11.06.2010, sought clarification from opposite party no.l, who, in turn, vide letter dated 14.01.2011, clarified the entitlement of the petitioner.

2.5. The opposite party no.l gave an interpretation that opposite party no.3 vide Office Order dated 21.05.2011 revised the pay fixation of the petitioner, who, in the meantime, retired on superannuation on 30.04.2011, from the stage of initial fixation of pay in "Senior Time Scale" of I.A.S. till the "Super Time Scale" and directed

recovery of excess payment made to him. Consequently, the Directorate of Animal Husbandry and Veterinary Service, Odisha, where the petitioner was posted before his retirement, directed vide letter dated 25.06.2011 to deposit an amount of Rs.81,825/- said to have been paid in excess of his entitlement.

2.6. Aggrieved by such action, the petitioner, on 28.06.2011, filed a representation before opposite party no.3. However, under coercion, the petitioner refunded the excess payment of Rs.81,825/- on 22.12.2011. The petitioner stated that an amount of Rs.58,216/-, which was due to be paid to him in terms of earlier pay revision/fixation, has also not been paid to him. Therefore, the petitioner approached the Central Administrative Tribunal, Cuttack Bench, Cuttack by filing O.A. No. 458 of 2012 seeking following relief:-

> *".....to quash Annexure A/15 to the extent it contains, "Since he has been given the benefit of before fixation of the pay in the Selection Grade of Pay I.A.S. before his actual appointment to the grade, he is not entitled to have his pay re-fixed on his actual appointment to this grade subsequently" for the ends of justice.*
>
> *AND*
>
> *Be further pleased to quash Annexure A/16 and A/17 for the ends of justice.*
>
> *AND*
>
> *Be further pleased to direct Respondent No.1 suitably amend/modify Rule-S(c) of Indian Administrative Service (Pay) Second Amendment Rules, 2008, to the extent it contains 'by adding two additional increments @ 3% of the sum of the pay in the Pay Band-3 and grade pay of Rs. 7600/-, computed and rounded off to the next multiple of 10 and added successively to the existing pay in the Pay Band-3 plus the grade pay of Rs. 7600/-' to bring the claim of the Applicant under its ambit or in the alternate treat the case of the Applicant as an anomaly to be sorted out by extending the benefit of promotion (granting two additional increments) in the grade of JAG for the ends of justice.*
>
> *AND*
>
> *Be further pleased to direct Respondent No.1 suitably amend/modify Rule-5(d) of Indian Administrative Service (Pay) Second Amendment Rules, 2008, to the extent it contains, 'to be computed on the minimum of pay band plus grade pay of Rs. 8700/-..... to bring the claim of the applicant under its ambit or in the alternate treat the case of the applicant as an anomaly to be sorted out by extending the benefit of promotion (granting two additional increments) in the grade of "Selection Grade" for the ends of justice.*
>
> *AND*
>
> *Be further pleased to direct the Respondent No.2 to pass appropriate order for refund of Rs. 81,825/- and release the withheld amount of Rs. 58,216/- along with the interest till the actual refund is made.*
>
> *AND*
>
> *Be further pleased to direct the Respondent No.2 to revise, re-fix the pay of the Applicant and corresponding grade pay from time to time with other entitlements as detailed vide Annexure A/20 and pay the differential amounts with interest for the ends of justice.*
>
> *AND*
>
> *Be further pleased to direct the Respondents to revise and re-fix the pension and determine the consequential revision of retirement benefit such as commutation, gratuity and leave salary accordingly and direct the payment of the differential amount with interest till the actual payment is made in the interest of justice.*

AND
Be further pleased to allow the cost."

2.7. The Tribunal, vide order dated 22.06.2017, observed that even if excess payment has been made by way of a bona fide mistake, recovery is to be made. Since re-fixation of pay was done after clarification of opposite party no.1, therefore, the opposite parties were justified in making recovery as per the law laid down in the judgment of the apex Court. By so observing, the Tribunal did not interfere with the same and dismissed the Original Application. Accordingly, W.P.(C) No. 22292 of 2017 has been filed challenging the said order of the Tribunal dated 22.06.2017 seeking the relief as quoted above.

2.8. So far as the petitioner in W.P.(C) No. 9877 of 2019 is concerned, he stands on the same footing as that of the petitioner in W.P.(C) No. 22292 of 2017. He had also approached the Tribunal by filing O.A. No. 676 of 2012 seeking the similar benefit. His Original Application was also dismissed, vide order dated 25.02.2019, relying on the order of the Tribunal in the case of Ashok Kumar Sahu, i.e. O.A. No. 458 of 2012.

3. Mr. Pitambar Acharya, learned Senior Advocate appearing along with Mr. S.S. Tripathy, learned counsel for the petitioner in W.P.(C) No. 22292 of 2017 vehemently contended before this Court that clarification was issued by opposite party no.l de hors the rules in the matter of pay fixation of IAS Officers. The service conditions and fixation of pay & emoluments of State Civil Service Officers, on promotion to IAS, are governed by statutory provisions framed under Section-3 of All India Services Act, 1951. The Tribunal has failed to read down Schedule-I of IAS (Pay) Amendment Rules, 2009 along with Rule 5(c) & 5(d) of IAS (Pay) Rules, 2007, as amended from time to time, and interpret all these provisions coherently so as to give justice to the petitioner.

3.1. He further contended that the right to pay & emoluments accrued under statutory provisions cannot be taken away by a mere clarification/ executive instruction, as has been done in the instant case. Therefore, the Tribunal has committed gross error of law in observing that who will get what pay is the prerogative of the Department of Personnel & Training, Government of India, i.e. opposite party no.1. He also contended that in the matter of fixation of pay of State Civil Service Officers, on promotion to IAS, consequent upon implementation of 7th Central Pay Commission, the opposite party no. 1, vide its letter no. 2015/2/2015-AIS-II dated 07.4.2017 addressed to the Chief Secretaries of all the States & Union Territories, has clarified under Clause 3 (a). Therefore, in view of the extant provision of Rule 5(6) of IAS (Pay) Rules, 2016 the two additional increments due to MoS inducted into IAS and on actual promotion to the Selection Grade/JAG, cannot be denied due to pay being initially fixed in the Selection Grade/JAG. Thereby, the State Government may ensure that the pay of these Officers on actual promotion to JAG/Selection Grade is re-fixed (only for the purpose of fixing pay on

promotion) at Level 11/12 of the Pay Matrix as per current pay drawn and given one increment in the Junior Scale and, thereafter, two additional increments shall be allowed at the level to which the Officer has been promoted.

3.2. He further contended that the instructions which have been issued in the nature of clarification that two additional increments due to members of the service inducted to IAS & on actual promotion to the rank of Selection Grade/ Junior Administrative Grade, cannot be denied due to their pay being initially fixed, at the time of promotion to IAS, under Schedule-I to IAS (Pay) Amendment Rules, 2009. Thereby, the Tribunal has committed a gross error in giving weightage to the clarification dated 14.01.2011 of the opposite party no.1 on the face of statutory rules. According to him, the conditions of service determined by statutory rules framed under the Constitution/ All India Services Act, 1951, cannot be undone by any mere clarification to supplant the rules. The executive instruction by no stretch of imagination can supersede the statutory rules governing the fixation of pay and other emoluments of a public servant, rather executive instruction can only supplement the rules but not to supplant the same. Thereby, seeks for quashing of the order passed by the Tribunal and to extend the benefit to the petitioner.

4. Mr. Bibhudhendra Dash, learned counsel appearing for the petitioner in W.P.(C) No. 9877 of 2019 endorsed the argument advanced by Mr. P. Acharya, learned Senior Advocate for the petitioner in W.P.(C) No. 22292 of 2017.

5. Mr. P.K. Parhi, learned DSGI appearing along with Mr. D.R. Bhokta and Mr. J. Nayak, learned Central Government Counsels contended that though the counter affidavit has not been filed in W.P.(C) No. 22292 of 2017, but the counter affidavit filed in W.P.(C) No. 9877 of 2019 may be taken into consideration. He contended that the Department of Personnel & Training, Ministry of Personnel, Public Grievance & Pensions, Government of India administers the provisions contained in Indian Administrative Service (Pay) Rules as per the recommendations of Central Pay Commission and interpretation of any of the statutory provisions laid down in the said rules, as the Cadre Controlling Authority in respect of the Indian Administrative Service rests with it. As such, the Department is involved in framing of policy pertaining to pay and promotion of IAS officers in general. The pay and promotion of individual officers are decided by the Government of the concerned State cadre in alignment with extant rules/ guidelines/ instructions /clarifications etc. Therefore, the State Government being competent in the matter and also in possession of all service details of the petitioner is in a better position to decide the benefits due to him under extant rules and instructions issued thereunder.

5.1. He further contended that it is admitted fact that the petitioner was inducted to the Indian Administrative Service (IAS) from the Odisha Administrative Service (OAS), vide notification dated 17.11.2006 issued by the Department of Personnel & Training (DoP&T). He was granted 1995 as the year of allotment. He further contended that the provisions contained in Rule 4(3) of IAS (Pay) Rules, 2007 as

amended from time to time stipulate that the pay of IAS officers inducted from State Civil Service shall be fixed as per the principles laid down in Schedule-I. Therefore, being the Cadre Controlling Authority in respect of the Indian Administrative Service officers, Department of Personnel & Training has expertise and authority for interpretation of any of the statutory provisions laid down in the said rules and can issue any clarification, instruction or guidelines and that cannot be construed to be contrary to the statutory provisions so as to warrant interference of this Court. In the light of the extant rules applicable during currency of 6th CPC and instructions issued thereunder, the pay of IAS officers inducted on promotion from the State Civil Service and selected from the Non-State Civil Service is to be fixed by protecting the State pay to the maximum of Grade Pay attached to Selection Grade, i.e., Rs.8700/- and granting one increment on such protected pay. Therefore, instructions issued by the Department to all the State Governments, vide letter dated 14.06.2010 and letter dated 01.03.2012, clarifying the fact that fixation of pay of members of service in Junior Administrative Grade (JAG) on promotion to Selection Grade in terms of Rule 4(6) of IAS (Pay) Rules, 2007 is applicable to those officers who are drawing their pay in JAG. The SCS/Non-SCS officers who are already drawing Grade Pay in Selection Grade on induction into IAS are not entitled to additional two increments on their actual appointment in Selection Grade on completion of 13 years of service, since their pay is already protected up to Selection Grade, even before their actual appointment to the grade in terms of provisions contained in Schedule-I of IAS (Pay) Rules, 2007, as amended from time to time. It is further contended that taking into account the provisions contained in Rule 4(6) of IAS (Pay) Rules, 2007, as amended vide notification dated 19.09.2008, suggest that the financial benefit attached to the promotion would be extendable to those officers who are drawing pay in the lower grade. The IAS Officers inducted from SCS/ Non-SCS, who are already drawing Grade Pay attached to Selection Grade as a special dispensation with a view to protect them from any loss on their induction into IAS, cannot claim the same benefits which are available to those officers who are getting benefits on promotion from a post holding lower Grade/ Pay Scale to a post carrying higher Grade/ Pay Scale. Therefore, the clarification issued vide Department's letter dated 14.01.2011 is in consonance with the procedures available in IAS (Pay) Rules, 2007 amended from time to time and instructions issued thereunder. It is further contended that the method of pay fixation as per IAS (Pay) Rules, 2007, as amended from time to time, read with the instructions issued vide letters dated 14.06.2010 and 01.03.2012 have been applicable to the officers of Indian Administrative Service across the country. Any alteration to the said provisions may have serious ramifications of monetary nature with a retrospective effect and it would give way to various anomalies to further aggravate of litigations.

5.2. He further contended that the provisions contained in IAS (Pay) Rules, 2016 and instructions issued vide letter dated 07.04.2017 are with reference to the provisions applicable w.e.f. 01.01.2016. These provisions in no way can be applied

to the cases falling to the ambit of 6th CPC. The said instructions have been superseded vide letter dated 28.02.2019, which have been further modified vide letter dated 06.03.2019. Thus, the provisions of each pay commission are distinct and based on the well thought of procedures derived by experts in the sphere. Therefore, provisions applicable to one pay commission cannot be extended to the cases falling in the ambit of other pay commission. Thereby, justified the order passed by the Tribunal and contended that the same should not be interfered with by this Court.

6. Mr. S.N. Nayak, learned Additional Standing Counsel appearing for the State-opposite parties contended that, so far as W.P.(C) No.22292 of 2017 is concerned, the petitioner was an officer of State Civil Service and promoted to IAS w.e.f. 17.11.2006, in pursuance of the IAS (Appointment by Promotion) Regulations, 1955. According to Rule 6(3) of the IAS (Recruitment) Rules, 1954, the initial appointment of the petitioner to IAS was made in Senior Time Scale in IAS. Subsequently, the inter-se seniority of the petitioner was fixed by the Government of India and he was assigned 1995 as his year of allotment. As such, he had already completed 12 years of service by the date of his actual appointment to the IAS. He was granted Junior Administrative Grade w.e.f. 17.11.2006, i.e., the date of his actual appointment to IAS. Subsequently, under Rule 3(1) of IAS (Pay) Rules, 2007, he was appointed to the Selection Grade in IAS w.e.f. 07.11.2008. Consequent upon implementation of recommendation of the 6th Central Pay Commission, the IAS (Pay) Rules was amended on 19.09.2008 and called as the IAS (Pay) 2nd Amendment Rules, 2008 and subsequently, it was further amended on 15.04.2009 called as the IAS (Pay) Amendment Rules, 2009 which deemed to have come into force w.e.f. 01.01.2006. Rule-3(a)(1) of IAS (Pay) Amendment Rules, 2009 states fixation of his pay. Prior to implementation of the above amended pay rules, the pay of the petitioner was fixed according to the provisions contained in the IAS (Pay) Rules, 1954/IAS (Pay) Rules, 2007 in the various grades in IAS. Consequent upon exercise of option by the petitioner to come over to the revised pay structure w.e.f. 01.01.2006, the pay of the petitioner was re-fixed afresh w.e.f. 17.11.2006.

6.1. He further contended that after implementation of IAS (Pay) Rules, 2009, certain doubts had arisen regarding fixation of pay of promoted IAS officers. IAS (Pay) 2nd Amendment Rules, 2008 do not clearly state whether the promoted IAS officers, who have been in Senior Time Scale, Junior Administrative Grade and Selection Grade on one day, would be entitled for multiple fixation of pay on the same day or not. Therefore, the State Government, vide their letter dated 11.06.2010 referred the matter to the Government of India basing on the representation dated 31.03.2009 of the petitioner. In reply, the Government of India, vide their letter 14.01.2011, clarified that the initial pay shall be fixed in PB-4 after grant of an increment @ 3% plus grade pay of Rs.8700 in the Senior Scale of IAS in terms of the provisions contained in Clause 1 of Schedule-I of IAS (Pay) Rules, 2007, as

amended vide notification dated 15.04.2009. Therefore, the petitioner is also entitled to have his initial pay in IAS re-fixed on enhance of his State Pay on account of increment of revision of pay scale during the period of probation in terms of Clause-2 of Schedule-I of the Pay Rules. Since the petitioner has been given the benefit of fixation of pay in the Selection Grade of IAS before his actual appointment to the grade, he is not entitled to have his pay re-fixed on his actual appointment to this grade subsequently. Therefore, direction was given for recovery of the excess amount of Rs. 81,825/-, so far as the petitioner in W.P.(C) No. 22292 of 2017 is concerned. Thereby, he contended that no illegality or irregularity has been committed by the authority by issuing such direction and the Tribunal is well justified in rejecting the grievance of the petitioners. Thereby, no interference to the orders so passed by the Tribunal is required.

7. This Court heard Mr. Pitambar Acharya, learned Senior Advocate appearing along with Mr. S.S. Tripathy, learned counsel for the petitioner in W.P.(C) No. 22292 of 2017; Mr. Bibhudhendra Dash, learned counsel appearing for the petitioner in W.P.(C) No. 9877 of 2019; Mr. P.K. Parhi, learned DSGI appearing along with Mr. D.R. Bhokta and Mr. J. Nayak, learned Central Government Counsels for opposite party no.1 in both the cases and Mr. S.N. Nayak, learned Additional Standing Counsel appearing for the opposite party nos. 2 and 3 in both the writ petitions 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.

8. For a just and proper adjudication of the case, the relevant provisions are referred hereunder:-

> ***Rule 4 (3) of IAS (Pay) Rules, 2007:-***
>
> *"The initial pay of a State Civil Service officer, on his appointment to the Service or on appointment in a cadre post in an officiating capacity in accordance with rule 9 of the Indian Administrative Service (Cadre) Rules, 1954, as the case may be, shall be fixed as per the principles laid down in Schedule I. Further pay and incremental benefits shall accrue to him under the other relevant provisions."*
>
> ***IAS (Pay) (Amendment) Rules 2009 amended on 15.4.2009 with retrospective effect from 01.01.2006, vide Para (1) of Schedule I says that: -***
>
> *Notwithstanding anything contained in the first provisio to sub rule (1) of rule 3, and the Notes thereunder, the initial pay of a promoted officer or an officer appointed by selection, as the case may be, shall be fixed in the Pay Band-3 or Pay Band-4 by adding one increment equal to 3% of the sum of pay in the pay band & Grade Pay applicable which will be rounded off to the next multiple of 10.*
>
> *In addition, the Grade Pay of Senior Time Scale or Junior Administrative Grade or Selection Grade. corresponding to the pay scale Or grade pay in the State Service, shall be granted.*
>
> *Provided that the grade pay attached to Selection Grade shall be granted with the pay in running pay band-4 only"*

Rule 4 (6) of the IAS (Pay) Rules, 2007 as amended on 19.09.2008 provides that:-

"The pay of a member of the Service in the Junior Administrative Grade shall, on promotion in the Selection Grade, be fixed in pay and-4 by granting two additional increments, computed on the minimum of the pay band plus grade pay and the grade pay of Rs.8700 shall be granted to the Selection Grade."

Para (7) of Schedule-I to IAS (Pay) Rules, 2007:-

"Notwithstanding anything contained in these rules, the pay of a promoted officer or an officer appointed by selection, as the case may be, shall not at any time exceed the basic pay which he would have drawn as a direct-recruit on that date if he had been appointed to the Indian Administrative Service on the date on which he was appointed to the State Civil Service or in a gazetted post in the non-State Civil Service, after attaining the age of twenty five years, as the case may be."

Rule 5(5) of IAS (Pay) Rules, 2016:-

"The pay of a member of the Service in the Senior Time Scale shall, on promotion to the Junior Administrative Grade, be fixed in Level 12 of the Pay Matrix in the same manner as in the case of promotion from Junior Time Scale to Senior Time Scale by adding one increment in the Level 11 of the Pay Matrix from which the Member of service is promoted, he shall be placed at a Cell equal to the figure so arrived at in the Level of the post to which promoted and if no such Cell is available in the Level to which he is promoted then he shall be placed at the next higher Cell in that Level and thereafter two additional increments shall be granted to the Basic Pay in the Level to which the Member of Service has been promoted by incrementally moving down two cells in the new Level to which he has been promoted."

Rule 5(6) of IAS (Pay) Rules, 2016:-

"The pay of a member of the Service in the Junior Administrative Grade shall, on promotion in the Selection Grade, be fixed at Level 13 of the Pay Matrix by adding one increment in the Level 12of the Pay Matrix from which the Member of service is promoted, he shall be placed at a Cell equal to the figure so arrived at in the Level of the post to which he is promoted and if no such Cell is available in the Level to which he is promoted, then he shall be placed at the next higher Cell in that Level and thereafter two additional increments shall be granted to the Basic Pay in the Level to which the Member of Service has been promoted by incrementally moving down two cells in the new Level to which he has been promoted."

9. The above being the provisions of law, the petitioner in W.P.(C) No. 22292 of 2017 joined in IAS, on 17.11.2006, on promotion and was assigned the "Year of Allotment" as 1995 based on his length of service in State Service as per rules, as he had acquired more than 09 years of seniority in IAS. The bone of contention of the petitioner is that he was denied 2 increments on promotion to the "Selection Grade" in IAS, which he is entitled to get as per statutory rules. These increments, though were granted initially, were withdrawn by opposite party no.2 on the basis of the executive instruction dated 14.01.2011 of opposite party no.1, in gross violation of statutory rules, reason being in State service just before promotion to IAS, he was getting a basic pay of Rs.37,400/-, in the scale of pay of Rs.37,400 67.000/- with a Grade Pay of Rs.8,700/-, in Pay Band-4 as per "Odisha Revised Pay Scale Rules, 2008", on the recommendations of 6th Central Pay Commission Report. On promotion to

IAS in "Senior Time Scale"/"Jr.Administrative Grade", with effect from 17.11.2006, his pay was fixed at same pay of Rs.37,400/-with Grade Pay of Rs.8,700/-in the revised scale of pay of Rs.37,400/- to Rs. 67,000/-, vide Office Order dated 11.02.2009 of opposite party no.2, as per Rule 4(3) read with Schedule-I of IAS (Pay) (2nd Amendment) Rules, 2008, made with retrospective effect from 01.01.2006.

10. The Government of India enacted IAS (Pay) Rules, 2007, vide notification dated 20.3.2007, in supersession to IAS (Pay) Rules, 1954, which was made effective from 01.04.2007. Thereafter, the Govt. of India enacted IAS (Pay) (2nd Amendment) Rules, 2008 with retrospective effect from 01.01.2006. Again, the Government of India enacted IAS (Pay) (Amendment) Rules, 2009 with retrospective effect from 01.01.2006. On a representation by the petitioner, the Government of Odisha refixed his initial pay on promotion from SCS to IAS at Rs.38,790/- by adding one increment on his last State Pay vide their Office Order dated 03.12.2009, but reduced his Grade Pay to Rs.7,600/-from Rs. 8,700/-with effect from 17.11.2006, i.e., in violation of Para (1) of Schedule-l of IAS (Pay) Rules, 2008 (as amended in 2009). Thereafter, the pay of the petitioner was fixed at Rs.45.890/- & Grade Pay at Rs.8,700/-on promotion to "Selection Grade" by granting two additional increments, based on statutory rules.

11. The petitioner submitted 2nd representation to opposite party no.2 to grant two additional increments on promotion to "Junior Administrative Grade" and restore his Grade Pay from Rs.7,600/- to Rs.8,700/ on initial promotion to IAS with effect from 17.11.2006, citing statutory rules. But, on a reference made by opposite party no.2 to opposite party no. 1, the opposite party no.1, i.e. the Government of India, Department of Personnel & Training issued a clarification to opposite party no.2 by stating as follows:-

> *"Sri A.K. Sahu IAS (OR/SCSI995) is entitled to have his initial pay fixed in Pay Band 4 after grant of increment @ 3% plus Grade Pay of Rs. 8,700/- in Senior Scale of IAS in terms of provisions contained in Clause-l of Schedule-I of IAS Pay) Rules, 2007 as amended vide Notification dated 15.4.2009.*
>
> *He is also entitled to his initial pay in IAS refixed on enhancement of his State pay on account of increment or revision of scale during the period of probation in terms of Clause-2 of Schedule-l of the Pay Rules.*
>
> *Since he has been given the benefit of fixation of pay in the "Selection Grade" in IAS before his actual appointment to the Grade, he is NOT entitled to have his pay refixed on his appointment to this subsequently."*

12. Therefore, without complying to Rule 4(6) quoted above, on the basis of a mere clarification/ executive instruction of opposite party no.1, the opposite party no.2 re-fixed/reduced his pay and pension and ordered for refund of the excess amount drawn, even after his retirement by passing the following order:-

> *"But they rectified their mistakes & allowed enhancement of "Grade Pay" from Rs.7,600/- to Rs. 8,700/- with effect from 17.11.2006, in pursuance to Rule 4(6) quoted above vide Notification dated 21.5.2011 of OP No.2.*

While fixing pay of a SCS Officers on promotion to IAS under Schedule-1, nowhere it is mentioned that one will be denied further increments on his actual promotion to "Selection Grade" even through as per Schedule-1. his initial pay was allowed to be enhanced by adding 01 (one) increment on his state pay, corresponding to Pay Band 3 or 4 of what he was enjoying in state services.

In addition, he was entitled to "Grade Pay" of "Sr Time Scale '"/ "Jr Administrative Grade " / Selection Grade", corresponding to the pay scale and Grade Pay in his State Service.

To corroborate the above stand, Rule 4(3) of lAS (Pay) Rules, 2007 says that after fixation of his initial pay under Schedule-l, his further pay and incremental benefits shall accrue to him under other relevant provisions.

This clarifies that there shall be no distinction between a "Direct Recruit" and a "Promotee recruit'" in IAS except while fixing initial pay of a promnotee recruit."

13. Needless to mention here, consequent upon IAS (Pay) (Amendment) Rules, 2008, Govt. of India, DoPT- opposite party no.1, vide letter dated 16.12.2008 addressed to all the Chief Secretaries, clarified that while implementing Rule 4(6), after grant of two additional increments on promotion to "Selection Grade", pay in PB-4 shall not be less than Rs.40,180/-. This concurs that as per rules, two additional increments shall have to be granted on promotion to "Selection Grade", which means pay on such promotion shall never be below Rs.40,180/- after grant of two additional increments.

14. Para (7) of Schedule-I to IAS (Pay) Rules, 2007, which has been referred to above, nullifies the stand taken by opposite party nos.1 and 2 in denying two additional increments on actual promotion to "Selection Grade" in IAS. This can be fortified that after 7th Central Pay Commission Report, the IAS (Pay) Rules, 2016 was enacted, allowing identical financial benefits to IAS Officers on promotion to the level of "Jr. Administrative Grade" & "Selection Grade" in view of Rule 5 (5) and 5 (6) of IAS (Pay) Rules, 2016, as mentioned above.

15. Under the IAS (Pay) Rules of 2016, an officer on promotion to "Selection Grade" is granted with three increments, i.e., one normal increment and two additional increments. Therefore, as per the analysis and comparison made above, both the rules, namely, (i) IAS (Pay) Rules, 2007 (as amended from time to time till 2009) and IAS (Pay) Rules, 2016 (as amended from time to time) provide additional increments on promotion to "Selection Grade"; in the former whereas, it is two additional increments, in the later, it is three additional increments. Therefore, the executive instruction issued on 14.01.2011 by opposite party no.1 contradicts all statutory rules governing the field. The DoPT, i.e. opposite party no.1, vide their clarification dated 14.01.2011, stated as follows:-

"Since Sri Ashok Kumar Sahoo has been given the benefit of fixation of pay in the Selection Grade of IAS. before his actual appointment to the Grade, he is NOT entitled to have his pay refixed on his actual appointment to his Grade, subsequently."

16. Irrespective of the Pay Scale and Grade pay being enjoyed by a SCS Officer, one is selected for appointment to IAS and rules provided that his State Pay shall have to be protected while fixing his initial pay in IAS, but his pay on future promotions shall have to be dealt under other relevant provisions of the rules.

17. Thereby, no distinction is made in the rules between a Direct recruit vis-a-vis a promote recruit, except as prescribed under Schedule-I on his initial pay fixation on promotion to IAS. The petitioner is granted with one increment over his State Pay on his initial pay fixation in IAS as per Schedule-I to the IAS (Pay) Rules, 2007 (as amended from time to time). Merely because the petitioner, who was an SCS officer, was getting pay scale equivalent to that of Selection Grade of IAS in State Service, before his promotion to IAS, rules nowhere denied; rather provided for granting of two additional increments promotion to "Selection Grade" in IAS.

18. Therefore, all promotions up to the level of "Jr. Administrative Grade" are on non-functional basis, promotion to "Selection Grade" is on availability of vacancies, holding of DPC on the basis of merit as per Rule 3(2)(i) of IAS (Pay) Rules, 2007. Therefore, it is implied that the petitioner is entitled to get two additional increments as per IAS (Pay) Rules, 2007. Thereby, by issuing the executive instruction dated 14.11.2011 the benefit, which has been accrued in favour of the petitioner statutorily, cannot be taken away. In other words, the benefits, which have been extended in favour of the petitioner as per the statutory rules, cannot be withdrawn by issuing executive instructions.

19. Much reliance has been placed on the Office Order dated 14.01.2011, by which the benefit of two increments, which was extended in favour of the petitioner as per the statutory rules, has been directed to be withdrawn. It is profitable to note that executive instruction or office memorandum issued by the department cannot supersede the statutory provisions governing the field.

20. In ***State of Madhya Pradesh v. Municipal Corporation, Indore***, AIR 1987 SC 1983 : 1987 Supp. SCC 748, the apex Court held that the Government cannot restrict the operation of statutory rules by issuing executive instruction. The executive instruction may supplement but not supplant the statutory rules. In ***Palghat Zilla Thandan Sam,udhaya Samrakshna Samiti v. State of Kerala***, (1994) 1 SCC 359, the apex Court held that the Government order cannot have the effect of modifying any Statute. ***In State of Madhya Pradesh v. G.S. Dal Flour Mill***, AIR 1991 SC 772, the apex Court further held that an executive instruction cannot go against the statutory provision so as to whittle down the effect of such provision.

21. In ***Subhash Ramkumar Bind v. State of Maharashtra***, (2003) 1 SCC 506 : AIR 2003 SC 269, the apex Court held that the administrative instructions are not intended to supplement or supersede the Act or statutory Rules and cannot take away the right vested in a person governed by the Act. The notification of which statute requires to be issued has a statutory force and not otherwise.

22. In ***K.H. Siraj v. High Court of Kerala***, (2006) 6 SCC 395, the apex Court held that executive instructions can always supplement the rules which may not deal with every aspect of a matter.

23. In ***State of Rajasthan v. Jagdish Narain***, (2009) 12 SCC 49, the apex Court held that in case of conflict between statutory rule and administrative instruction, the former shall prevail. No administrative instruction can override a statutory rule.

24. In ***Vinod Kumar v. State of J&K***, (2012) 11 SCC 247, the apex Court held that there is primacy of statutory rules over Government Circulars.

25. In ***Joint Action Committee of Airlines Pilots' Association v. Director of General of Civil Aviation***, (2011) 5 SCC 435, the apex Court held that executive instructions which are issued for guidance and to implement the scheme of the Act and do not have the force of law, can be issued by the competent authority and altered, replaced and substituted at any time. The law merely prohibits the issuance of a direction, which is not in consonance with the Act or the statutory rules applicable thereunder. An executive order is to be issued keeping in view the rules and executive business, though the executive order may not have the force of law but it is issued to prove guidelines to all concerned.

Similar view has also been taken by the apex Court in ***Khet Singh v. Union of India***, (2002) 4 SCC 380, ***Sant Ram Sharma v. State of Rajasthan***, AIR 1967 SC 1910 and ***Union of India v. Amrik Singh***, (1994) 1 SCC 269.

26. In ***G.M. Uttanchal Jal Sansthan v. Laxmi Devi***, (2009) 7 SCC 205, the apex Court held as follows:-

> *"We fail to understand how a mere circular letter which has no force of law shall prevail over the statutory rules. The respondents themselves have relied upon the decisions of the Court in* ***DDA v. Joginder S. Monga****, (2004) 2 SCC 297 : A. 2004 SC 3291 wherein it was held that executive instructions cannot run contrary to the statutory provisions."*

Similar view has also been taken by the apex Court in catena of decisions.

27. In view of the aforementioned settled position of law, it is made clear that IAS (Pay) Rules, 2007, as amended from time to time, having extended the benefits of two increments, the same cannot be withdrawn by issuing the executive instruction dated 14.01.2011.

28. Considering from other angle, in ***State of Kerala v P.N. Neelkandan Nair***, (2005) 5 SCC 561 : AIR 2005 SC 3066, the apex Court held that the increment has a definite concept in service laws. It is conceptually different from revision of pay scale. It is an increase or addition in a fixed scale. It is a regular increase in salary on such a scale.

29. The term "increments" is generic and is wide enough to not only include increments in the time scale of pay but all other kinds of increments. Therefore, the word "increment" is a word of wide meaning.

30. Therefore, two increments having been extended as per the provisions contained in IAS (Pay) Rules, 2007, as amended from time to time, the same cannot be withdrawn by making interpretation of the executive instruction dated 14.01.2011 and, as such, the consequential direction to recover the amount already paid, that too by revising the pension after retirement, cannot be sustained in the eye of law.

31. As it appears, in response to the RTI application of one promotee IAS Officer-Sri Janaki Ballabha Mishra seeking a copy of the impugned clarification dated 14.01.2011 in the matter of the present petitioner, it was replied by the "Central Public Information Officer-cum-Under Secy." of DoPT-Sri Sandeep Ku Sinha, vide letter dated 12.2.2021, to the following effect: -

> *"As regards information related to the File No. 20016/1/2011-AIS-II, it is stated that the same is not readily traceable in the Section."*

The 1st Appellate Authority-cum-Dy. Secretary, DoPT-Ms. Manmeet Kaur in her letter no. 29018/3/2020-AIS-II dated 24.5.2021 stated as under:-

> *"Whereas, Shri Janaki Balhav Mishra preferred an appeal dated 6.3.2021 against the reply provided by CPIO on 12.02.2021, stating that he asked for the copy of DoPT clarification letter No. 20016/1/2011-AIS-II dated I4.01.201I issued to the Chief Secretary to Government of Orissa. However, the information has not been provided by the CPIO.*
>
> *Whereas, the perusal of records reveals that the File No. 20016/1/2011-AIS-II is neither traceable in the Section nor in the Record Room of this Department.*
>
> *Now, therefore, in view of the aforesaid facts and observations, the reply of the CPIO is found to be correct and based on the facts. Accordingly, appeal stands disposed off."*

32. The basic foundation, on which opposite party no.2 withdrew the increments, reduced pension & recovered alleged excess pension drawn, even after retirement, is proved by authorities of opposite party no.1 as non-existent. Therefore, all consequential actions based on such non-existent clarification are unlawful and void. As such, the benefits granted under the rules, cannot be taken away to the disadvantage of the petitioner after his retirement. The withdrawal of two advance increments in the "Selection Grade" in IAS and recovery of such financial benefits, are in gross violation of the statutory rules. Therefore, the petitioner is entitled to get refund of the same.

33. The observation made by the Tribunal that the grievance of the petitioner originates from the wrong fixation of his pay, which resulted in the order of recovery and consequentially his pension, has no basis at all. The Tribunal has committed a gross error apparent on the face of the order by holding "who will get what pay is the prerogative of the employer to decide". If the employee challenges the same, it has to be on specific and cogent grounds. Thus, the Tribunal has come to such a finding on surmises and conjectures, more particularly without considering the grievance of the petitioner in proper perspective referring to the rules applicable and proceeded in a manner as if the error has been committed by the petitioner and the action of the authorities are sacrosanct. Rather, the authorities had extended the

benefit of two increments in consonance with the rules applicable to the petitioner, but on receipt of the clarification dated 14.01.2011, after the retirement of the petitioner, forcibly recovered the alleged excess amount and withdrawn the benefit of two increments extended in favour of the petitioner, without complying with the principle of natural justice. Thereby, the authorities have acted arbitrarily and unreasonably, which violates Articles 14 and 16 of the Constitution of India.

34. The opposite parties, being the State authorities, have to act in consonance with the provisions contained in the Constitution. If action has been taken in derogation thereto, the same cannot be sustained in the eye of law. As a consequence thereof, the executive instruction, which has been issued on 14.01.2011, is liable to be quashed and hereby quashed, as it is a non-existent instruction, as is revealed from the information provided under RTI Act. Thereby, consequential action taken by recovering the alleged excess amount already paid also cannot be sustained and the said amount should be refunded to the petitioner and the petitioner's pension should be re-fixed by extending the benefits of two increments in consonance with the rules applicable. Thus, the order dated 22.06.2017 passed by the Central Administrative Tribunal in O.A. No. 458 of 2012 is liable to be quashed and hereby quashed. Referring to the order dated 22.06.2017 passed in O.A. No. 458 of 2012, since the Tribunal had passed the order dated 25.02.2019 in case of Kashinath Sahoo in O.A. No. 676 of 2012, which is impugned in W.P.(C) No. 9877 of 2019, the said order also cannot be sustained in the eye of law and is liable to be quashed and hereby quashed. The opposite parties are directed to refund to the petitioners the excess amount already recovered from them and re-fix their pensionary benefits by extending two increments, within a period of six weeks from the date of communication of copy of this judgment.

35. Both the writ petitions are accordingly allowed. But, however, in the facts and circumstances of the case, there shall be no order as to costs.

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2024 (I) ILR-CUT-1204

ARINDAM SINHA, J & SANJAY KUMAR MISHRA, J.

WPCRL NO. 6 OF 2024

KSHMANIDHI MEHER ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – Article 226 – Writ of Habeas Corpus – The petitioner being the natural guardian want to have the child produced from custody of Opp. Party No.7 – The child appeared before the Court and he appears to be happy with Opp.No.7 – Whether Court would interfere in the custody of the child? – Held, No – The

petitioner may find his remedy for custody or visitation right as permissible under law.

Case Laws Relied on and Referred to :-

1. (2019) 7 SCC 42 : Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari.
2. Supreme Court in Criminal Appeal No. 127 of 2020 (dt. 20/01/2020) : Yashita Sahu v. State of Rajasthan & Ors.

For Petitioner : Ms. Deepali Mahapatra

For Opp.Parties : Mr. Arupananda Das, A.G.A. & Mr. Jugal Kishore Panda

JUDGMENT Dates of Hearing : 21 & 23.02.2024 : Date of Judgment : 23.02.2024

ARINDAM SINHA, J.

1. The writ petition with prayer for issuance of writ of habeas corpus was filed by petitioner saying, he is father of the minor boy, who is at present fourteen years old. On moving the writ petition before us Ms. Mahapatra, learned advocate appearing on behalf of petitioner had submitted, opposite party no.6 is the wife. She left her client and made false complaint, for the police to act under section 498-A in Indian Penal Code, 1860. She then married opposite party no.7. In the circumstances, her client being the natural guardian under section 6(a) in Hindu Minority and Guardianship Act, 1956 is entitled to have the child produced from custody of opposite party nos. 6 and 7. She had relied upon judgment of the Supreme Court in **Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari**, reported in **(2019) 7 SCC 42**, inter alia, paragraph 14 therein, reproduced below.

> *"14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention.* ***The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it****. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child.* ***For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction****."*
>
> (Emphasis supplied)

2. Mr. Das, learned advocate, Additional Government Advocate appears on behalf of State and Mr. Panda, learned advocate, for opposite party nos. 6 and 7.

3. We by our order dated 21st February, 2024 had made directions. We reproduce paragraphs 6 to 8 from said order.

> *"6. We have made our queries in context of the father being natural guardian of the minor boy, who is more than 5 years old. Opposite party no.6 does not have an order for custody. In a situation where there is allegation she has married opposite party no.7, opposite party no.7 can have no claim whatsoever to custody. It is enough for us that said opposite parties have together empowered learned advocate.*
>
> *7. We give liberty to opposite party no.6 to produce the boy in Court at 12:30 P.M. on 23rd February, 2024. Petitioner may also be present. We make it clear, if the boy is not voluntarily produced we shall make appropriate directions upon State.*
>
> *8. List on 23rd February, 2024 marked at 12:30 P.M."*

Today Mr. Panda submits, his client (opposite party No.6) is present along with her minor son. Ms. Mahapatra submits, her client (petitioner) is also present.

4. Thinking fit, we asked the boy to approach the Bench. We interacted with him. He appears to be very happy where he is. We found out from him he is studying in a school and he has friends there. According to him, he is with his mother and his uncle. He had last seen his father seven years ago. Ms. Mahapatra submits, the boy is staying with his maternal grandparents, opp.party Nos. 4 and 5.

5. We are not inclined to probe whether opposite party nos. 6 and 7 are married nor are we inclined to probe regarding correctness of the particulars or allegations in the writ petition. It is sufficient for us that the child has been produced on our aforesaid direction and it is not necessary, therefore, for us to make any further order. Petitioner may find his remedy for custody or visitation as permissible by law.

6. Ms. Mahapatra submits, some direction be made to comply with visitation right of her client. Following **judgment dated 20th January, 2020 of the Supreme Court in Criminal Appeal No. 127 of 2020 (Yashita Sahu v. State of Rajasthan and others**) arising from writ petition for habeas corpus, we direct petitioner may visit his son at his school. The administration of Anchal Nodal High School, Jharmunda is requested to arrange any room in the school being made available for petitioner to meet his son every Friday, except holidays, in presence of a teacher. The meetings will be between 1.30 to 2.00 p.m.

7. Parties are at liberty to produce website copy of this order to the administration of the school.

8. The WPCRL is disposed of.

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2024 (I) ILR-CUT-1206

ARINDAM SINHA, J & M.S. SAHOO, J.

W.P(C) NO. 4798 OF 2024

ALEKHA PRASAD NAYAK ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

ELECTRICITY ACT, 2003 – Section 127 – Appeal – There was a demand of ₹ 2,89,718 along with arrear outstanding of ₹ 30,365/- The appeal can be preferred on payment of the specified fee – Appeal will be entertained upon deposit of an amount equal to half of the assessed amount – The petitioner has deposited 25% of the demand amount – Whether the deposited amount should be considered towards the specified fee to prefer the appeal? – Held, Yes – The petitioner should deposit balance 25% of the demand amount along with proof of earlier deposit of 25% with the supplier while preferring the appeal against the demand.

For Petitioner : Mr. Suresh Chandra Dash

For Opp.Parties : Mr. A.K. Sharma, Addl. Govt. Advocate
Mr. Lalit Kumar Maharana

JUDGMENT Date of Hearing & Judgment : 04.03.2024

ARINDAM SINHA, J.

1. Mr. Dash, learned advocate appears on behalf of petitioner and submits, his client is the consumer. He has challenged, inter alia, order dated 28th December, 2023 of the ombudsman. Reference to the authority happened because there was purported demand dated 13th December, 2023 made of ₹ 2,89,718/- along with arrear outstanding of ₹ 30,365/-. The larger sum was for charges of alleged theft of electricity. His client on having approached the Grievance Redressal Forum (GRF), it rejected his complaint saying it did not have jurisdiction to interfere with a demand raised in respect of offence under section 135 in Electricity Act, 2003.

2. Mr. Sharma, learned advocate, Additional Government Advocate appears on behalf of State.

3. Mr. Maharana, learned advocate appears on behalf of the supplier and submits, final assessment has already been made and duly communicated. There should not be interference. Mr. Dash disputes the submission.

4. The writ petition discloses order dated 6th October, 2023 made by the learned single Judge. It appears therefrom, in it was impugned notice dated 1st July, 2023 of provisional assessment but said to be under section 135. Mr. Maharana had conceded before the learned Judge that it was notice of provisional assessment. We reproduce below the direction paragraph from said order.

> *"In view of the above, this Court disposes of the writ petition with an observation that the Petitioner, if so advised, may submit his reply to the notice under Annexure-1 in terms of Section 126 (3) of the Act within a period of fifteen days hence and in that event, the Assessing Officer shall proceed with the matter in accordance with law and communicate the order of final assessment to the Petitioner."*

5. Aforesaid demand dated 13th December, 2023 of, inter alia, ₹ 2,89,718/- raised by the supplier says it is in compliance with direction in said order dated 6th October, 2023. Hence, it is the order of final assessment. Mr. Dash submits, his client has already partly complied with impugned order inasmuch as 25% of the demand has been deposited with the supplier.

6. Under section 127 there is appeal provision from a final order made under section 126. The appeal can be preferred on payment of the specified fee. It will be entertained upon deposit of an amount equal to half the assessed amount. Petitioner says he has deposited 25% of ₹2,89,718/- with the supplier. Petitioner on preferring appeal to the appellate authority with the specified fee and depositing balance 25%, along with proof of earlier deposit of 25% with the supplier, will thereby have duly preferred appeal against aforesaid demand dated 13th December, 2023. Petitioner is

required to make good the difference by 30th March, 2024. On his doing so, the appellate authority will proceed to adjudicate the appeal. On his failure, petitioner will thereby forfeit his remedy under the appeal provision. No coercive step be taken against petitioner till 30th March, 2024, time given to him hereby for depositing the difference. We mention here, petitioner preferred writ appeal against order of the learned single Judge, disposed of by order dated 6th October, 2023. Said order required participation in the section 126 proceeding. It has run its course to result in said demand.

7. We direct that the proceeding by C.R. Case No. OM(I)-151 of 2023 stands disposed of.

8. With above directions, the writ petition is disposed of.

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2024 (I) ILR-CUT-1208

ARINDAM SINHA, J.

CRLA NO.13 OF 2024

SANGRAM JENA @ NAYA ……Appellant

-V-

SULOCHANA MALLICK & ANR. ……Respondents

CODE OF CRIMINAL PROCEDURE, 1973 – Section 319 – The appellant name registered in FIR – After investigation, Police did not include his name in the charge sheet – Whether learned Court below by exercising its discretionary power could add the appellant as an accused? – Held, Yes – The persons who witnessed the occurrence were examined by the Police and they all asserted that, appellant was present – In the circumstances, the Court exercised the power U/s. 319 of IPC – Hence it is not attracting any interference in the appeal.

Case Law Relied on and Referred to :-

1. Supreme Court in Criminal Appeal No.1349 of 2018 (dt. 13/11/2018) : Labhuji Amratji Thakor & Ors. v. The State of Gujarat.

For Appellant : Mr. Manoranjan Khatua

For Respondents: Mrs.Saswata Pattanaik (AGA), Mr. P.S.Nayak.

JUDGMENT Date of Hearing & Judgment : 19.02.2024

ARINDAM SINHA, J.

1. Appellant is aggrieved by order dated 16th August, 2023 made by the Additional District and Sessions Judge in exercising power under section 319 in Code of Criminal Procedure, 1973, to add him as an accused in the case on trial.

2. Mr. Khatua, learned advocate appears on behalf of appellant and submits, his client was named in the First Information Report (FIR). The police made investigation and upon being satisfied, did not include his name in the charge-sheet. The Supreme Court by **judgment dated 13th November, 2018 in Criminal Appeal no.1349 of 2018 (Labhuji Amratji Thakor and others v. The State of Gujarat**) declared that section 319 is a discretionary and extraordinary power, which should be exercised sparingly and only in those cases where the circumstances of the case so warrant. The crucial test, which had been laid down is, "the test that has to be applied is that it is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction". He submits, this test does not stand satisfied by reasons given in impugned judgment and hence, there be interference in appeal.

3. Mrs. Pattanaik, learned advocate, Additional Government Advocate appears on behalf of State and submits, in course of the investigation there was intimation made to Motorcycle Riders of the Indian Army at Jabalpur regarding appellant, whether he was present and on duty at his station on 13th November, 2013. The Captain, Officer Commanding of 10 Dispatch Rider, section 10 replied by letter dated 25th March, 2014. Paragraphs 1 and 2 from the letter are reproduced below.

> *"1. Ref your case No.112 dt 14 Nov 2013 u/s 341/323/324/354/307/506/34 IPC and 3(1)(X)(XI) SC/ST(PA) Act.*
>
> *2. In reference to your letter mentioned above it is to inform you that the fact and finding of the above subject case as mentioned there in have been examined and found that **L/NK Sangram Keshari Jena S/O Bharat Chandra Jena was present in Defence duty in his head quarter at Jabalpur on 13 Nov 2013** so question does not arise in the subject offence."* (Emphasis supplied)

Accordingly appellant was not named in the charge-sheet.

4. Mr. Nayak, learned advocate appears on behalf of respondent no. 2 (informant). He submits, appellant was named in the FIR. The persons, who witnessed the occurrence, were examined by the police and they all asserted that appellant was present. However, the police did not name him in the charge-sheet. Said persons again deposed at trial that appellant was present. In the circumstances, the Court exercised power under section 319 and there should not be interference in appeal.

5. The letter sent by the Commanding Officer, on presence of appellant at Jabalpur, as on duty, is at best a certificate. It is not primary evidence. The trial Court has relied on statements made in the investigation by persons, who claimed to be ocular witnesses. In the circumstances, this aspect supports exercise of the extraordinary power, to add appellant as accused in the case.

6. Applying the test as in **Labhuji Amratji Thakor** (supra), it is to be seen that if there is no cross-examination of the persons, who claimed to be ocular witnesses, it will lead to conviction. Result of examination of the persons by the police as well as the Trial Court is that appellant was seen at the occurrence. Such

evidence, in event unchallenged, would be reliable evidence for the trial Court to act upon. At this stage there is satisfaction obtained on successful application of the test, in the making of impugned order.

7. No interference is warranted in appeal. However, on appellant facing trial, he will be entitled to his defence including by production of primary evidence, to show he was on duty at Jabalpur on 13th November, 2013. Mr. Khatua submits, trial Court had straight away issued warrant. His client will be represented on the next date in the trial Court. The submission stands recorded.

8. The appeal is accordingly disposed of.

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2024 (I) ILR-CUT-1210

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

CRLA NO. 453 OF 2011

PADMANAVA MAHAKUL@MAHAKUD & ANR. ……Appellants

-V-

STATE OF ORISSA ……Respondent

CRIMINAL TRIAL – The appellants have been convicted for committing offence U/ss. 302/34 of the Indian Penal Code – There is no eye witness to the occurrence – There are contradictions in the evidences of P.W.9 and P.W.3 – Neither the seized material has been indentified nor produced before the Court – Effect of – Held, in the absence of any clear, cogent explanation coming from the witnesses, presumption would not come in that, they are responsible for all said happening with the deceased.

For Appellants : M/s.Brahmananda Tripathy

For Respondent : Mrs.Saswata Patnaik, AGA

JUDGMENT Date of Hearing :13.02.2024 : Date of Judgment : 29.02.2024

D.DASH, J.

The Appellants, by filing this Appeal, have called in question the judgment of conviction and order of sentence dated 18th May, 2011 passed by the learned Ad hoc Additional Sessions Judge, Sundergarh in Sessions Trial No.6/3 of 2011 arising out of G.R. Case No.181 of 2010 corresponding to Lephripara P.S. Case No.10 of 2010 in the Court of the learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Sundergarh.

The Appellants (accused persons) thereunder have been convicted for committing the offence under sections 302/34 of the Indian Penal Code, 1860 (for

short, 'the IPC'). Accordingly, each of them has been sentenced to undergo imprisonment for life and pay fine of Rs.5,000/- (Rupees Five Thousand) in default to undergo rigorous imprisonment for six months with a further direction that if the fine amount is realized the same shall be paid to the father of the deceased.

2. **PROSECUTION CASE:-**

On 19.03.2010 morning, these two accused persons had gone to the house of Benudhar Mahakula at Village Bakuldihi (Chandrapur) under Tikayatpali Police Station in the District of Sundergarh in a scooter. From the house of Benudhar, they along with Benudhar started for Rourkela in that very scooter in order to purchase one Hero Honda Motorcycle for Benudhar. Benudhar had taken cash of Rs.50,000/- (Rupees Fifty Thousand) with him for paying the price of the motorcycle. Benudhar along with the accused persons thereafter came to Sundergarh from Rourkela to purchase the motorcycle. As the colour of the motorcycle was not up to the choice, they moved in the said scooter towards the house of the accused Suresh at Village-Chhotoanga. When Benudhar did not return to his house till night, it was around 8.00 p.m., his younger brother Muralidhar (P.W.3) telephoned to him. Benudhar, having received the call, replied that he along with the accused persons were returning in the jungle route in the scooter and he would take when the scooter would stop. However, Benudhar did not further call Muralidhar (P.W.3) over telephone. So, it was around 10.00 p.m. Muralidhar (P.W.3) again called Benudhar over telephone. The mobile phone of Benudhar was then found to have been switched off. On the next day, i.e., 20.03.2010 around 1.00 p.m., one Mangal Kisan (P.W.1) of Village-Bijadihi was moving on the road Mayurmunda of Village-Bijadihi. He then found a bhujali stained with blood and blood patches on the side of the said road. Thereafter, he found a dead body of a male lying with injuries on his head and blood clots over there. He suspected someone to have killed that person. So, he reported the matter at Sargipali Police Out Post in writing vide Ext.1. The Assistant Sub-Inspector (ASI) of Police attached to that Police Out Post, receiving that information, entered the said fact in the Station Diary book maintained at the Police Out Post and sent the same to Lephripada P.S. for registration of the case and follow up action.

The Officer-in-Charge (OIC) of Lephripada P.S. (P.W.9), receiving the said written report from the ASI of Sargipali Police Out Post, registered the criminal case and took up investigation.

3. The Investigating Officer (I.O.-P.W.99), in course of the investigation, examined the informant (P.W.1) and went to the spot, i.e., Podmundi Jungle at Mayurmunda of Village-Bijadihi. Having found the dead body of a male person lying on the ground by the side of the road with injuries on his head and few documents such as the money receipts issued by Sarsara Lamp, he seized those documents under the seizure list (Ext.8). He then held inquest over the dead body of the Benudhar and prepared the report to that effect (Ext.3) after having ascertained

that the dead body is none other than that of Benudhar of Village-Bakuldihi. The I.O. (P.W.9) sent the dead body for post mortem examination by issuing necessary requisition. The wearing apparels of the deceased and accused were seized by the I.O. (P.W.9) under seizure list Ext.13 & 14 respectively. The seized incriminating articles were sent for chemical examination through Court. On completion of investigation, the Final Form was submitted placing these accused persons to face the Trial for commission of the offence under section 302/34 of the IPC.

4. Learned S.D.J.M., Sundergarh, on receipt of the Final Form, 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 charge for the aforesaid offence against these accused persons.

5. The prosecution, in support of its case, has examined in total nine (9) witnesses during Trial. Out of them, the informant is P.W.1, who saw the dead body first. P.W.2 is a witness to the seizure of sample earth, blood stained earth and the weapon of offence. P.Ws.3, 4 & 5 are the younger brother, father and co-villager of the deceased respectively. P.Ws.6 & 8 are the witnesses to the disclosure statement of accused Suresh. The Doctor, who had conducted the post mortem examination over the dead body of the deceased is P.W.7. The I.O. of the case, at the end, has come to the witness box as P.W.9.

6. 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 18. Out of those, the important are, the FIR (Ext.1), the inquest report (Ext.3); the post mortem report (Ext.6); and the spot map (Ext.11).

7. The accused persons have taken the plea of complete denial and false implication. They, however, have not tendered any evidence in support of such plea, but have stated in their statement recorded under section 313 Cr.P.C. that they are in no way connected with this case and had no acquittance with the deceased.

8. Mr.B. Tripathy, learned counsel for the Appellants (accused persons), without disputing the finding of the Trial Court as regards the nature of death of Benudhar to be homicidal in view of the evidence of the Doctor (P.W.7), who had conducted the autopsy over the dead body of the deceased and the I.O. (P.W.9), who held inquest over the dead body of the deceased and prepared the report (Ext.3) as also other witnesses, who had the occasion to see the dead body with injuries, submitted that the entire case of the prosecution is based on circumstantial evidence and the prosecution having not proved the circumstances which are said to be incriminating by leading clear, cogent and acceptable evidence, the trial court has erred in holding the charge against the accused to have been proved beyond reasonable doubt. According to him, here the circumstances are that the deceased had left his house with the accused persons in the morning next before the detection of the dead body. He submitted that the said evidence is not believable and the time

gap, being too much when the evidence as to the telephonic exchange of words between the deceased and P.W.3 and others has not been proved, it cannot be said that the prosecution is relieved of the obligation in saying that the burden of proof has shifted upon the shoulder of the accused persons to show as to what happened to the deceased after he left with them. He further submitted that the evidence as to the seizure of cash and mobile phone of the deceased and the blood stained wearing apparels of the accused under seizure list (Ext.5), which is said to have been based upon the statement of the accused Suresh purported to have been recorded under Ext.4 is highly unbelievable. He, therefore, urged that the judgment of conviction and order of sentence impugned in this Appeal are liable to be set aside.

9. Mrs. S. Patnaik, learned Additional Government Advocate for the Respondent-State, while supporting the finding of guilt against these accused persons, as has been returned by the Trial court, contended that there being positive evidence coming from the lips of P.Ws.3, 4 & 5 on the score that there was telephonic conversation between the accused and P.W.3 when the deceased had disclosed to be with the accused persons in the night and that the dead body, having recovered on the next day afternoon when the accused persons are not coming forward with any explanation as to how the deceased left their company with the attraction of the provisions contained in section 106 of the Evidence Act the Trial Court has rightly convicted the accused persons.

10. Keeping in view the submissions made, we have carefully read the impugned judgment of conviction. We have also extensively travelled through the depositions of the witnesses (P.W.1 to P.W.9) and have perused the documents admitted in evidence and marked as Ext.1 to Ext.18.

11. P.W.1 is the person, who had first seen the dead body of Benudhar.

P.W.3 is an important witness for the prosecution and he is none other than the brother of deceased- Benudhar. It is his evidence that on 19.03.2010, his brother Benudhar with the accused persons went to Rourkela from their village in order to purchase a Hero Honda CD Delux Motorcycle. But, they did not return and, therefore, around 8.00 p.m, he is saying to have telephoned to his brother Benudhar, who, receiving the same, told that he along with these accused persons were returning through the jungle route and they would talk when the vehicle would stop. Thereafter, there has been no communication. Most interestingly, this important part of the evidence was not the version of P.W.3 before the I.O. during the investigation, as has been recorded by I.O. (P.W.9). The attention of this witness, having been drawn to the said omission, it has been proved through the I.O. (P.W.9), which certainly is a material contradiction. Accepting the evidence of P.W.3 that the accused persons and the deceased had left the house in the morning, the dead body, having been recovered in the next afternoon, in the absence of any other evidence that the deceased was seen in the company of these accused persons at any time towards the late night or even in the afternoon, it would not be permissible to hold

that since the accused persons were having the special knowledge as to what happened to the deceased and how he left their company. Therefore, in the absence of any explanation coming from them, presumption would not come in that they are responsible for all said happenings with the deceased.

P.W.4, who is the father of the deceased. He although has stated that Muralidhar (P.W.3) had a telephonic conversation with the deceased in asking him as to whether they were coming to the house or not and Benudhar told that they were returning from Sundergarh to the house of the accused Suresh, that is not the version of P.W.3.

P.W.5, who is a neighbour, has stated that he had been told by P.W.3 about the telephonic conversation which, however, runs little different from what have been disclosed by P.Ws.3 & 4.

The mobile set of the deceased although has been seized has not been produced in Court and identified. It has not been ascertained as to whether the SIM card had been issued in the name of the deceased. Call detail reports are also not proved. The evidence as to the recording of disclosure statement of accused Suresh coming from the lips of the I.O. (P.W.9.), on a plain reading does not inspire confidence in mind. He says that on 27.03.2010, accused Padmanava was arrested. It is also his evidence that on 03.04.2010 morning, accused Suresh was arrested. When he states that he was arrested from his house at Village-Chutbanga, he says that then the accused Suresh gave his statement. It is his evidence that Suresh led him and witnesses to his in-law's house in giving recovery of cash of Rs.10,000/- along with the mobile set of the deceased and his wearing apparels. As already stated, there is no cogent evidence to establish that the seized mobile set was belonging to the deceased as the same has not been identified nor produced during trial and marked as a material object. No evidence has been given in the trial that it was seen by anybody to being so used by the deceased. The seizure of cash from the house is not that incriminating a circumstance. The incriminating articles, having been sent to the Director, RFSL, Sambalpur, during the trial only the forwarding report has been proved.

With the available evidence on record, we are of the considered view that the Trial Court is not right in holding that the prosecution has proved the charge against these accused persons beyond reasonable doubt.

12. In the result, the Appeal is allowed. The judgment of conviction and order of sentence dated 18th May, 2011 passed by the learned Ad hoc Additional Sessions Judge, Sundergarh in Sessions Trial No.6/3 of 2011, are hereby set aside.

Since both the Appellants, namely, Padmanava Mahakul @Mahakud; and Suresh Bhainsal, are on bail, their bail bonds shall stand discharged.

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2024 (I) ILR-CUT-1215

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

W.P(C) NO. 33521 OF 2023

SUNDARAM HOME FINANCE LTD, CHENNAI ……Petitioner

-V-

DISTRICT MAGISTRATE-CUM-COLLECTOR, KHORDHA & ORS. ……Opp.Parties

SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – Section 26-E r/w Section 4 of Odisha Protection of Interest of Depositors Act, 2011 – The petitioner/company want to take physical possession of the secured asset – The application U/s. 14 of the 2002 Act rejected on the ground that, said property has been placed as surety while getting the Opp.Party No.3 on bail in connection with a case pending trial before designated court under OPID Act – Whether the provisions contained in the SARFAESI Act would prevail over the relevant provisions contained in the OPID Act? – Held, after the amendment of SARFAESI Act by introduction of the provision of Section 26E, which begins with the non obstante clause, the matter stands at rest as said provision over-rides the provisions contained in the OPID Act, subject to fulfillment of certain conditions.

Case Laws Relied on and Referred to :-

1. (1983) 4 SCC 45 : M/s.Hoechst Pharmaceuticals Ltd. & Ors. v. State of Bihar.
2. (2004) 10 SCC 201 : State of W.B. v. Kesoram Industries Ltd. & Ors.
3. (2011) 3 SCC 793 : K.K. Baskaran v. State rep.by its Secretary, Tamil Nadu & Ors.
4. (2010) 3 SCC 571 : State of West Bengal & Ors. v. Committee for Protection of Democratic Rights, West Bengal & Ors.
5. (2002) 9 SCC 232 : ITC Ltd. v. Agricultural Produce Market Committee & Ors.
6. (1994) 3 SCC 1 : S.R. Bomai v. Union of India.
7. (2016)3 SCC 762 : Vishal N. Kalsaria v. Bank of India.
8. 2022 (5) Mh. L.J. 691 : Jalagaon Janta Sahakari Bank Ltd. & Anr v. Joint Commissioner of Sales Tax Nodal 9, Mumbai and Anr.
9. (2000) 5 SCC 694 : Dena Bank v. Bhikhabhai Prabhudas Parekh & Co.
10. (2006) 10 SCC 452 : ICICI Bank Ltd. v. SIDCO Leathers Ltd.

For Petitioner : Mr. Nilakantha Dash, S.K.Aziz

For Opp.Parties : Mr. G.N. Rout (ASC)

JUDGMENT Date of Hearing : 30.11.2023 : Date of Judgment : 29.02.2024

D.DASH, J.

The Petitioner is a Company incorporated under Indian Companies Act, 1956 and regulated under the Reserve Bank of India Act, 1934 being a Non-Banking Financial Institution under the guidelines of the Reserve Bank of India, basically deals with advancing of the loans for construction of the house and other term loans against the properties.

By filing this writ petition, the Petitioner has invoked the jurisdiction of this Court under Articles 226 & 227 of the Constitution of India, seeking quashment of an order dated 14.09.2023, passed by the District Magistrate-cum-Collector, Khurda (Opposite Party No.1) in Bank Misc. Case No.73 of 2016 in the matter of an application under section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'SARFAESI Act') filed by the Petitioner seeking assistance in taking possession of the secured asset, i.e., the immovable property on which security interest has been created towards the loan advanced by the Petitioner-Company to the Opposite Party No.2

2. **Facts necessary for the purpose are as under:-**

The Petitioner has advanced loan to the Opposite Party No.2 to the tune of Rs.40 lacs. The Opposite Party No.3 is the co-borrower/guarantor to the said loan. Since there was failure on their part to discharge the obligations in timely depositing the instalments fixed for repayment ultimately leading to financial indiscipline, taking recourse of the provision contained in the SARFAESI Act, the Petitioner classified the said loan account as Non-Performing Asset (NPA).

Notice under section 13 (2) of the SARFAESI Act was then issued to the Opposite Party No.2 and 3 and published in Odia as well as English Newspapers following the Security Interest (Enforcement) Rules, 2002. Then the next notice under section 13 (4) of the SARFAESI Act was also served upon the Opposite Party No.2 & 3 and published in Odia as well as English daily newspapers.

3. Since the Petitioner found it difficult to take physical possession of the property in question, a move was made resorting to the provisions contained in section 14 of the SARFAESI Act, seeking an order from the Opposite Party No.1 as to provide assistance for taking physical possession of the secured assets. The application has finally been rejected by order dated 14.09.2023, which has been impugned in the present proceeding before us.

The reason for rejection of the application under section 14 of the SARFAESI Act filed by the Petitioner is that the said property has been placed as surety while getting the husband of the Opposite Party No.2 i.e. Opposite Party No.3 on bail in connection with a case pending trial before the Designated Court under the Odisha Protection of Interest of the Depositors Act, 2011 (for short, 'the OPID Act') vide C.T Case No.13 of 2007 and secondly, which is more important is that on account of pendency of the proceeding for confiscation of the said property vide I.A. No.6 of 2018 resorting to the provision of the OPID Act.

4. We have heard Mr.N.K.Dash, learned counsel for the Petitioner and Mr.G.N.Rout, learned Additional Standing Counsel at length.

5. In the backdrop of the facts narrated above, further keeping in view of the submissions, as advanced, it is now seen that the property in question which remained as the secured asset in the hands of the Petitioner for recovery of the

outstanding dues in connection with the loan advanced to the Opposite Party No.2 for which the Opposite Party No.3 had mortgaged this immovable property; the very same property is also the subject matter of a proceeding under section 4 of the OPID Act for sale and ultimate utilization of the sale proceeds in making payment to the innocent depositors who have been the victims under the Ponzi Company carrying out chit fund & illegal money circulation activities so as to secure their interests. Therefore, the question now arises as to whether the provisions contained in the SARFAESI Act would have a march over the relevant provisions contained in the OPID Act or not.

6. The purpose and objects of SARFAESI Act which came into force on 21.06.2002 is to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereof.

On the other hand, the purpose of the OPID Act, which came into force with effect from 17.08.2013 is to secure the interest of the gullible depositors, who have been the victims in the hands of the fraudster Companies carrying out illegal money circulation and chit fund activities.

The OPID envisages a situation where multitudes of small depositors are defrauded by dubious corporations by luring them with unscrupulous schemes which promised Utopian returns. The object of the Act is tailored to clear-cut situations where hapless depositors are defrauded by dubious "schemes" floated by such dubious "Financial Establishments" as provided under section 2 (d) of the Act. It is imperative that the background of the Act needs to be understood before dealing with the legislation. In recent times a legion of such dubious corporations have burgeoned in different parts of the country which have been alluring naïve investors by promising them quixotic returns under the schemes floated by them. Such companies are essentially sham or paper companies with no real businesses, which arduously market such devious machinations in the form of lucrative "schemes". Gullible common fold mostly acting out of the avarice invest Gullible common folk mostly acting out of avarice invest in such schemes which promise them the moon, hoping to make quick bucks Such schemes loosely find their origin in "collective investment schemes" which were monitored by SEBI, the capital market regulator and guidelines framed by it from time to time. However, over the period, such Machiavellian paper companies began to erupt across the country mostly in rural and backward areas having designed the "schemes," with a promise to the depositors with high returns and sometimes even assured some sham services to give it the colour of genuine transactions.This court, on numerous occasions has, unfortunately, come across many such cases where thousands of gullible depositors have lost their hard-earned monies. Cognizant of the shamelessly rampant advertising and marketing that were being carried out (almost on a war footing) by such companies, the legislatures across various states of the country were compelled to bring such enactments to curb the menace that was spreading fast and deep. It is with this backdrop that the legislation in question needs to be viewed with proper perspective.

7. Repugnancy or inconsistency between the provisions of Central and State enactments can firstly occur in case of a Central and a State Act on any field of entry mentioned in List III of the Seventh Schedule (Concurrent List). To such a situation of repugnancy or inconsistency, the provisions of Article 254 of the Constitution would apply. If there is such an inconsistency, Article 254(1) makes it very clear that the Central law will prevail subject, however, to the provisions of Article 254(2) and further subject to proviso to Article 254(2). The above position would be clear from the opinion rendered by a three Judges Bench of the Apex Court in M/s. Hoechst Pharmaceuticals Ltd. & Ors. -V- State of Bihar; (1983) 4 SCC 45.

8. Para 67 of the aforesaid opinion, which may be usefully noticed is the following terms:-

> "67. Article 254 of the Constitution makes provision first, as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Article 254(1) enunciates the normal rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. Clause (1) lays down that if a State law relating to a concurrent subject is 'repugnant' to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general rule laid down in clause (1), clause (2) engrafts an exception viz., that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject. In such a case, the Central Act, will give way to the State Act only to the extent of inconsistency between the two, and no more. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only. The predominance of the State law may however be taken away if Parliament legislates under the proviso to clause (2). The proviso to Article 254(2) empowers the Union Parliament to repeal or amend a repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the 'same matter'. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together: See Zaverbhai Amaidas v. State of Bombay, (1955) 1 SCR 799; *M. Karunanidhi v. Union of India, (1979) 3 SCR 254 and T. Barai v. Henry Ah Hoe*, (1983) 1 SCC 177."

9. The above view has been reiterated in *State of W.B. vs. Kesoram Industries Ltd. and Ors.*;(2004) 10 SCC 201. There are several other pronouncements of the Apex Court on the aforesaid issue. The same, however, would not require any mention as any such reference would be only a multiplication of discussions on what appears to be a settled issue. In the present case, however, the question before this Court is not one of repugnancy between a Central and a State law relatable to an Entry in List III (Concurrent List). No further attention to the above aspect of the matter would, therefore, be required.

10. Article 246 of the Constitution of India is in the following terms.

> "246. Subject-matter of laws made by Parliament and by the Legislatures of States:-
>
> (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the 'Union List').
>
> (2) Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the 'Concurrent List').
>
> (3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the 'State List').
>
> (4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List"

11. The Hon'ble Apex Court, in case of K.K. Baskaran -V- State represented by its Secretary, Tamil Nadu & Others; (2011) 3 SCC 793; while deciding the question as to the validity of Tamil Nadu Protection of Interests of Depositors (in Financial Establishment) Act, 1997, has held:-

> "17. We are of the opinion that the impugned Tamil Nadu Act enacted by the State Legislature is not in pith and substance referable to the legislative heads contained in List I of the Seventh Schedule to the Constitution though there may be some overlapping. In our opinion, in pith and substance the said Act comes under the entries in List II (the State List) of the Seventh Schedule.
>
> 18. It often happens that a legislation overlaps both Lists I as well as List II of the Seventh Schedule. In such circumstances, the doctrine of pith and substance is applied. We are of the opinion that in pith and substance the impugned State Act is referable to Entries 1, 30 and 31 of List II of the Seventh Schedule and not Entries 43, 44 and 45 of List I of the Seventh Schedule.
>
> 19. It is well-settled that incidental trenching in exercise of ancillary powers into a forbidden legislative territory is permissible vide Constitution Bench decision of this court in State of West Bengal etc. vs. Kesoram Industries Ltd & Ors; (2004) 10 SCC 201 (vide paras 31(4), (5) and (6) and 129 (5). Sharp and distinct lines of demarcation are not always possible and it is often impossible to prevent a certain amount of overlapping vide ITC Ltd. vs. State of Karnataka; 1985 (Supp) SCC 476 (para 17). We have to look at the legislation as a whole and there is a presumption that the legislature does not exceed its constitutional limits.
>
> 20. The `financial companies' in the present case had not obtained any licence from the Reserve Bank of India. Hence they are not governed by the Reserve Bank of India Act nor the Banking Regulation Act, 1949.
>
> 21. The doctrine of pith and substance means that an enactment which substantially falls within the powers expressly conferred by the Constitution upon a Legislature which enacted it cannot be held to be invalid merely because it incidentally encroaches on matters assigned to another legislature. The Court must consider what constitutes in pith

and substance the true subject matter of the legislation. If on such examination it is found that the legislation is in substance one on a matter assigned to the legislature then it must be held to be valid even though it incidentally trenches on matters beyond its legislative competence vide Union of India vs. Shah Goverdhan L. Kabra Teachers' College (2002) 8 SCC 228 (vide para 7).

22. For applying the doctrine of pith and substance regard is to be had to the enactment as a whole, its main objects and the scope and effect of its provisions vide Bharat Hydro Power Corporation vs. State of Assam (2004) 4 SCC 489 (vide para 15). For this purpose the language of the Entries in the Seventh Schedule should be given the widest scope of which the meaning is fairly capable vide State of West Bengal vs. Kesoram Industries Ltd (supra) (para 31(4), Union of India vs. Shah Goverdhan Kabra Teachers College (supra) (para 6), ITC Ltd. vs. State of Karnataka (supra) (para 17).

23. Learned counsel for the appellant submitted that the subject-matter of the Tamil Nadu Act being banking, falls within the legislative competence of Parliament under Entry 45 of List I. We do not agree. Admittedly, none of the financial companies in question obtained any licence from the Reserve Bank of India. Hence they are not governed by the Reserve Bank of India Act or the Banking Regulation Act. The activities of these financial companies do not, in our opinion, come within the meaning of the term `banking' as defined in the Banking Regulation Act, 1949 or the Reserve Bank of India Act, 1934.

24. The Tamil Nadu Act was enacted to find out a solution for the problem of the depositors who were deceived on a large scale by the fraudulent activities of certain financial establishments. There was a disastrous consequence both in the economic as well as social life of such depositors who were exploited by false promise of high return of interest. These financial institutions/establishments did not come either under the Reserve Bank of India Act or the Banking Regulation act, and hence they escaped from public control. By the impugned Act the State not only proposed to attach the properties of such fraudulent establishments and the mala fide transferees, but also provided for the sale of such properties and for distribution of the sale proceeds amongst the innocent depositors. Hence, in our opinion, the doctrine of occupied field or repugnancy, has no application in the present case.

25. The object of the Tamil Nadu Act was to give a speedy remedy to the innocent depositors who were vulnerable to the temptation of earning high rates of interest and were victimized by the financial establishments fraudulently. As regards Section 58A of the Companies Act, this prescribes the conditions under which the deposits may be invited or accepted by the companies. On the other hand, the aim and object of the Tamil Nadu Act is totally different.

26. The Tamil Nadu Act was enacted to ameliorate the conditions of thousands of depositors who had fallen into the clutches of fraudulent financial establishments who had raised hopes of high rate of interest and thus duped the depositors. Thus the Tamil Nadu Act is not focused on the transaction of banking or the acceptance of deposit, but is focused on remedying the situation of the depositors who were deceived by the fraudulent financial establishments. The impugned Tamil Nadu Act was intended to deal with neither the banks which do the business or banking and are governed by the Reserve Bank of India Act and Banking Regulation Act, nor the non-banking financial companies enacted under the Companies Act, 1956.

27. The Reserve Bank of India Act, the Banking Regulation Act and the Companies Act do not occupy the field which the impugned Tamil Nadu Act occupies, though the latter

may incidentally trench upon the former. The main object of the Tamil Nadu Act is to provide a solution to wipe out the tears of several lakhs of depositors to realize their dues effectively and speedily from the fraudulent financial establishments which duped them or their vendees, without dragging them in a legal battle from pillar to post. Hence, the decision of this Court in Delhi Cloth Mills (supra) has no bearing on the constitutional validity of the Tamil Nadu Act.

28. In the case of the Tamil Nadu Act, the attachment of properties is intended to provide an effective and speedy remedy to the aggrieved depositors for the realization of their dues. The offences dealt with in the impugned Act are unique and have been enacted to deal with the economic and social disorder in society, caused by the fraudulent activities of such financial establishments.

29. Under Section 3 & 4 of the Tamil Nadu Act, certain properties can be attached, and there is also provision for interim orders for attachment after which a post decisional hearing is provided for. In our opinion this is valid in view of the prevailing realities.

30. The Court should interpret the constitutional provisions against the social setting of the country and not in the abstract. The Court must take into consideration the economic realities and aspirations of the people and must further the social interest which is the purpose of legislation, as held by Justices Holmes, Brandeis and Frankfurter of the U.S. Supreme Court in a series of decisions. Hence the Courts cannot function in a vacuum. It is for this reason that Courts presume in favour of constitutionality of the statute because there is always a presumption that the legislature understands and correctly appreciates the needs of its own people, vide Govt. of Andhra Pradesh vs. P. Laxmi Devi (2008) 4 SCC 720.

31. We fail to see how there is any violation of Article 14, 19(1)(g) or 21 of the Constitution. The Act is a salutary measure to remedy a great social evil. A systematic conspiracy was effected by certain fraudulent financial establishments which not only committed fraud on the depositor, but also siphoned off or diverted the depositor's funds mala fide. We are of the opinion that the act of the financers in exploiting the depositors is a notorious abuse of faith of the depositors who innocently deposited their money with the former for higher rate of interest. These depositors were often given a small pass book as a token of acknowledgment of their deposit, which they considered as a passport of their children for higher education or wedding of their daughters or as a policy of medical insurance in the case of most of the aged depositors, but in reality in all cases it was an unsecured promise executed on a waste paper. The senior citizens above 80 years, senior citizens between 60 and 80 years, widows, handicapped, driven out by wards, retired government servants and pensioners, and persons living below the poverty line constituted the bulk of the depositors. Without the aid of the impugned Act, it would have been impossible to recover their deposits and interest thereon.

32. The conventional legal proceedings incurring huge expenses of court fees, advocates' fees, apart from other inconveniences involved and the long delay in disposal of cases due to docket explosion in Courts, would not have made it possible for the depositors to recover their money, leave alone the interest thereon. Hence, in our opinion the impugned Act has rightly been enacted to enable the depositors to recover their money speedily by taking strong steps in this connection.

33. The State being the custodian of the welfare of the citizens as parens patriae cannot be a silent spectator without finding a solution for this malady. The financial swindlers, who are nothing but cheats and charlatans having no social responsibility, but only a lust for easy money by making false promise of attractive returns for the gullible investors,

had to be dealt with strongly. The small amounts collected from a substantial number of individual depositors culminated into huge amounts of money. These collections were diverted in the name of third parties and finally one day the fraudulent financers closed their financial establishments leaving the innocent depositors in the lurch.

12. In our given situation of repugnancy or inconsistency is between to a subsequent State law (OPID Act) covered by Entry 1, 30 & 31 of List II of the Seventh Schedule and an earlier Central law (SARFAESI Act) relatable to Entries 43, 44 & 45 of the List I of the Seventh Schedule. How such a situation is to be resolved and answered and which legislation would have the primacy is the moot question that arises for consideration in the present appeals.

13. In interpreting Article 246 regard must be had to the constitutional scheme which visualises a federal structure giving full autonomy to the Union Parliament as well as to the State legislatures in their respective/demarcated fields of legislation. The problem may, however, become a little more complex than what may seemingly appear as the two legislations may very well be within the respective domains of the concerned legislatures and, yet, there may be intrusion into areas that fall beyond the assigned fields of legislation. In such a situation it will be plain duty of the Constitutional Court to see if the conflict can be resolved by acknowledging the mutual existence of the two legislations. If that is not possible, then by virtue of the provisions of Article 246(1), the Parliamentary legislation would prevail and the State legislation will have to give way notwithstanding the fact that the State legislation is within the demarcated field (List II). This is the principle of federal supremacy which Article 246 of the Constitution embodies. The said principle will, however, prevail provided the pre- condition exists, namely, the Parliamentary legislation is the dominant legislation and the State legislation, though within its own field, has the effect of encroaching on a vital sphere of the subject or entry to which the dominant legislation is referable. This is the principle that is discernible from the Constitution Bench judgment of this Court in *State of West Bengal and Ors. vs. Committee for Protection of Democratic Rights, West Bengal and Ors.*; (2010) 3 SCC 571 Paragraphs 25, 26 and 27 which illuminates the issue may be conveniently extracted below:-

> "25. The non obstante clause in Article 246(1) contemplates the predominance or supremacy of the Union Legislature. This power is not encumbered by anything contained in clauses (2) and (3) for these clauses themselves are expressly limited and made subject to the non obstante clause in Article 246(1). The State Legislature has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule and it also has the power to make laws with respect to any matters enumerated in List III (Concurrent List). The exclusive power of the State Legislature to legislate with respect to any of the matters enumerated in List II has to be exercised subject to clause (1) i.e. the exclusive power of Parliament to legislate with respect to matters enumerated in List I. As a consequence, if there is a conflict between an entry in List I and an entry in List II, which is not capable of reconciliation, the power of Parliament to legislate with respect to a matter enumerated in List II must supersede pro tanto the exercise of power of the State Legislature.

> 26. Both Parliament and the State Legislature have concurrent powers of legislation with respect to any of the matters enumerated in List III. The words "notwithstanding anything contained in clauses (2) and (3)" in Article 246(1) and the words "subject to clauses (1) and (2)" in Article 246(3) lay down the principle of federal supremacy viz. that in case of inevitable conflict between the Union and State powers, the Union power as enumerated in List I shall prevail over the State power as enumerated in Lists II and III and in case of an overlapping between Lists II and III, the latter shall prevail.
>
> 27. Though, undoubtedly, the Constitution exhibits supremacy of Parliament over the State Legislatures, yet the principle of federal supremacy laid down in Article 246 of the Constitution cannot be resorted to unless there is an irreconcilable direct conflict between the entries in the Union and the State Lists. Thus, there is no quarrel with the broad proposition that under the Constitution there is a clear demarcation of legislative powers between the Union and the States and they have to confine themselves within the field entrusted to them. It may also be borne in mind that the function of the lists is not to confer powers; they merely demarcate the legislative field……"

14. Equally illuminating is the view available in the opinion of the Apex Court rendered in re. Special Reference No. 1 of 2001[4], which is reproduced below.

> "13. The Constitution of India delineates the contours of the powers enjoyed by the State Legislature and Parliament in respect of various subjects enumerated in the Seventh Schedule. The rules relating to distribution of powers are to be gathered from the various provisions contained in Part XI and the legislative heads mentioned in the three lists of the Schedule. The legislative powers of both the Union and State Legislatures are given in precise terms. Entries in the lists are themselves not powers of legislation, but fields of legislation. However, an entry in one list cannot be so interpreted as to make it cancel or obliterate another entry or make another entry meaningless. In case of apparent conflict, it is the duty of the court to iron out the crease and avoid conflict by reconciling the conflict. If any entry overlaps or is in apparent conflict with another entry, every attempt shall be made to harmonise the same.
>
> 14. When the question arose about reconciling Entry 45 of List I, duties of excise, and Entry 18 of List II, taxes on the sale of goods, of the Government of India Act, 1935, Sir Maurice Gwyer, C.J. in Central Provinces and Berar Act No. XIV of 1938, In re, (1939) FCR 18, at pp. 42-44 observed:-
>
> "…a grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense, but it may be qualified by other express provisions in the same enactment, by the implications of the context, and even by considerations arising out of what appears to be the general scheme of the Act."
>
> It was further observed: -
>
> "…….an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary modifying the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then, and only then, will the non obstante clause operate and the federal power prevail."

15. Although Parliament cannot legislate on any of the entries in the State List, it may do so incidentally while essentially dealing with the subject coming within the purview of the entry in the Union List. Conversely, the State Legislature also

while making legislation may incidentally trench upon the subject covered in the Union List. Such incidental encroachment in either event need not make the legislation ultra vires the Constitution. The doctrine of pith and substance is sometimes invoked to find out the nature and content of the legislation. However, when there is an irreconcilable conflict between the two legislations, the Central legislation shall prevail. However, every attempt would be made to reconcile the conflict."

16. The federal structure under the constitutional scheme can also work to nullify an incidental encroachment made by the Parliamentary legislation on a subject of a State legislation where the dominant legislation is the State legislation. An attempt to keep the aforesaid constitutional balance intact and give a limited operation to the doctrine of federal supremacy can be discerned in the concurring judgment of in ITC Ltd. vs. Agricultural Produce Market Committee and Ors.; (2002) 9 SCC 232, wherein after quoting the observations of the Apex Court in the case of S.R. Bomai vs. Union of India; (1994) 3 SCC 1 (para 276), the Hon'ble Judge has gone to observe as follows (para 94 of the report):-

> "276. The fact that under the scheme of our Constitution, greater power is conferred upon the Centre vis-à-vis the States does not mean that States are mere appendages of the Centre. Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers. More particularly, the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States.
>
> 94. Although Parliament cannot legislate on any of the entries in the State List, it may do so incidentally while essentially legislating within the entries under the Union List. Conversely, the State Legislatures may encroach on the Union List, when such an encroachment is merely ancillary to an exercise of power intrinsically under the State List. The fact of encroachment does not affect the vires of the law even as regards the area of encroachment. [*A.S. Krishna vs. State of Madras*, AIR 1957 SC 297; *Chaturbhai M. Patel vs. Union of India*, (1960) 2 SCR 362; *State of Rajasthan vs. G. Chawla*, AIR 1959 SC 544; *Ishwari Khetan Sugar Mills (P) Ltd. vs. State of U.P*., (1980) 4 SCC 136]. This principle commonly known as the doctrine of pith and substance, does not amount to an extension of the legislative fields. Therefore, such incidental encroachment in either event does not deprive the State Legislature in the first case or Parliament in the second, of their exclusive powers under the entry so encroached upon. In the event the incidental encroachment conflicts with legislation actually enacted by the dominant power, the dominant legislation will prevail."

17. The aforesaid view in the concurring judgment of Ruma Pal, J. in *ITC Ltd. vs. Agricultural Produce Market Committee and Ors.* (supra), seems to have been echoed in a later pronouncement of this Court in *Vishal N. Kalsaria vs. Bank of India*; (2016)3 SCC 762, wherein the Apex Court had held that the provisions of the Act of 2002 will not have an overriding effect on the provisions of the State Rent Control Acts.

18. In the case at hand, the conflict between the Central and State is on account of an apparent over stepping by the provisions of the State Act dealing with the

security of the innocent depositors who have fallen as the victims in the hands of the fraudster Companies into an area of banking covered by the Central Act, which is to regulate the securitization and reconstruction of financial asset and enforcement of security interest etc., The test therefore would be to find out as to which is the dominant legislation having regard to the area of encroachment.

19. The provisions of SARFAESI Act enable the financial institution to take possession of any property whereupon security interest has been created in its favour, more particularly, section 13 of the SARFAESI Act enable the financial institution to take process of sale such property of any person to realize its dues and section 14 of the said Act stands to render assistance to the financial institution to take process of the said property for the purpose.

The above Central Act had from the beginning in section-35 as under: -

> "35. The provisions of this Act to override other laws. -
> The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

The objects and reasons are that the provisions shall override other laws and the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

The above provision was there from the beginning and thereafter the OPID Act came into force on 17.08.2013 after having received the assent of the President on 12.08.2013.

20. Coming to the State Legislation which has received the assent of the President on 12.08.2013 i.e. OPID Act, whose interplay with the SARFAESI Act is under test, we too find section-3 of the OPID Act beginning with non-obstante at clause, reads as under:-

> "3. Notwithstanding anything contained in any other law for the time being in force, -
>
> (i) where, upon complaints received from a number of depositors that any Financial Establishment defaults the return of deposits after maturity or fails to pay interest on deposit or fails to provide the service for which deposit has been made, or
>
> (ii) where the Government have reason to believe that any Financial Establishment is acting in a calculated manner with an intention to defraud the depositors, and if the Government are satisfied that such Financial Establishment is not likely to return the deposits or to make payment of interest or to provide the service, the Government may, in order to protect the interest of the depositors of such Financial Establishment, pass an ad-interim order attaching the money or other property alleged to have been procured either in the name of the Financial Establishment or in the name of any other person from and out of the deposits collected by the Financial Establishment, or if it transpires that such money or other property is not available for attachment or not sufficient for repayment of the deposits, such other property of the said Financial Establishment or the Promoter, Director, Partner or Manager or Member of the said Financial Establishment or a person who has borrowed money from the Financial Establishment to the extent of

his default or such other properties of that person in whose name properties where purchased from and out of the deposits collected by the Financial Establishment, as the Government may think fit and transfer the control over the said money or property to the Competent Authority"

The other important provisions i.e. section 9 of the OPID Act indicating the follow up actions read as follows: -

"9. **Powers of Designated Court regarding attachment, sale, etc**.: -

(1) Upon receipt of an application under section 4, the Designated Court shall issue to the Financial Establishment or to any other person whose property is attached by the Government under section 3, a notice accompanied by the application and affidavits and of the evidence, if any, recorded, calling upon the said Establishment or the said person to show cause on a date to be specified in the notice as to why the order of attachment should not be made absolute and the properties so attached be sold in public auction.

(2) The Designated Court shall also issue such notice to all other persons represented to it as having or being likely to claim any interest or title in the property of the Financial Establishment or the person to whom the notice is issued under sub-section (1), calling upon such person to appear on the same date as that specified in the notice and make objection if he so desires to the attachment of the property or any portion thereof on the ground that he has an interest in such property or portion thereof.

(3) Any person claiming an interest in the property attached or any portion thereof may, notwithstanding that no notice has been served upon him under this section, make an objection as aforesaid to the Designated Court at any time before an order is passed under sub-section (4) or sub-section (6).

(4) If no cause is shown and no objections are made on or before the specified date, the Designated Court shall forthwith pass an order making the ad-interm order of attachment absolute and direct the Competent Authority to sell the property so attached by public auction and realize the sale proceeds.

(5) If cause is shown or any objection is made as aforesaid the Designated Court shall proceed to investigate the same and in so doing, as regards the examination of the parties and in all others respects, the Designated Court shall, subject to the provisions of this Act, follow the procedure and exercise all the powers of a court in hearing a suit under the Code of Civil Procedure, 1908 and any person making an objection shall be required to adduce evidence to show that on the date of the attachment he had some interest in the property attached.

(6) After investigation under sub-section (5), the Designated Court shall pass an order, within a period of one hundred and eighty days from the date of receipt of an application under sub-section (3) of section 4, either making the ad-interim order of attachment absolute or varying it by releasing a portion of the property from attachment or cancelling the ad-interim order of attachment and then direct the Competent Authority to sell the property so attached by public auction and realize the sale proceeds:

Provided that the Designated Court shall not release from attachment any interest, which it is satisfied that the Financial Establishment or the person referred to in sub-section (1) has in the property, unless it is also satisfied that there will remain under attachment an amount or properly of a value not less than the value that is required for repayment to the depositors of such Financial Establishment.

> **(7) The Designated Court shall, on an application by the Competent Authority, pass such order or issue such direction as may be necessary for the equitable distribution among the depositors of the money attached or realized out of the sale.**"

21. The SARFAESI Act is relatable to entry of banking which is included in entries in 43, 44 & 45 of list 1 of the 7th Schedule. Sale of mortgaged property by a bank is inseparable and integral part of the business of banking. The object of the State Act as already noted on the other hand is the basically concerned with refund/return of money to the gullible depositors who have been defrauded. The words found in the statement of object and reasons viz. in the public interest, in order to regulate the activities of such financial establishment therefore, mean that the OPID Act had been enacted to protect the interest of the depositors. Therefore, the State Act having been assented to by the President on 12.08.2013, the provision contained in the OPID Act will prevail notwithstanding its repugnancy to the SARFAESI Act. The SARFAESI Act will give way to the OPID Act only to the extent of the inconsistency between the two and no more. In short, with the assent of the President to the State OPID Act, some provisions of which stand in conflict/ inconsistent with the provision of SARFAESI Act, said provisions of the OPID Act will prevail in the State of Odisha and over ride the provision of SARFAESI Act to said extent and the attachment as provided in OPID Act may stand on the way of the same in taking over possession as the secured asset and transfer for recovery of the loan dues at the behest of the Bank/Financial Institution advancing the loan.

22. The above, however, having remained as the position, till coming into force of the provision contained in section 26E of the SARFAESI Act w.e.f. 01.09.2016 which reads as under:-

> "**26E. Priority to secured creditors**.-Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.
>
> *Explanation*.--For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."

23. It provides that notwithstanding anything inconsistent therewith contained in any other law for the time being in force, after registration of the security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenue taxes and cesses and other rates payable to Central Government or State Government or local authority. This priority is however subject to the provisions of Insolvency and Bankruptcy Code.

As per the OPID Act, the money being realized by sale of the attached property, as per order of the Designated Court, the same is essentially for distribution

amongst the depositors. Therefore, the State Government by virtue of the statutory provisions and pressing the same into service use to sale the property as if it has been confiscated and has vested with the state and thus being the owner and then playing the role of a welfare State distribute the same to the innocent duped depositors as per the order of the Designated Court. Upon sale of the property, the funds collected remains in the hands of the State awaiting further order of the Designated Court.

24. At this juncture, we feel it proper to refer to the Full Bench decision of the Bombay High Court in case of "Jalagaon Janta Sahakari Bank Ltd. and another vs. Joint Commissioner of Sales Tax Nodal 9, Mumbai and Anr.; 2022 (5) Mh. L.J. 691". The Hon'ble Full Bench has clearly held hat if the security interest of the secured creditor is registered with the Central Registry of Securitization Asset Reconstruction and Security Interest of India (CERSAI), then the secured creditor would get priority over the dues of the Government. The relevant portions of the decision reads as thus:-

> "84. …….The next query that would obviously follow is:
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> whether the word 'priority' appearing in section 26E of the SARFAESI Act, i.e., "…paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority", was used without a purpose? This reply has to be in the negative.
>
> 85. Priority means precedence or going before (Black's Law Dictionary). In the present context, it would mean the right to enforce a claim in preference to others. In view of the splurge of 'first charge' used in multiple legislation, the Parliament advisedly used the word 'priority over all other dues' in the SARFAESI Act to obviate any confusion as to inter-se distribution of proceeds received from sale of properties of the borrower/dealer. If a secured asset has been disposed of by sale by taking recourse to the Security Interest (Enforcement) Rules, 2002 it would appear to be reasonable to hold, particularly having regard to the non-obstante clauses in sections 31 B and section 26, that the dues of the secured creditor shall have 'priority' over all other including all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.
>
> 86. A debt that is secured or which, by reason of the provisions of a statute, becomes a 'first charge' on the property, in view of the plain language of Article 372 of the Constitution, must be held to prevail over a Crown debt, which is an unsecured one. The law, as it stands even today, is that a Crown debt enjoys no priority over secured debts. This principle has been repeatedly reaffirmed including, inter alia, in the decision of the Supreme Court reported in (2000) 5 SCC 694 (Dena Bank vs. Bhikhabhai Prabhudas Parekh & Co.) where the Court observed:"
>
> "10. However, the Crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgagee or pledgee of goods or a secured creditor. It is only in cases where the Crown's right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not

apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. In Giles v. Grover it has been held that the Crown has no precedence over a pledge of goods. In Bank of Bihar v. State of Bihar the principle has been ealizedd by this Court holding that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. Rashbehary Ghose states in Law of Mortgage (TLL, 7th Edn., p. 386) – 'It seems a government debt in India is not entitled to precedence over a prior secured debt'."

87. It would also not be inapposite to draw guidance from the decision of the Supreme Court reported in (2006) 10 SCC 452 (ICICI Bank Ltd. vs. SIDCO Leathers Ltd.) where the Court ruled as follows:

"41. While enacting a statute, Parliament cannot be presumed to have taken away a right in property. Right to property is a constitutional right. Right to recover the money lent by enforcing a mortgage would also be a right to enforce an interest in the property. The provisions of the Transfer of Property Act provide for different types of charges. In terms of Section 48 of the Transfer of Property Act claim of the first charge-holder shall prevail over the claim of the second charge-holder and in a given case where the debts due to both, the first charge-holder and the second charge-holder, are to be ealized from the property belonging to the mortgagor, the first charge-holder will have to be repaid first. There is no dispute as regards the said legal position.

42. Such a valuable right, having regard to the legal position as obtaining in common law as also under the provisions of the Transfer of Property Act, must be deemed to have been known to Parliament. Thus, while enacting the Companies Act, Parliament cannot be held to have intended to deprive the first charge-holder of the said right. Such a valuable right, therefore, must be held to have been kept preserved. [See Workmen v. Firestone Tyre and Rubber Co. of India (P) Ltd., (1973) 1 SCC 813].

43. If Parliament while amending the provisions of the Companies Act intended to take away such a valuable right of the first charge-holder, we see no reason why it could not have stated so explicitly. Deprivation of legal right existing in favour of a person cannot be presumed in construing the statute. It is in fact the other way round and thus, a contrary presumption shall have to be raised.

44. Section 529(1)I of the Companies Act speaks about the respective rights of the secured creditors which would mean the respective rights of secured creditors vis-à-vis unsecured creditors. It does not envisage respective rights amongst the secured creditors. Merely because Section 529 does not specifically provide for the rights of priorities over the mortgaged assets, that, in our opinion, would not mean that the provisions of Section 48 of the Transfer of Property Act in relation to a company, which has undergone liquidation, shall stand obliterated.

45. If we were to accept that inter se priority of secured creditors gets obliterated by merely responding to a public notice wherein it is specifically stated that on his failure to do so, he will be excluded from the benefits of the dividends that may be distributed by the Official Liquidator, the same would lead to deprivation of the secured creditor of his right over the security and would bring him on par with an unsecured creditor. The logical sequitur of such an inference would be that even unsecured creditors would be placed on par with the secured creditors. This could not have been the intendment of the legislation."

> 88. Bare perusal of the 2016 Amending Act would show that the dues of the Central/State Governments were in the specific contemplation of the Parliament while it amended the RDDB Act and the SARFAESI Act, both of which make specific reference to debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority and ordains that the dues of a secured creditor will have 'priority', i.e., take precedence. Significantly, the statute goes quite far and it is not only revenues, taxes, cesses and other rates payable to the State Government or any local authority but also those payable to the Central Government that would have to stand in the queue after the secured creditor for payment of its dues.
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> 89. The effect of using the word 'priority' in section 26E of the SARFAESI Act, according to us, is this. The rights accorded to 'first charge' holders by Central as well as State legislation having been known to the Parliament, in such a situation, what the Parliament intended by exercising its legislative power by introducing amendments in the SARFAESI Act, more particularly by incorporating section 26E therein, was to explicitly make the valuable right of the 'first charge' holder, subordinate to the dues of a second creditor. The rights of such of the first charge holders accorded by several legislations enacted by the State, having regard to the language in which section 26E is couched, would rank subordinate to the right of the secured creditor as defined in section 2(1)(zd) subject, of course, to compliance with the other provisions of the statute. Acceptance of the contra-arguments of learned counsel for the State/respondents would undo what the Parliament has chosen to do.
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> **********
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> 92. In view of the foregoing discussion, we have no hesitation to hold that the dues of a secured creditor (subject of course to CERSAI registration) and subject to proceedings under the I & B Code would rank superior to the dues of the relevant department of the State Government." (Emphasis supplied)

It has also been held in that case of *Jalagaon Janta Sahakari Bank Ltd. and Anr*. (supra) at para 189 to 192 thereof that:-

> 189. In the case at hand, we have seen that the secured creditor had registered the security interest with CERSAI on 25th October 2017. Post enforcement of Chapter IV-A of the SARFAESI Act, under sub-section (4) of section 26B of the SARFAESI Act, the department of the Government which professes to recover any tax or other Government dues, is enjoined to register such claim with CERSAI.
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> 190. It does not appear that the respondent no. 1 registered its claim or attachment over the secured asset with CERSAI, post enforcement of Chapter IV-A of the SARFAESI Act. Sub-section (2) of section 26C provides that any attachment order subsequent to the registration of the security interest with CERSAI, shall be subject to such prior registered claim.
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> 191. In our view, in the instant case, with the enforcement of Chapter IV-A of the SARFAESI Act, the claim of the respondent no.7 Bank, the secured creditor, was extolled to a higher pedestal and the subsequent act of recording a charge in the record of right of the secured asset cannot dilute the right of priority in payment, under sections 26C(2) and 26 of the SARFAESI Act. As a necessary corollary, the non-registration of the claim and/or attachment order by the respondent no.1 under section 26B(4) of the SARFAESI Act, can only be at the peril of the department. Mere recording of the purported charge in the record of right of the secured asset, in the absence of the registration with CERSAI, in our considered view, cannot be to the detriment of the auction purchaser, though the auction sale was on "as is where is and as is what is basis".

192. Mr. Sen, learned senior advocate appearing for the petitioner submitted that in the event the Court is persuaded to allow the writ petition, it is necessary to extend the time to adjudicate the stamp duty on the sale certificate and register the same. There are provisions in the Maharashtra Stamp Act, 1958 (sections 31 and 32) and the Registration Act, 1908 (sections 23 and 25) which stipulate the time for tendering the instrument for adjudication, determination of stamp duty thereon and registration of the instrument from the date of its execution. Since the petitioner had instantaneously lodged the sale certificate for adjudication, we are inclined to direct that the time commencing from the lodging of the said sale certificate till the decision of this writ petition, be excluded from consideration in computing the statutory period for adjudication of the stamp duty and registration of the instrument."

25. Accordingly, after the above amendment of SARFAESI Act by introduction of the provision of Section 26E, which again begins with the non obstante clause, the matter stands at rest as said provision overrides the provisions contained in the OPID Act subject of course on fulfillment of certain conditions.

As per the settled position of law, if legislature confers the later enactment with a non-obstante clause, it means that the legislature wanted the subsequent/later enactment to prevail. Thus, a 'priority' conferred/provided under section 26E of the SARFAESI Act subject to the conditions as laid down being fulfilled would prevail over the recovery mechanism of the OPID Act, which even though had received the Presidential assent after the SARFAESI Act, the very amendment to SARFAESI Act with introduction of section 26E in the said Act coming into force thereafter carrying a non-abstante clause would have a march over all said provisions of the OPID Act which had its march over the SARFAESI when it had come into force after the Presidential assent.

26. In the wake of all the aforesaid, since we find that the above aspects have not been touched in the impugned order dated 14.09.2023, passed by the District Magistrate-cum-Collector, Khurda (Opposite Party No.1) in Misc. Case No.73 of 2016 upon an application under section 14 of the SARFAESI Act we are inclined to quash the said order impugned before us and remit the matter for fresh disposal in accordance with law, keeping in view the discussions made hereinabove and within the ambit and scope of section 14 of the SARFAESI Act.

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2024 (I) ILR-CUT-1231

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

CRLA NO.442 OF 2012

SANTOSH MAHABHARA ……Appellant

-V-

STATE OF ORISSA ……Respondent

(A) CRIMINAL TRIAL – The appellant convicted for offence U/s. 302 of IPC – The intention behind the crime was conspicuously absent in

the present case – The appellant had not come to the spot with the intention to kill the deceased – During the fight, on account of scuffle and altercation, he had thrown stone and brick bat after being thrashed by the informant's party – But, unfortunately one of the brick bat hit on the chest of the deceased & he fell down and died – Effect of – Held, the evidence on recording conspicuously silent with regard to the intention of the convict to kill the deceased, the liability of the convict would be to the extent of committing culpable homicide not amounting to murder coming within the Section of 304, Part II of IPC.

(B) INDIAN PENAL CODE, 1860 – Section 300 – "Intention of Causing Death" – The circumstances from which 'intention to cause death' can be gathered – Discussed with reference to case law.(Para-9)

Case Laws Relied on and Referred to :-

1. (2006) 11 SCC 444 : Pulicherla Nagaraju Vrs. State of AP.
2. 1983 (4) SCC 159 : Jawahar Lal and another vs. State of Punjab.
3. 2000 (9) SCC 1 : Camilo Vaz vs. State of Goa.

For Appellant : Mr.L.N. Patel

For Respondent : Mr.P.K. Mohanty, ASC.

JUDGMENT Date of Hearing : 24.01.2024 : Date of Judgment : 29.02.2024

G. SATAPATHY, J.

1. The learned Addl. Sessions Judge, Kuchinda by the judgment dated 03.11.2009 passed in S.T. Case No.82/18 of 2008 convicted Santosh Mahabhara for offence U/S 302 of IPC and sentenced him to undergo Rigorous Imprisonment (R.I.) for life and to pay a fine of Rs.5,000/- in default whereof, to undergo R.I. for further six months. Being aggrieved with his conviction and sentence for commission of offence U/S 302 of IPC, the convict Santosh Mahabhara has preferred this appeal.

2. The prosecution case in precise is the convict-Santosh Mahabhara is the cousin of P.W.1-Bijaya Mahabhara and about seven days before 14.01.2008, P.W.1 had expressed dissatisfaction over partition of their homestead land before his elder parents Cheru Mahabhara and Janaki Mahabhara in presence of convict and his younger brother Jayakrushna Mahabhara, but they did not respond. On 14.01.2008 at about 5 P.M. in the evening while Cheru Mahabhara, Taru Mahabhara (father of P.W.1), convict-Santosh Mahabhara and Binod Sunani and Pramod Kusum of their street were warming by sitting in front of fire in the house of the convict, at that time, the convict told that had I been taken liquor on the day previous week, I would have killed you (informant) and thereafter, there was altercation between two sides relating to the partition dispute of their homestead land. When the informant and his father were returning back to their house, the convict threw a burnt brick which struck on the chest of the father of P.W.1 namely Taru Mahabhara (hereinafter referred to as the "deceased") and he died.

On this incident, P.W.1 lodged an F.I.R. before the I.I.C., Mahulpali P.S., P.W.13-Narendra Kumar Sarangi, who registered Mahulpali P.S. Case No. 03 of 2008 against the convict for commission of offence punishable U/S 302 of IPC and took up the investigation of the case. P.W.13 accordingly, conducted investigation and submitted charge sheet against the convict for commission of offences U/Ss.302/324/352 of the IPC under which cognizance was taken resulting in trial in the present case when the convict pleaded not guilty to the charge for commission of aforesaid offences.

3. In support of its case, the prosecution examined 14 witnesses, relied upon documents under Exts.1 to 15 and identified Material Objects MO-I to MO-V as against the oral evidence of two witnesses as DWs.1 and 2 including the convict himself as DW1 and one documentary evidence under Ext.A by the convict. Of the prosecution witnesses, P.W.1 is the informant, P.W.2, the sister-in-law of the informant and P.W.3, the mother of P.W.2 are projected as eye witnesses to the occurrence, P.W.4 is a witness to the inquest and seizure, P.Ws.5 and 14 are the doctors, P.Ws. 6 to 8 and 12 are post occurrence witnesses, P.W.9 is a witness to seizure whereas, P.Ws. 10 and 11 are Police personnel and lastly P.W.13 is the I.O.

4. The plea of the convict in the course of trial was one of complete denial and false implication. In addition, the convict had also taken a plea in his statement U/S 313 of Cr.P.C. that he was present in his house, but the informant group demanded homestead land, to which he replied that the homestead land has been properly partitioned as a result, they assaulted him and blood oozed out of his body and he informed the in-charge of Police Station about the incident.

5. After appreciating the evidence on record upon hearing the parties, the learned trial Court by the impugned judgment convicted the appellant for offence U/S 302 of IPC while acquitting him for the rest of the offences and accordingly, sentenced to the imprisonment indicated supra.

6. In the course of hearing of appeal, Mr. L.N. Patel, learned counsel for the appellant, while not disputing the act of the appellant resulting in death of the deceased, has submitted that considering the manner in which the incident had occurred and the role attributed to the appellant, the conviction of the appellant is required to be modified from one Under Section 302 of IPC to Section 304 Part-II of IPC. It is accordingly, submitted by the learned counsel for the appellant for alteration of conviction of the appellant and modification of sentence to the period already undergone for the offence U/S 302 of IPC.

7. On the other hand, Mr. P.K. Mohanty, learned Additional Standing Counsel, however, has strongly opposed the prayer of the appellant and he has *inter-alia* submitted that the act of the appellant being squarely covered within the definition of Section 300 clause fourthly and thereby, the conviction of the appellant being recorded on sound principle of law needs no interference. Mr. Mohanty, has accordingly prayed to dismiss the appeal.

8. After having considered the rival submission upon perusal of evidence on record together with the impugned judgment of conviction, the only question now emerges for consideration is whether the conviction of the appellant can be altered or modified to one U/S 304 Part-II of IPC and thereby, the convict is entitled for reduction in the sentence. Since the only argument addressed before this Court is for alteration of the conviction of the appellant, it thereby, appears to the Court that the convict does not seriously challenge the homicidal death of the deceased, which is apparent from the evidence of P.W.5-Dr. Sradhakar Gartia, who in his evidence has clarified that the cause of death of the deceased was due to shock and haemorrhage on account of rupture of heart and liver. P.W.5 has also answered affirmatively to the query of the I.O. as to the possibility of rupture of heart and liver by strike of stone and brick, but it is also admitted by P.W.5 in cross-examination that the injury as per postmortem report can be possible by fall and he has not mentioned in his report whether the injuries were postmortem or ante-mortem in nature and he has not given any opinion as to whether the death was homicidal.

9. One of the essential ingredients of the offence of murder as contemplated U/S 300 of the IPC is the intention to cause death of such person, but intention can never be precisely established by way of direct evidence as a fact and it can only be deduced or inferred or gathered from the circumstance of facts which are proved. It is, therefore, clear that intention of a person can be gathered from the evidence, but it cannot be proved like any other fact by way of direct evidence. The circumstance from which intention to cause death can be gathered from a combination of a few or several circumstances as laid down in ***Pulicherla Nagaraju Vrs. State of AP; (2006) 11 SCC 444***, wherein the Apex Court has enumerated the following circumstances relevant to consider whether there was any intention to cause death on the part of the accused; viz. (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of post employed in causing injury; (v) whether the act was in the course of a sudden quarrel or sudden fight or free from all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause of such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injuries had taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. It is also held in ***Pulicherla (supra)*** that the above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. In addition, the seat (place) of injury/injuries on the person and the nature of injuries inflicted are also the circumstances required to be addressed while dealing the intention of the offender.

10. On the other hand, culpable homicide is not murder, if it falls within the four exceptions as provided U/s.300 of the IPC, but the punishment provided for culpable homicide not amounting to murder has been contemplated U/S 304 of the IPC. The second limb of Section 304 of the IPC i.e. Part-II, prescribes punishment for the act done with the knowledge, but without any intention to cause death or to cause such bodily injury as is likely to cause death. Keeping in view the aforesaid principle and provisions of law, let us scrutinize the evidence on record. It is not in dispute that the informant is the cousin of the convict and the deceased-Taru Mahabhara, who was the father of the informant, was the uncle of the convict being the brother of his father and the evidence on record suggests that there was land dispute between the parties relating to the partition of homestead land. It is also not in dispute that there was an altercation between the informant and the convict just one week prior to the incident and on the day of incident, there was a tussle between the informant and the convict and during tussle, the convict had bitten on the right arm of the informant as deposed to by P.W.1 in his evidence. It, therefore, appears that some dissentions and rancor were existing between the informant and the convict.

11. It also transpires from the evidence of P.W.1 that subsequent to biting to him, while they were standing and discussing in front of their house, the convict arrived there and threw stones and brick, which struck on the chest of his father as a result of which, his father fell down. Similarly, the evidence of P.W.2 also transpires that the convict pelted bolder and brick which struck his father-in-law (deceased) and he was moved to hospital, where he was declared dead. On a close scrutiny of the evidence of prosecution witness, it goes without saying that the prosecution has established that the convict had pelted stone and brickbat at the deceased and one of it hit the chest of the deceased, who fell down on the ground and died. In the circumstance, the evidence of doctor also plays important role and it transpires from the evidence of doctor-P.W.14 that on 14.01.2008 at about 7 P.M., he had examined the informant-Bijaya Mahabhara, the elder brother of the informant, P.W.6-Malaya Mahabhara and the convict-Santosh Mahabhara, but he found one teeth bite injury on P.W.1 and one bruise of size 0.6 inches x 0.3 inches on P.W.6 and both the injuries on P.Ws.1 and 6 were opined to be simple in nature, whereas P.W.14 had detected four injuries such as lacerated wound, bruise/abrasion on the person of the convict. On a comparative analysis of evidence of P.Ws.1 and 6, it appears that there was a fight between the convict on one side and the informant and his brother on other side and in a fit state of rage, the convict had pelted stone and brick at him, which accidentally hit on the chest of the deceased. The evidence of postmortem conducting doctor P.W.5-Dr.Sradhakar Gartia does not reveal any external injury on the person of the deceased and the death of the deceased was on account of rupture of heart and liver. In the aforesaid circumstance of evidence, one can gather that the intention was conspicuously absent on the part of the convict to cause death of the deceased inasmuch as he had not come to the spot prepared to kill the deceased, rather during the fight on account of scuffle and altercation with informant's group,

he had thrown stone and brickbat after being thrashed by the informant's party, but unfortunately one of the brickbat hit on the chest of the deceased, as a result he fell down and died and therefore, only knowledge can be attributed to the convict in the circumstance of transaction of death of the deceased inasmuch as it would be within the knowledge of convict that if a person was hit by a brickbat or stone on his chest with force, then there is every chance of the death of such person receiving assault.

12. In ***Jawahar Lal and another vs. State of Punjab; 1983 (4) SCC 159*** wherein the Apex Court has held as under:-

> *"20. Looking to the age of the 1st appellant at the time of the occurrence, the nature of the weapon used, the circumstances in which one blow was inflicted, the time of the day when the occurrence took place and the totality of other circumstances, namely, the previous trivial disputes between the parties, we are of the opinion that the 1st appellant could be attributed the knowledge that he was likely to cause an injury which was likely to cause death. Accordingly, the 1st appellant is shown to have committed an offence under Section 304, Part II of the Indian Penal Code, 1860 and he must be convicted for the same and sentenced to suffer rigorous imprisonment for five years maintaining the sentence of fine."*

13. In ***Camilo Vaz vs. State of Goa; 2000 (9) SCC 1***, wherein the accused was found to have hit the deceased with a danda during a pre-meditated gang fight resulting in death of the victim. In this decision, the Apex Court while converting the conviction of the accused to one U/S 304 Part-II of the IPC has observed as under:-

> *"14. When a person hits another with a danda on a vital part of the body with such force that the person hit meets his death, knowledge has to be imputed to the accused. In such situation the case will fall in part II of Section 304 of IPC as in the present case."*

14. In view of the aforesaid discussion of facts and evidence together with the principle laid down by the Apex Court in the decisions referred to above and taking into account the evidence of doctor-P.W.5, who has not opined as to whether the injury was sufficient in ordinary course of nature to cause death of a person and the evidence on record being conspicuously silent with regard to the intention of the convict to kill the deceased, only knowledge can be attributed to the convict for the death of the deceased. In such situation, the conviction of the appellant cannot be sustained for offence U/s.302 of the IPC, rather the liability of the convict would be to the extent of committing culpable homicide not amounting to the murder within the meaning of Section 304 Part-II of the IPC. Accordingly, the conviction of the appellant is altered to Section 304 Part-II of the IPC and he is therefore, sentenced to undergo rigorous imprisonment for 6 years.

15. In the result, the appeal stands allowed in part on contest, but no order as to costs. Consequently, the judgment of conviction and order of sentence passed by the learned Addl. Sessions Judge, Kuchinda in S.T. Case No.82/18 of 2008 is hereby modified to the extent indicated above.

16. Since the appellant is on bail, he be directed to surrender to custody to suffer the remainder of the sentence, if he has not already undergone the sentence.

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2024 (I) ILR-CUT-1237

D. DASH, J

R.S.A. NO.133 OF 2019

SITANATH SAHOO .....Appellant

-V-

SMT. KALPANA PRADHAN & ORS. .....Respondents

PROPERTY LAW – The first Appellate Court heard the appeal and delivered the Judgement against the dead man, who was a party to the suit – His legal representative remained unrepresent – No steps has been taken by the appellant who pursued the appeal – Whether the Judgement and decree passed by the 1st Appellate Court without impleadment is sustainable? – Held, No – The Judgment and decree passed in the first appeal after the death of the Def. No.2 without his legal representative being brought on record cannot hold the field.

For Appellant : Mr. R. K. Mohanty, Sr. Advocate

For Respondents : Mr. S. K. Mishra, Sr. Advocate

JUDGMENT Date of Hearing : 22.01.2024 : Date of Judgment :11.03.2024

D.DASH, J.

The Appellant, by filing this Appeal, under Section 100 of Code of Civil Procedure, 1908 (for short, 'the Code'), has challenged the judgment and decree passed by the learned Additional District Judge, Balasore, in R.F.A. No.13/92 of 2018/2014.

2. The Appellant as the Plaintiff had filed Title Suit No.93/1998-I in the Court of learned Civil Judge, Junior Division, Balasore for declaration of his right, title, interest, correction of the Record of Right (RoR) in respect of the suit land with further prayer of permanent injunction as against the predecessor in interest of Respondent No.1 to 4, namely Anadi Charan Pradhan, who had been arraigned as Defendant No.5 in the suit, the Respondent No.5 (since dead), the predecessor in interest of Harihar Barik, the original Defendant No.3 and Respondent No.6 (Defendant No.6) as also the State of Odisha. The suit stood decreed. The Defendant No.5 (Anandi Charan Pradhan) being aggrieved by the same, had carried an Appeal under section 96 of the Code. The First Appeal has been allowed.

3. In course of hearing of this present Second Appeal, which had been admitted on 29.05.2019 for answering the substantial questions of law framed; it came to the notice that present Respondent No.5, who was the Respondent No.2 before the First Appellant Court and the Defendant No.2 before the Trial Court had died on 18.05.2018. Therefore, on 08.12.2023 when hearing of this Appeal commenced, this Court framed the following question to be answered first before going to answer the substantial questions of law as had been framed on 29.05.2019.

The question so posed is as under:-

> *"Whether for non-substitution of the legal representative/s of the Defendant No.2 before the First Appellate Court, the hearing of the Appeal when had been taken up and the judgment and decree have been passed; whether those judgment and decree of the First Appellate Court would be rendered nullity?"*

4. Heard Mr. R. K. Mohanty, learned senior counsel for the Appellant and Mr. S. K. Mishra, learned senior counsel for the Respondent. Perused the written notes of submission.

5. Keeping in view the submissions made, I have gone through the judgments passed by the Courts below as also the rival pleadings for the purpose of addressing the above question.

6. 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 Suit.

7. The Plaintiff in the suit had arraigned Ramachandra Barik as the Defendant No.2. It is stated that the Ramachandra Barik became the absolute owner of the suit land by purchasing the same from Sundarmani Dei by registered sale deed dated 05.08.1960 and accordingly, Ramachandra Barik became the absolute owner of the suit land and accordingly, rent was fixed in his name under section 8(1) of Odisha Estate Abolition Act, 1951 (for short, "the OEA Act") vide order passed in OEA Case No.837 of 1963-64 and the rent schedule was issued in his name who was paying rent for the suit land. The Plaintiff claims to have purchased the suit land from that Ramachandra by registered sale deed dated 01.12.1975 for valuable consideration and to have entered into possession over the suit land. It is stated that the land has been erroneously recorded under Bebandobasta Khata in the name of Defendant No.3 to 4 without preparing the same in the name of the Plaintiff under Stitiban Khata.

8. The suit was decreed by the following order:-

> *"It is declared that the suit land is the purchased property of the plaintiff and the publication of M.S.R.O.R. in the name of Defendant Nos.3 & 4 in "Bebandovasta Khata" and later recording of the same in the name of Kailash Barik (Defendant No.4) vide Khata 196/428 is wrong and illegal. Further the defendants are permanently retrained from disturbing in the peaceful possession of the suit land in any manner."*

9. The Defendant No.5 being aggrieved by the said judgment and decree had carried the First Appeal and he having died during pendency of the First Appeal, his legal representatives came on record and pursued the First Appeal. The case of Defendant No.5 in his written statement is that once for the suit land, his right, title has been decided by the Revenue Court and when independent title has accrued in his favour by fixation of rent, the Civil Court has no further jurisdiction to reopen the same and sit over to adjudicate upon the title afresh. The Defendant No.5 claims to have purchased the suit land from Defendant No.4 by registered sale deed dated 21.11.2008.

10. The suit having been decreed by judgment dated 23.04.2014, followed by the decree, sealed and signed on 01.05.2014; the First Appeal has been disposed of by the judgment delivered on 16.05.2019 followed by the decree. The First Appeal had been instituted in the year 2014. The date of death of Defendant No.2 being not disputed, since it has taken place on 18.05.2018, it is during the pendency of the First Appeal. Record reveals that the legal representatives of Defendant No.2 have not been brought on record under Order 22 Rule 4 read with Rule 11 of the Code nor the Defendant No.5 or his legal representatives, who pursued the First Appeal have sought for exemption from such substitution of the legal representatives of Defendant No.2 banking upon the provision of Sub Rule 4 of Rule 4 of Order 22 of the Code.

11. In the factual settings of the case in case of denial of the relief as claimed by the Plaintiff, the eventual remedy for the Plaintiff certainly would lie against the Defendant No.2 and after him as against his legal representatives.

12. The First Appellate Court is thus found to have heard the First Appeal and delivered the judgment as against the dead man, who being a party to the suit, his legal representatives remained unpresented in the First Appeal after the death of that Defendant No.2 when their legal liability in view of the judgment of the First Appellate Court vis-a-vis the Plaintiff has very much stood up. The factum of death of Defendant No.2 was not brought by the legal heirs of the Defendant No.5 who prosecuted the First Appeal, to the notice of the First Appellate Court so as to proceed further. Thus no order has been passed consequent upon the death of Defendant No.2, who even though was dead, the First Appeal was heard and decided as if living and now in view of the judgment and decree passed by the First Appellate Court running against the Plaintiff, the legal representatives of the Defendant No.2 have been affected as the legal liability has stood up to be fed by them. Accordingly, the judgment and decree as have been passed by the First Appellate Court in non-suiting the Plaintiff when by the time of hearing of the Appeal, the Defendant No.2 was dead and no step as per law has been taken by the legal representatives of the Defendant No.5, who as the Appellants therein pursued the Appeal, the judgment and decree passed in the First Appeal after the death of the Defendant No.2 without his legal representatives being brought on record, cannot hold the field.

When that stands the position, as a logical sequitor, the judgment and decree passed by the Trial Court, decreeing the suit of the Plaintiff, granting him the reliefs spring into life to hold the field.

13. In the wake of aforesaid, there arises no further need to answer the substantial questions of law framed while admitting this Appeal.

14. This Appeal is accordingly allowed. The judgment & decree passed by the Trial Court are hereby restored. In the peculiar facts and circumstances, no order as to cost is passed.

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2024 (I) ILR-CUT-1240

S.K. SAHOO, J & S.K. MISHRA, J.

JAIL CRIMINAL APPEAL NO.58 OF 2008

JAGA @ JAGABANDHU MOHALIK ……Appellant

-V-

STATE OF ORISSA ……Respondent

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Section 313 – What is the purpose of examining the accused U/s. 313 Cr.P.C? – Held, the purpose of examining the accused is to meet the requirements of the principle of Natural Justice – The circumstances, which are not put to the accused in his examination U/s. 313 of the Cr.P.C, cannot be used against him and must be excluded from consideration.

(B) CRIMINAL TRIAL – Appellant is convicted for the offence U/s. 302 of the IPC – There is no clinching evidence that the appellant was in company of the deceased on the night of occurrence – The appellant was arrested at another place on some other day – Whether the appellant can be said as absconder and as such the author of crime? – Held, No – Mere fact of abscondence cannot, ipso facto, result in an irresistible inference that the person absconding necessarily had the guilty intention to commit the crime alleged.

Case Laws Relied on and Referred to :-

1. (1984) 4 SCC 116 : Sharad Birdhichand Sarda v. State of Maharashtra.
2. (2022) SCC OnLine SC 1454: Nandu Singh v. State of M.P. (Now Chhattisgarh).
3. (2010) 10 SCC 439 : Paramjeet Singh v. State of Uttarakhand.
4. (1992) 3 SCC 700 : 1992 SCC (Cri) 705 : State of Maharashtra v. Sukhdev Singh.
5. (2023) SCC OnLine SC 1653 : Sekaran v. State of Tamil Nadu.
6. (1971) 2 SCC 75 : Matru v. State of U.P.

For Appellant : Mr. Dillip Ray
For Respondent : Mr. Rajesh Tripathy, ASC

JUDGMENT Date of Hearing & Judgment : 04.01.2024

BY THE BENCH

The appellant Jaga @ Jagabandhu Mohalik faced trial in the Court of learned Adhoc Additional Sessions Judge (F.T.C.), Balasore in S.T. Case No.22/153 of 2007 for offence punishable under section 302 of the Indian Penal Code (hereinafter 'I.P.C.') on the accusation that in the intervening night of 04/05.05.2005, at village Pakharsaun, he committed murder of his wife Bibi @ Padmabati Mohalik (hereinafter 'deceased').

The trial Court, vide impugned judgment and order dated 30.05.2008, found the appellant guilty of the offence charged and sentenced him to undergo rigorous imprisonment for life.

Prosecution Case:

2. The prosecution case, as per the first information report (hereinafter 'the F.I.R.) (Ext.1) lodged by Purna Chandra Das (P.W.1) on 05.05.2005 before the Sadar Police Station, Balasore, is that the marriage between the deceased and the appellant was solemnised 19 years prior to the date of occurrence and they were staying in the village Saunpada with their children for the last 6 to 7 months after constructing a house there. On 05.05.2005, at about 6 a.m., upon getting information about the death of the deceased, the informant (P.W.1) came to Saunpada and found the deceased lying dead and there were bleeding injuries on the head of the deceased, which was caused by a spade, which was lying near the dead body. It has further been stated that the appellant used to assault the deceased repeatedly and on the night of 04/05.5.2005, after killing the deceased, he had absconded.

Ananta Pradhan (P.W.9) scribed the F.I.R. as per the oral report of P.W.1. After its presentation before the Officer-In-Charge in Balasore Sadar Police Station, a case was registered as Balasore Sadar P.S. Case No.105 dated 05.05.2005 under section 302 of the I.P.C. Suryamani Pradhan (P.W.7), the Officer-In-Charge of Sadar Police Station, Balasore, himself took up investigation of the case.

During course of investigation, P.W.7 deputed a constable (P.W.13) to guard the dead body of the deceased, examined the informant, sent requisition for scientific team, visited the spot on 05.05.2005 and prepared spot map (Ext.6). He held inquest over the dead body and prepared inquest report vide Ext.2. He seized the weapon of offence i.e. spade, which was lying at the spot as per seizure list Ext.4. He sent the dead body for post mortem examination, seized blood stained earth and sample earth as per seizure list Ext.3. Though the Investigating Officer searched for the appellant, but his whereabouts could not be ascertained. After the post mortem examination, the wearing apparels of the deceased were produced by the constable before the I.O. (P.W.7), which were seized as per seizure list Ext.7. P.W.7 sent requisition to the Medical Officer (P.W.10), who conducted post mortem examination and sought for her opinion regarding possibility of injuries sustained by the deceased with the spade and received the opinion from the doctor. He also took steps for sending the exhibits for chemical examination to S.F.S.L., Rasulgarh through Court and received the report of the chemical examiner vide Ext.10.

On 07.09.2006, P.W.7 handed over the charge of investigation to P.W.8, Sudarsan Das, who also visited the spot, examined the witnesses. On 14.10.2006, the appellant was arrested and forwarded to Court. P.W.5, the son of the appellant and deceased, was produced before the Court and his statement under section 164 Cr.P.C. was recorded. On completion of investigation, charge sheet was submitted on 05.12.2006 against the appellant under section 302 of the I.P.C.

Framing of Charge:

3. After submission of charge sheet and complying with the due committal procedure, the case was committed to the Court of Session, where the trial Court

framed charge against the appellant as aforesaid. As the appellant pleaded not guilty and claimed to be tried, sessions trial procedure was resorted to establish the guilt of the appellant.

Prosecution Witnesses and Exhibits:

4. In order to prove its case, the prosecution examined as many as fourteen witnesses.

P.W.1 Purna Chandra Das is the brother of the deceased and the informant in the case. He stated that the deceased was previously assaulted by the appellant when she objected to the selling of a landed-property by the appellant. He further stated that the appellant threatened the deceased one day prior to her death. He was informed by P.W.5 that the appellant had murdered the deceased and fled away from the spot. Subsequently, he went to the house of the deceased and saw bleeding injury on the parietal region of the deceased.

P.W.2 Dinabandhu Das is the uncle of the deceased who stated to have heard about assault on the deceased by the appellant basing upon sale of a piece of land. He further stated that in the morning hours of the date of occurrence, P.W.5 came to P.W.1 to inform him that the appellant had committed murder of the deceased. He proceeded to the spot and saw bleeding injury on the body of the deceased. He is also a witness to the preparation of inquest report vide Ext.2.

P.W.3 Ram Chandra Nayak stated that during the morning hours of 05.05.2005, P.W.5 came and disclosed that the appellant dealt blows by the blunt side of a spade as a result of which the deceased died. He further stated to have seen the dead body of the deceased lying in front of her hut with bleeding injury on the left side parietal region, near the ear root. He also saw a cloth which was tied around her neck and blood was coming out of her ear and nostril. He is a witness to the preparation of the inquest report vide Ext.2 and seizure of blood-stained earth and sample earth as per seizure list Ext.3 and seizure of the spade as per seizure list Ext.4.

P.W.4 Lambodar Das stated that though the deceased was living with the husband in her matrimonial villager but after a dispute between the couple, she had come to reside in her paternal village and stayed there by constructing a hut. He also stated that 15 days prior to the occurrence, the appellant also came to reside with the deceased. He further stated that he has seen the deceased a day prior to the date of occurrence and on the next morning, P.W.5 informed him that the appellant had killed the deceased.

P.W.5 Rabindra Mohallik @ Putia, who is the son of both the deceased and the appellant, stated that there was a quarrel between the appellant and the deceased for which the deceased had come to live in Pakharsaun. He along with his three younger sisters also came with her and resided together. He further stated that he came to know about the death of the deceased in the morning when he saw bleeding injury on the ear root of the deceased and she did not respond to his call. However,

he stated that he does not know as to how the deceased died as he had slept in the night. Subsequently, he was declared hostile by the prosecution.

P.W.6 Purna Chandra Mohallik stated that subsequent to a quarrel between the appellant and the deceased, the latter came to reside in her paternal village along with four of her children. He further stated that the appellant came to stay with the deceased 15 days prior to the occurrence. He also stated to have seen the deceased and the appellant when they came to his house after having a quarrel on the previous day of occurrence. He is also a witness to the preparation of inquest report vide Ext.2.

P.W.7 Suryamani Pradhan was working as the Officer-in-Charge of Sadar Police Station, Balasore, who registered the case upon receipt of F.I.R. from P.W.1. He is also the initial Investigating Officer of the case.

P.W.8 Sudarsan Das joined as the Officer-In-Charge of Sadar Police Station, Balasore, on 10.09.2006 and took over the charge of investigation of the case from P.W.7. Upon completion of investigation, he submitted the charge sheet against the appellant.

P.W.9 Ananta Pradhan scribed the F.I.R. as per the instruction of the informant (P.W.1).

P.W.10 Dr.Jayanti Parida was working as the Assistant Surgeon at the District Headquarters Hospital, Balasore, who conducted the post-mortem examination on the dead body of the deceased on police requisition. She proved her report vide Ext.11. A spade was produced before her, upon examining which she opined that the injuries found on the dead body of the deceased can be caused by such spade.

P.W.11 Sanjukta Mohapatra was posted as a constable at Sadar Police Station, Balasore. She is a witness to the seizure of one green colour saree stained with blood, one white colour saya and one red colour blouse stained with blood as per seizure list Ext.7.

P.W.12 Bidyadhar Mohallik is the brother-in-law (husband of the sister of the deceased) of the deceased who stated that on 05.05.2005, he received a telephone call about the death of the deceased. After hearing the news, he came to the spot and saw the deceased lying there sustaining bleeding injury on her left side ear. He also stated that a saree was tied around her neck. He is also a witness to the preparation of inquest report vide Ext.2.

P.W.13 Mangal Singh was working as a constable at the Sadar Police Station, Balasore, who was issued a command certificate to guard the dead body of the deceased which was lying on the field of Pakharsaun School. He also took the dead body of the deceased for post-mortem examination. Further, he brought the wearing apparels of the deceased and other articles from the spot and produced the same before the I.O.

P.W.14 Kailash Chandra Majhi was posted as the Sub-Inspector of Police at the Sadar Police Station, Balasore. He is a witness to the seizure of the wearing apparels of the deceased as per seizure list Ext.7.

The prosecution also proved fourteen documents. Ext.1 is the F.I.R., Ext.2 is the inquest report, Exts.3, 4 and 7 are the seizure lists, Ext.5 is the statement of P.W.5 recorded under section 164 Cr.P.C., Ext.6 is the spot map, Ext. 8 is the injury requisition, Ext.9 is the forwarding letter, Ext.10 is the report of chemical examiner, Ext.11 is the post mortem examination report, Ext.12 is the command certificate, Ext.13 is the dead body challan and Ext.14 is the examination report of biology and serology.

Defence Plea:

5. The defence plea is one of denial. However, neither any witness was examined nor any document was exhibited on behalf of the defence to negate the prosecution case.

Findings of the Trial Court:

6. The trial Court, after assessing oral as well as documentary evidence, came to hold that all the witnesses have stated that they came to know about the incident from P.W.5 and proceeded to the spot forthwith and found the appellant absent in his house. The trial Court further held that from the inquest report (Ext.2) and from the post mortem report (Ext.11), it is crystal clear that the death of the deceased was homicidal one due to injury on the vital part of brain and the injuries were ante mortem in nature. The trial Court further held that if the documentary evidence coupled with ocular evidence is considered together, it would unerringly point out guilty finger towards the appellant. It was further held that the conduct of the appellant subsequent to the occurrence appears to be suspicious and to escape from the liability, he had left the house and that the appellant has not explained the reason as to why he absconded from the house or why he left the house immediately after the occurrence. The trial Court summed up that the conduct of the accused subsequent to the occurrence and the oral evidence taken together pointed out that it was nobody else but the appellant, who had committed the offence and accordingly, found that the prosecution has proved a case under section 302 of the I.P.C. against the appellant beyond all reasonable doubt.

Contention of the Parties:

7. Mr. Dillip Ray, learned counsel appearing for the appellant contended that there is no direct evidence in the case and the case solely rests upon circumstantial evidence. The circumstances proved by the prosecution are not clinching and do not form a complete chain so as to unerringly point towards the guilt of the appellant. The last seen theory is not established by way of clinching evidence and relevant questions have not been put in the accused statement so far as the last seen is concerned. Therefore, the same could not have been used against the appellant. The

learned counsel further argued that since in a case of circumstantial evidence, motive assumes significance and the prosecution has not proved any motive on the part of the appellant to commit the crime, the appellant is entitled to get the benefit of doubt, more particularly when the star witness on behalf of the prosecution is none else then P.W.5, son of the deceased. The appellant has made a specific statement that in the night of occurrence, he was not present in the house and that the dead body of the deceased was lying on the outer verandah of the house. Learned counsel further argued that the act of absconding itself cannot be a ground to convict an accused for offence punishable under section 302 of the I.P.C. and therefore, the impugned judgment and order of conviction is liable to be set aside.

Mr. Rajesh Tripathy, learned Addl. Standing Counsel, on the other hand, supported the impugned judgment and argued that even though P.W.5 has not supported the prosecution case and was declared hostile by the prosecution, but it would appear that in his statement recorded under section 161 of the Cr.P.C., he has stated about the assault on the deceased by the appellant and more particularly, the presence of the appellant on the date of occurrence. Learned counsel further argued that the evidence has come on record that since the appellant wanted to dispose of the landed property and it was opposed to by the deceased, there was dissention between the two. She was assaulted for which, she left the house of the accused and came back to stay at her paternal village by constructing a house on a Government land and the same was said to be the motive behind the commission of offence. Learned counsel further argued that a number of witnesses have stated about the presence of the appellant at the spot and that he was staying in the company of the deceased prior to the occurrence. Since the appellant was found absconding after the occurrence, it can be said that the chain of circumstances is complete and the trial Court has not committed any illegality in convicting the appellant under section 302 of the I.P.C.

Adverting to the contention raised by the learned counsel for the parties, it is not disputed that there is no direct evidence in the case and the case is based on circumstantial evidence. The principle for appreciation of a case based on circumstantial evidence is well settled from the judgment of the Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda -Vrs.- State of Maharashtra reported in (1984) 4 Supreme Court Cases 116**. Keeping in view the 'panchasheel principle' laid down by the Hon'ble Court therein, we have to assess the evidence on record to see whether the prosecution has established that the circumstances taken together form a complete chain which points towards the guilt of the accused and it can be safely concluded that it is the appellant alone, who committed the crime.

Whether the deceased met with a homicidal death?:

8. Before going to assess the ocular evidence, we think it apposite to see how far the prosecution has established that the deceased met with a homicidal death. The investigating officer (P.W.7), after visiting the spot on 05.05.2005, conducted inquest over the dead body and prepared inquest report vide Ext.2. He also sent the

dead body for post mortem examination and the doctor (P.W.10) conducted post mortem examination at District Headquarters Hospital, Balasore on 05.05.2005 and she noticed the following injuries on the body of the deceased:

> (i) There was presence of rigor mortis in four limbs. Face was swollen with lacerated injury of 4" x 1" x 1" over left side face extending from face of left ear lobe extends upward left lateral angle of left side eye surrounding the above mentioned wound, there was a haematoma of size 3" x 3" bleeding from both nostrils and ear. On dissection, brain was congested and there was a haematoma of 3" x 3" over left temporal lobe of brain. Both lungs, both kidneies, liver and splin were intact but pale. Stomach was intact and pale containing 200 gms. of partial digested food particular having no characteristic of smell. Uterus was intact having no symptom of conception.
>
> (ii) All the above features were ante mortem in nature except rigor mortis. Time since death within 36 hours at the time of my examination at 4 P.M. Cause of death was due to haemorrhagic shock due to injury on the vital organ like brain.
>
> (iii) During my post mortem examination spade was shown to me and I opined that the injury was possible by the said supplied spade. This is my report Ext. 11 and Ext.11/1 is my signature on it.

P.W.10 has specifically opined that all the injuries are ante mortem in nature except rigor mortis. Time since death was opined to be within 36 hours of the examination and the cause of death was said to be on account of haemorrhagic shock due to injury to the vital organ like brain. She has further stated that the spade was produced before her and after verifying the same, she gave her opinion that the injury sustained by the deceased was possible by the said spade and the post mortem report has been marked as Ext.11. Nothing has been brought out in the cross-examination so as to discard the evidence of the doctor. The appellant has also not challenged the finding of the trial Court on the ground that it was a case of homicidal death.

Considering the inquest report, the evidence of the doctor (P.W.10) and the post mortem report (Ext.11), we are of the humble view that the trial Court has rightly come to the conclusion that the deceased met with a homicidal death.

Circumstances relied upon by the Prosecution:

9. The prosecution primarily seeks to establish the following circumstances so as to tighten the grip of guilt against the appellant.

> (i) there were previous quarrel in between the appellant and the deceased as the deceased was raising objection to the appellant for making attempt to sell the landed property and thus, the dissention between them is the motive behind commission of the crime;
>
> (ii) the deceased was last seen alive in the company of the appellant;
>
> (iii) the conduct of the appellant in absconding immediately after the occurrence took place is a relevant factor.

Dispute between the appellant and the deceased as motive behind the murder:

10. So far as the circumstance no.(i) i.e. the dispute between the appellant and the deceased is concerned, which is said to be the motive behind the crime as per the

prosecution case. P.W.1, the brother of the deceased, has stated that in the year 2005, the deceased raised objection when the appellant tried to sale a landed property and the appellant assaulted the deceased for which the deceased came to their village and there was a meeting in that regard and the deceased stayed in a separate house near the village school. However, in the cross-examination, P.W.1 has stated that the appellant had joint property of one and half acres of land and that he had not seen the document and he could not say the location of the land. He has further stated that the property stood in the name of the father and the paternal uncles of the appellant. He has further stated that as per his knowledge, there was no landed property in the name of the appellant and there was also no property in the name of the deceased. Though he stated that the appellant sold some of his lands, but he could not say as to whom the land was sold and to what extent. The evidence of this witness in the cross-examination makes his statement in the chief-examination doubtful that the appellant tried to sale the landed property. If the property stood recorded in the name of the father and paternal uncles of the appellant and there is no documentary evidence that they gave any authority to sale such land, it is not believable that the appellant would try to sale the land and that the deceased would raise objection, for which there would be dissention between them. The other witnesses have stated about such dispute in a vague manner. Therefore, we are of the view that there is no clinching evidence on record that the appellant wanted to sale the landed property and that the deceased was raising objection, for which there was dissention between the two.

In a case of circumstantial evidence, motive assumes significance. Absence of motive puts the Court in guard to scrutinize other evidence on record. In the case of **Nandu Singh -Vrs.- State of Madhya Pradesh (Now Chhattisgarh) reported in (2022) Supreme Court Cases OnLine SC 1454**, a three-Judge Bench of the Hon'ble Supreme Court has reiterated the aforesaid stance of law in the following words:

> "12. In a case based on substantial evidence, motive assumes great significance. It is not as if 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."

In this case, when the prosecution has come forward with a particular motive behind the commission of the crime and we find that the prosecution has been unsuccessful in proving the same, it is incumbent upon us to assess other evidence on record to see how far those are established and whether the chain of circumstances is complete or not.

Whether the deceased was last seen alive with the appellant?:

11. The next circumstance is the appellant being last seen in the company of the deceased. The star witness on behalf of the prosecution is no one else than P.W.5, who is the son of the appellant as well as the deceased. He was aged about 12 years

when he deposed in the trial Court. Some formal questions were put by the trial Court to assess his competence to depose in a criminal trial and he answered to the same and after verifying the answers, the trial Court came to a finding that the witness was able to give reasonable answers and therefore, he was declared to be a competent and his evidence was recorded. P.W.5 stated that the deceased died in village Pakharsaun and there was a quarrel between his father (appellant) and his mother (deceased), as a result of which the deceased came to village Pakharsaun. He further stated that he himself along with his three younger sisters came with the deceased and stayed together and the deceased died in the night. In the next day morning, he came to know about the death as she was having bleeding injury on the ear root and she did not respond to his call. He has further stated that he went to call his maternal uncle (P.W.1). He could not say anything about the death of the deceased as he slept in the night. In the cross-examination he has stated that when they came to village Pakharsaun, they first stayed in the house of P.W.1. As there was some discontentment, the deceased left the house of P.W.1 and lived separately and it was an one room house. He has further stated that on the night of occurrence, the deceased slept outside the house, as it was a night of summer season. P.W.5 specifically stated that the appellant had never come to the house where they were staying and that the appellant had not come to the hut of his mother on 04.05.2005. Therefore, this evidence of the star witness, on behalf of prosecution, is completely silent about the presence of the appellant in the hut. Though this witness has been declared hostile and his previous statement recorded under section 164 Cr.P.C. has been confronted to him, but law is well settled that the statement of a witness recorded under Section 164 Cr.P.C. is not a substantive piece of evidence and it may be used for contradiction or corroboration of the witness, who made it. Such a statement can be used to cross-examine the maker thereof.

In view of the settled position of law and the fact that even in the statement recorded under section 164 of the Cr.P.C., P.W.5 has not whispered anything about the presence of the appellant in the night in question when the deceased was in the hut, we are of the view that from the evidence of P.W.5, it is not established that the appellant was last seen in the company of the deceased. The other witnesses, who have stated about the appellant staying with the deceased, have stated it vaguely. P.W.3 though has stated that he had seen the appellant standing in front of the house of the deceased on each evening and he had seen him from a distance of 20 to 25 links at about 9 p.m. on the night of occurrence, but most peculiarly, no question was put to the appellant regarding his presence in the company of the deceased on the night of occurrence. During his cross-examination, the question nos.4, 15 and 21 were put to the appellant suggesting him that he had stayed with the deceased for last 15 days. But no specific question has been put to him that on the night of occurrence, he was in the company of the deceased.

The examination of the accused is for the purpose of enabling him to explain any circumstance appearing in the evidence against him. Each separate piece of evidence in support of circumstance is to be put to the accused and the accused may

or may not avail the opportunity for offering his explanation. In a criminal trial, the purpose of examining the accused under section 313 Cr.P.C. is to meet requirements of the principle of natural justice. The circumstances, which are not put to the accused in his examination under section 313 of the Cr.P.C., cannot be used against him and must be excluded from consideration. The Hon'ble Highest Court in the case of **Paramjeet Singh -Vrs.- State of Uttarakhand reported in (2010) 10 Supreme Court Cases 439**, emphasized on the mandatory nature of duty cast on the trial Court to put all inculpatory circumstances to the accused under section 313 of the Cr.P.C. It has also succinctly explained the result that may ensue in case the strict procedure is not adhered to. The following observation of the Hon'ble Apex Court can be reproduced for better appreciation of the stand of law on this point.

> "22. Section 313 CrPC is based on the fundamental principle of fairness. The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Therefore, the court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. Circumstances which were not put to the accused in his examination under Section 313 CrPC cannot be used against him and have to be excluded from consideration. (Vide **Sharad Birdhichand [(1984) 4 SCC 116 : 1984 SCC (Cri) 487 : AIR 1984 SC 1622]** and **State of Maharashtra v. Sukhdev Singh [(1992) 3 SCC 700 : 1992 SCC (Cri) 705]**.)"

Some of the co-villagers have stated in their evidences that since 15 days prior to the date of occurrence, the appellant was staying in the company of the deceased. But when the specific evidence relating to the presence of appellant in the company of the deceased in the night in question is absent and since the evidence adduced by P.W.3 in that respect has not been put to the appellant and more particularly, in view of the evidence of P.W.5 that the appellant had not come to the hut in question on the date of occurrence and that he was never staying there with them, we are of the view that the prosecution has not succeeded in establishing the last seen theory against the appellant.

Merely the fact of abscondence is not sufficient to convict the appellant:

12. So far as the abscondence of the accused is concerned, it would have been relevant had there been any clinching evidence regarding the presence of the appellant in the hut house in the company of the deceased in the fateful night. Since we have already held that there is no such clinching evidence that the appellant was in the company of the deceased on the night of occurrence, merely because the appellant was arrested at another place on some other day, it cannot be said that he was absconding. Also, for the sake of argument, even if it is believed that the appellant was absconding, the law is well settled that even absconding itself is not sufficient to draw an inference against the accused that he is the author of the crime, inasmuch as a person may abscond when he comes to know that the police is suspecting his involvement in a crime. Recently, in the case of **Sekaran -Vrs.- State**

of Tamil Nadu reported in (2023) Supreme Court Cases OnLine SC 1653, the Hon'ble Supreme Court has held that merely because the accused absconded, it cannot be inferred that he is essentially the author of the crime and it is not unnatural for a man to abscond if he apprehends his arrest in connection with a criminal case. The Hon'ble Court observed as follows:

> "23. Although not brought to our notice in course of arguments, it is revealed from the oral testimony of PW-11 that the appellant could be apprehended 3 (three) years after the incident from Puliyur road junction in (1 km. away from Ambalakalai) in Kerala after vigorous search. However, abscondence by a person against whom an FIR has been lodged and who is under expectation of being apprehended is not very unnatural. Mere absconding by the appellant after alleged commission of crime and remaining untraceable for such a long time itself cannot establish his guilt or his guilty conscience. Abscondence, in certain cases, could constitute a relevant piece of evidence, but its evidentiary value depends upon the surrounding circumstances. This sole circumstance, therefore, does not enure to the benefit of the prosecution." **(Emphasis supplied)**

As far as evidentiary value of the conduct of the accused in absconding is concerned, the following observations made by the Hon'ble Supreme Court in the case of **Matru -Vrs.- State of U.P. reported in (1971) 2 Supreme Court Cases 75** throw much light as to how much reliance can be placed upon such piece of evidence to record a finding of conviction.

> "19....Now, mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused."

Thus, from the aforesaid settled precedents, it is clear that mere fact of abscondence cannot, ipso facto, result in an irresistible inference that the person absconding necessarily had the guilty intention to commit the crime alleged. Further, when the accusation is for a grave crime, like the one under section 302 of the IPC, i.e. murder, the solitary conduct of the accused in absconding cannot be given much weightage so as to ignore the fact that there is no other clinching evidence available to implicate him in the ghastly crime. However, when other circumstances clearly show the accused as the culprit, then abscondence on his part might add a negative inference against him and lead to the completion of chain of circumstances. But in the case in hand, when all the alleged incriminating circumstances could not be proved against the appellant beyond reasonable doubt, it would be perilous for the interest of justice to hold him guilty as possibility of his innocence cannot be ruled out.

Conclusion:

13. In view of the foregoing discussion, we are of the view that the circumstances have not been established with clinching evidence and the circumstances taken together do not form a complete chain. The motive behind the commission of the crime is absent. There is no clinching evidence regarding the last seen of the appellant in the company of the deceased. In that view of the matter, the impugned judgment and order of conviction of the appellant under Section 302 of the I.P.C. is not sustainable in the eye of law. Accordingly, the same is hereby set aside.

It appears from the case records that the appellant is on bail. The bail bond, if any, executed by the appellant hereby stands cancelled.

Before parting with the judgment, we put on record our appreciation to Mr. Dillip Ray, learned counsel for rendering his assistance in arriving at the above decision. We also appreciate Mr. Rajesh Tripathy, learned Additional Standing Counsel for ably and meticulously presenting the case on behalf of the State.

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2024 (I) ILR-CUT-1251

S.K. SAHOO, J & S.K. MISHRA, J.

JAIL CRIMINAL APPEAL NO.124 OF 2005

NANDA ADHA ……Appellant

-V-

STATE OF ODISHA ……Respondent

CRIMINAL TRIAL – Whether "medical evidence" is sufficient to discard "ocular evidence"? – Held, No – If the ocular evidence is clear, consistent and trustworthy, merely because the medical evidence runs contrary to the oral evidence, the same cannot be a ground to discard the oral evidence – The medical officer is really of an advisory character given on the basis of the symptoms found on examination.

(Para 9)

Case Laws Relied on and Referred to :-

1. (1992) 3 SCC 204 : Madan Gopal Kakkad Vs. Naval Dubey & Anr.
2. (2014) 5 SCC 398 : Bastiram Vs. State of Rajasthan
3. (2013) 15 SCC 298 : Gangabhavani Vs. Rayapati Venkat Reddy.

For Appellant : Mrs. Suman Modi

For Respondent : Mr. Rajesh Tripathy, ASC

JUDGMENT Date of Hearing & Judgment: 18.01.2024

BY THE BENCH

The appellant Nanda Adha faced trial in the Court of learned Additional Sessions Judge, Deogarh in S.T. No.2 of 2004/S.T. No.436 of 2003 for commission of offence punishable under section 302 of the Indian Penal Code (hereinafter the

'I.P.C.') on the accusation that on 20.05.2003 at about 10 a.m., at village Rengalpali under Reamal police station in the district of Deogarh, he committed murder of his daughter Rebati Adha (hereinafter 'the deceased').

The learned Trial Court, vide impugned judgment and order dated 18.11.2004, found the appellant guilty of the offence charged and sentenced him to undergo imprisonment for life.

Prosecution Case:

2. The prosecution case, as per the first information report (hereinafter the 'F.I.R.') lodged by Janha Naik (P.W.1), the mother of the deceased before the officer-in-charge of Reamal police station on 20.05.2003, in short, is that she was the second wife of the appellant and out of their wedlock, a female child was born, who is the deceased in this case. At the time of occurrence, she was just one month old. It is further stated in the F.I.R. that since there was a scarcity of water in the house of the appellant, P.W.1 came to stay at her paternal place at village Rengalpali at the time of her delivery and after giving birth to the deceased, she was also staying there at her father's place. The appellant used to visit her occasionally. Three to four days prior to the occurrence, the appellant came to the paternal place of P.W.1 and compelled her to accompany him to his house. P.W.1 was unwilling to accompany the appellant on the ground of scarcity of water in the house of appellant, however she assured to go there in the rainy season. At this, the appellant got angry and tried to take away the deceased baby with him, but P.W.1 did not allow the appellant to take the deceased with him. It is further stated in the F.I.R. that on 20.05.2003 at about 10 a.m., while P.W.1 was cooking rice on the verandah of her house and the deceased was sleeping inside the house, the appellant came and entered into the room where the deceased was sleeping. Suddenly, P.W.1 heard cries of the deceased and ran inside and found that the appellant was administering injection on the abdomen of the deceased and upon seeing P.W.1, he took out that injection and fled away. Immediately, the deceased had some reaction on the body and her body became black and stiff. Noticing the health condition of the deceased, P.W.1 shouted that the appellant administered poisonous injection to the deceased and she also informed the co-villagers about the same. The villagers advised her to take the deceased to the hospital and while taking the deceased to the hospital, on the way on the outskirts of village Rengalpali, due to the side effect of poisonous injection, the deceased died.

P.W.1 came to Reamal police station on 20.05.2003 and orally reported the matter before P.W.10 Sanatana Mahananda, the officer-in-charge of Reamal police station who reduced the same into writing and it was read over and explained to P.W.1 and when she admitted it to be correct, her thumb impression was taken on the report, which was treated as F.I.R. and Reamal P.S. Case No.50 dated 20.05.2003 was registered under section 302 of the I.P.C. against the appellant.

P.W.10 took up investigation of the case, examined the informant, other witnesses, held inquest over the dead body, prepared inquest report vide Ext.1, sent the dead body to the District Headquarters Hospital, Deogarh for post mortem examination, arrested the appellant on 21.05.2003 and on the basis of the statement of the appellant and at his instance, one syringe was recovered from the backyard of one Uma Pradhan and one tin diba containing some liquid substance was recovered from the house of the appellant in presence of the witnesses, as per seizure list Ext.2 and Ext.4 respectively. P.W.10 received the post mortem examination report (Ext.5) and he sent the plastic injection syringe, tin diba along with the viscera preserved by the doctor, who conducted post mortem examination, to the S.F.S.L., Rasulgarh for chemical examination through S.D.J.M., Deogarh. He made a query to the medical officer, who conducted the post mortem examination regarding whether the death of the deceased could be caused by pesticide poisonous injection and the doctor opined in affirmative as per his opinion vide Ext.6. P.W.10 received the chemical examination report from S.F.S.L., Rasulgarh vide Ext.11 and on completion of investigation, he submitted charge sheet under section 302 of the I.P.C. against the appellant.

Framing of Charges:

3. After submission of the charge sheet, complying with the due committal procedure, the case was committed to the Court of Session, where the learned trial Court framed the charge against the appellant as aforesaid. As the appellant pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to establish his guilt.

Prosecution Witnesses & Exhibits:

4. In order to prove its case, the prosecution examined as many as ten witnesses.

P.W.1 Janha Naik is the wife of the appellant and mother of the deceased baby. She narrated the unfortunate incident as it unfolded on the date of occurrence.

P.W.2 Gurubari Naik is mother-in-law of the appellant who stated that on the date of occurrence, upon hearing the shout of P.W.1, she came running to her house and found the appellant running away from the house after injecting the deceased.

P.W.3 Bipin Bihari Kumura is a witness to the preparation of the inquest report vide Ext.1. He stated that the appellant, while in police custody, confessed to have injected the deceased and to have thrown the syringe along with remnant of the injection inside a bari. He is also a witness to the leading to discovery of the syringe at the instance of the appellant vide seizure list Ext.2 and recovery of a diba at the instance of the appellant from his house as per seizure list Ext.4.

P.W.4 Dr. Gangadhar Pradhan was the Assistant Surgeon in the District Headquarters Hospital, Deogarh who conducted post mortem examination over the dead body of the deceased and proved his report vide Ext.5.

P.W.5 Rudra Charan Biswal was the constable attached to Reamal police station who took the dead body of the deceased to the District Headquarters Hospital, Deogarh for post mortem examination.

P.W.6 Bida Naik is the father-in-law of the appellant who stated to have seen froth coming out of the mouth of the deceased. He stated to have learnt from P.W.2 that the appellant, after injecting the deceased fled away.

P.W.7 Runu Pradhan stated that he has no personal knowledge about the occurrence. He was declared hostile by the prosecution.

P.W.8 Kishore Chandra Pradhan is a co-villager of the informant (P.W.1). He stated that on the date of incident, upon hearing hulla raised by P.W.1 and P.W.2, he went to their house and heard that the appellant fled away from the spot after administering poison to the deceased. He further stated that the deceased was struggling for death and while she was being taken to the hospital, she died. He also stated that while going to the house of the informant, he had seen the appellant at the outskirts of the village.

P.W.9 Bijaya Behera stated that he has no personal knowledge about the occurrence. He was declared hostile by the prosecution.

P.W.10 Sanatana Mahananda was working as the O.I.C. of Reamal Police Station, who on the oral report of P.W.1, registered the F.I.R. He is the investigating officer of this case.

The prosecution exhibited 11 documents. Ext.1 is the inquest report, Exts. 2 and 4 are the seizure lists, Exts.3 and 4/3 are the confessional statements of the accused, Ext.5 is the P.M. examination report, Ext.6 is the opinion report of the doctor, Ext.7 is the command certificate, Ext.8 is the F.I.R., Ext.9 is the dead body challan, Ext.10 is copy of the requisition sent to the S.F.S.L. and Ext.11 is the chemical examination report.

Defence Plea:

5. The defence plea of the appellant is one of denial. However, the appellant neither examined any witness not proved any document to negate the claim of the prosecution.

Findings of the trial Court:

6. The learned trial Court, after assessing the oral as well as the documentary evidence, came to hold that the medical opinion given by the doctor goes to show that the death of the baby could be possible by injecting pesticide through a syringe. The learned trial court accepted version of the witnesses P.W.1, P.W.2, P.W.6 and P.W.8 as truthful and came to hold that from the oral and medical evidence adduced by the prosecution, it is crystal clear that the appellant is solely responsible for intentionally causing the death of the deceased by injecting insecticide poison with an injection syringe. The evidence of P.W.1, P.W.2 & P.W.6 coupled with the medical

report and the chemical examination report (Ext.11) clearly goes to show that there is strong circumstance against the appellant, which point out accusing finger on him, who is absolutely responsible for the homicidal death of the deceased. Accordingly, the appellant was held guilty for the offence under section 302 of the I.P.C.

Contention of the Parties:

7. Mrs. Suman Modi, learned Amicus Curiae for the appellant contended that even though the evidence of eye witness, i.e. P.W.1 indicates that the appellant gave injection on the belly of the deceased baby and that she further stated that there was a mark on the belly of the deceased when the injection was given and that she had shown that spot on the body to the police and there was little bleeding due to injection, but the I.O. (P.W.10) has stated that at the time of inquest, he could not notice any mark of injection on the belly of the deceased. The learned counsel further argued that even the doctor, who conducted post mortem examination, has stated that injury is a must when there is a pick by an injection and therefore, the evidence of P.W.1 that she saw the appellant giving injection on the belly of the deceased, which resulted in her death, is not acceptable. Placing reliance on the statement of P.W.2, it is further argued that the appellant was taking proper care of his daughter (the deceased) from her birth till 'NAMAKARAN' and there was good understanding between the appellant and P.W.1 after marriage and therefore, there was no motive on the part of the appellant to commit murder of the deceased baby merely because P.W.1 did not agree to accompany him to his house or did not allow the deceased baby to be carried by the appellant. The learned counsel contended that since the case mainly rests upon solitary evidence of P.W.1 and her evidence is not clinching and trustworthy and it is not corroborated by the medical evidence, it would be very risky to accept such evidence to convict the appellant and therefore, it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Rajesh Tripathy, learned Addl. Standing Counsel, on the other hand, supported the impugned judgment and argued that P.W.1, being the wife of the appellant, had no axe to grind against him and she was not supposed to implicate her husband falsely in a case of murder and her evidence as an eyewitness has not been shaken at all. The learned counsel further argued that the evidence of the P.W.1 not only gets corroboration from the medical evidence adduced by P.W.4, but also the recovery of the injection syringe and diba so also the chemical analysis report of the viscera of the deceased and the chemical examination report marked as Ext.11 clearly indicate that endosulfan, an insecticidal poison was detected not only in Ext.A (injection syringe), but also in Ext.B (tin daba containing liquid) and in viscera. The learned counsel strenuously argued that absence of motive is not a factor to disbelieve the prosecution case when P.W.1 deposed as an eye witness to the occurrence which is trustworthy and in view of the materials available on record and the manner in which being the father of the deceased baby, the appellant administered poisonous injection to the baby, who was only one month old at the time of occurrence, the Trial Court has rightly found the appellant guilty of the

charge and therefore, the appeal should be dismissed.

Whether the versions of the eye witness (P.W.1) is reliable and trustworthy?:

8. Adverting to the contentions raised by the learned counsel for the respective parties, let us first examine the evidence of the star witness of the prosecution, who is none else than the informant (P.W.1), the wife of the appellant and the mother of the deceased baby. She has stated that at the time of occurrence, she was in her paternal house at village Rengalpali as there was shortage of water in the village of appellant and she came to her paternal place for the purpose of delivery, where she gave birth to the deceased. She further stated that after the birth of the deceased, the appellant had come to her house and went back to his house. After two days, he again came and at that time, the new born daughter (deceased) was sleeping inside the room and she was cooking on the verandah. She heard the deceased crying and rushed there and saw the appellant giving injection on the belly of the deceased and after administering the injection, the appellant fled away. She further stated that she shouted for which the neighbours came there and upon seeing the sensitive condition of the deceased, they advised her to take the baby to the hospital. While the deceased was being taken to the hospital, she died at the outskirts of the village, after which P.W.1 took the dead body to the police station and orally reported the matter.

In the cross-examination, P.W.1 has stated that the deceased was aged one month and that before she slept, she had given her breast milk. Suggestion was given to P.W.1 that while she was feeding her baby, there was suffocation for which the deceased died, but she has denied the same. She further stated that since there was no issue out of the first marriage of the appellant, the appellant married her for second time for begetting a child. In the cross-examination, it has been further elicited that there was a mark on the belly of the deceased when injection was given. She had shown that spot on the body of her deceased baby to the police and there was a little bleeding due to the injection given and prior to that, no injection was given to the deceased. She further stated that the appellant used to remain with his first wife at village Neherapal and she was objecting it frequently. The evidence of P.W.1 has remained unshattered.

The evidence of P.W.1 is getting corroboration from the evidence of P.W.2, who is her mother and stated that due to shortage of water in the village of the appellant, P.W.1 was brought for delivery. She further stated that while she was in the backyard, she heard shout of P.W.1 and came running and found the appellant running away from the house and she shouted for help for which the neighbours rushed to her house. In the cross-examination, it has been confronted to her and proved through the I.O. that she had not stated before the police to have seen the appellant running away after injecting. Since such a statement has been made for the first time in Court, we are not inclined to place reliance on that part of the evidence. However, the statement of P.W.2 that she heard the shout of P.W.1 and came running and thereafter, the deceased was shifted for medical treatment but at the outskirts of the village, the baby died, corroborates the version of P.W.1.

The doctor (P.W.4), who conducted post mortem examination, found that the body was looking bluish, tongue was protruded and bluish, cyanosis found in finger tips and toes tips, face was bluish, hypostasis was present on the back, however no injury was detected. He opined that the cause of death was due to asphyxia, however he reserved the final opinion awaiting the chemical examination report of the viscera, which was preserved by him. He proved the post mortem report vide Ext.5. In the cross-examination, he has stated that the possibility of the death of the child while breast feeding cannot be ruled out, but it is remote. He further stated that injury is a must when there is pick by injection and no syringe was produced before him for his examination and opinion. He did not notice any sign of injection on the body of the deceased at the time of his post mortem examination. However, in the further chief-examination on recall by the prosecution, he stated that he received a query from the police to opine whether injecting pesticide by a syringe would lead to death or not, to which he replied that death in such case is possible and he proved his report to that effect vide Ext.6.

At the instance of the appellant and basing on his statement recorded under section 27 of the evidence Act, one syringe was recovered from the backyard of one Uma Pradhan and a tin diba containing some liquid was seized from the house of the appellant and in that respect, the evidence of I.O. (P.W.10) so also the evidence of P.W.3 are very clinching and nothing has been elicited in the cross-examination to dislodge such statements. The injection syringe marked as ‘A’ and the tin diba marked as ‘B’, which were seized at the instance of the appellant so also the viscera collected by the doctor during post mortem examination were sent for chemical examination and the chemical examination report (Ext.11) indicates that endosulfan, an insecticidal poison was detected in the exhibits marked as ‘A’, ‘B’ and in the viscera. The possibility of the death of the child while breast feeding as stated by the doctor is no way relevant in view of the C.E. Report.

Whether medical evidence sufficient to discard ocular evidence of P.W.1?:

9. The submission of the learned counsel for the appellant that as the medical evidence runs contrary to the ocular evidence since the doctor did not notice any sign of injection on the body of the deceased, the evidence of P.W.1 is to be discarded, is not acceptable. It is difficult to accept such proposition, because the body of the deceased baby and face were looking bluish and the tongue was protruded and bluish and more particularly, after-effects of the injection have been deposed to by P.W.1. Recovery of exhibits ‘A’ and ‘B’ at the instance of the appellant so also the viscera report indicate that one particular poison i.e. endosulfan was found in all the three and the ocular evidence of P.W.1 has not at all been shaken. Above all, it is apparent from the case records that the post-mortem was conducted a day after the death of the deceased. Therefore, relying on the evidence of the doctor regarding absence of any injection sign on the body of the deceased, we cannot discard the version of P.W.1 and other surrounding circumstances appearing on record against the appellant particularly in view of the finding of C.E.

Report (Ext.11). Law is well settled, as held in case of **Madan Gopal Kakkad -Vrs.- Naval Dubey and another reported in (1992) 3 Supreme Court Cases 204** that 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. Law is well settled that if the ocular evidence is clear, consistent and trustworthy, merely because the medical evidence runs contrary to the oral evidence, the same cannot be a ground to discard the oral evidence. In the case of **Bastira -Vrs.- State of Rajasthan reported in (2014) 5 Supreme Court Cases 398**, it was observed:

> 33. The question before us, therefore, is whether the "medical evidence" should be believed or whether the testimony of the eyewitnesses should be preferred? There is no doubt that ocular evidence should be accepted unless it is completely negated by the medical evidence. This principle has more recently been accepted in **Gangabhavani -Vrs.- Rayapati Venkat Reddy : (2013) 15 Supreme Court Cases 298**.

Motive behind commission of the crime:

10. In view of the foregoing discussions, we find that the evidence of P.W.1, who is the wife of the appellant is clear, clinching, trustworthy and absolutely reliable and her evidence that poisonous injection was administered to the deceased baby for which there was reaction on the body of the deceased and she died, is not only getting corroboration from the external appearance of the deceased, which was noticed at the time of post mortem examination, but also from the opinion given by the doctor (Ext.6) coupled with the chemical examination report (Ext.11) that endosulfan, an insecticidal poison was detected in the exhibits marked as 'A', 'B' and in the viscera. No doubt, P.W.2 has stated that there was good understanding between the appellant and P.W.1 after the marriage, but there is also evidence on record that since the appellant was frequently remaining with his first wife at village Neherapal, P.W.1 used to object it. Moreover, in a case based on direct evidence, failure of the prosecution to assign specific motive on the part of the appellant behind the alleged crime is neither significant nor relevant. Therefore, the submission of the learned counsel for the appellant that since there was no motive on the part of the appellant to commit the crime, the prosecution case is to be discarded, is not acceptable.

Conclusion:

11. In view of the foregoing discussions, the ocular evidence of P.W.1, the medical evidence adduced by P.W.4, the recovery of the syringe and plastic diba containing poison at the instance of the appellant and the findings of the chemical examination report, we are of the humble view that the appellant injected endosulfan poison to the deceased baby which resulted in her death and therefore, learned trial Court has rightly found the appellant guilty under section 302 of the I.P.C.

Accordingly, the JCRLA being devoid of merit stands dismissed.

It appears that the appellant was granted bail by this Court on 17.06.2014. He shall surrender within a period of two weeks from today, failing which the learned trial Court shall take appropriate steps for the arrest of the appellant for undergoing the sentence as awarded by the Trial Court, which is confirmed by us.

The Trial Court record along with a copy of this judgment be sent down to the concerned Court for information and compliance.

Before parting with the judgment, we put on record our appreciation to Mrs. Suman Modi, learned Amicus Curiae for rendering her assistance in arriving at the above decision. She shall be entitled to her professional fee which is fixed at Rs.7,500/-. We also appreciate Mr. Rajesh Tripathy, learned Additional Standing Counsel for ably and meticulously presenting the case on behalf of the State.

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2024 (I) ILR-CUT-1259

S.K. SAHOO, J & S.K. MISHRA, J

JCRLA NO. 86 OF 2005

1. BICHI NAIK ……Appellants
2. MAYADHAR NAIK

-V-

STATE OF ODISHA ……Respondent

(A) CRIMINAL TRIAL – The appellants found guilty U/ss. 302/34 of IPC – The evidence of solitary witness P.W.13 is full of material contradiction – At the first instance, there was no implication against the appellant No. 2 that he assaulted the deceased – Whether the learned Trial Court was justified in placing reliance on the evidence of P.W.13 to convict appellant No.2 ? – Held, No.

(B) CRIMINAL TRIAL – Offence U/ss. 302/34 – The prosecution did not explain the injuries on the person of the accused at the time of occurrence or in the course of altercation – What inference the court can draw from this circumstance? – Explained with reference to case law.

Case Law Relied on & Referred to :-

1. A.I.R. 1976 Supreme Court 2263 : Lakshmi Singh -Vrs.- State of Bihar.

For Appellants : Ms. Anima Dei, Amicus Curiae
For Respondent : Mr. Arupananda Das, AGA

JUDGMENT Date of Hearing & Judgment : 30.01.2024

BY THE BENCH

The appellants Bichi Naik and Mayadhar Naik faced trial in the Court of learned Adhoc Additional Sessions Judge, Khurda in S.T. Case No. 29/252 of 2003

for commission of offences punishable under sections 341/323/302/34 of the Indian Penal Code (hereinafter the 'I.P.C.') on the accusation that on 23rd June 2002 at about 9.00 a.m. in the paddy field situated at Tutumbar Palli Mouza, they wrongfully restrained Dasa Sitha (hereinafter 'the deceased'), voluntarily caused hurt to Bhaskar Sitha (P.W.13) and also committed murder of the deceased in furtherance of their common intention.

The learned trial Court vide judgment and order dated 23rd November 2004 found the appellants guilty under section 302/34 of the I.P.C. and sentenced each of them to undergo rigorous imprisonment for life and to pay a fine of Rs.2,000/- (rupees two thousand), in default, to undergo further rigorous imprisonment for two months.

Since it was brought to the notice of this Court that the appellant no.1 Bichi Naik was dead, as per order dated 16.01.2024, it was held that the JCRLA so far as appellant no.1 Bichi Naik is concerned, stood abated.

Prosecution Case:

2. The prosecution case, as per the first information report (hereinafter 'F.I.R.') (Ext.5) lodged by Janak Sasmal (P.W.10) before P.W.16, the Officer in-charge of Tangi police station on 23.06.2002, in short, is that on that day at about 9.00 a.m., while he along with the deceased and P.W.13 were cultivating their land situated in Tutumbar Palli Mouza, the appellants Bichi Naik, Mayadhar Naik and two others namely, Raj Naik and Aparti Naik came there being armed with lathi, katuri and gupti and abused the deceased in filthy language, assaulted him by slaps, fist and kick blows and also pressed his neck. The appellant no.1 Bichi Naik dealt katari blow to the deceased and Aparti Naik also assaulted the deceased by gupti. The deceased sustained head injuries and there was severe bleeding for which he fell down on the ground. P.W.13 Bhaskar Singh, the cousin brother of the deceased intervened to rescue the deceased and he was also assaulted by all the accused persons. The informant (P.W.10) and other persons shifted the deceased to Tangi Government Hospital for treatment but since his health condition deteriorated and there was continuous bleeding from his nose, ears and mouth and he was senseless, the deceased was shifted in an Ambulance to S.C.B. Medical College and Hospital, Cuttack.

P.W.16 registered Tangi P.S. Case No.106 dated 23.06.2002 under sections 341/294/323/324/326/307/506/34 of I.P.C. against four accused persons including the appellants and directed the S.I. of Police, Sangram Keshari Biswal (P.W.15) to take up investigation of the case.

During the course of investigation, P.W.15 examined the informant, came to Tangi Hospital where he came to know that the deceased had been referred to S.C.B. Medical College and Hospital, Cuttack and shifted there by his relatives. He visited the spot, collected the sample earth and blood stained earth from the spot and prepared seizure list (Ext.2). He searched the house of appellant no.1 Bichi Naik and seized one katuri with wooden handle as per seizure list (Ext.3). The deceased while

undergoing treatment at Cuttack expired and the intimation was received by P.W.16 from Mangalabag police station. Accordingly, the case turned to one under section 302 of I.P.C. and P.W.16 took over charge of investigation from P.W.15. P.W.16 visited the spot, examined the witnesses, seized the broken stick as per seizure list (Ext.4/1). He prepared the spot map (Ext.9), arrested the appellant no.2 Mayadhar Naik on 27.06.2002 and forwarded him to Court on 28.06.2002. He received the injury report of P.W.13 Bhaskar Singh vide Ext.1 and further received information that the appellant no.1 Bichi Naik was undergoing treatment at Capital Hospital, Bhubaneswar and was to be discharged on the same day. P.W.16 proceeded to Bhubaneswar, reached at Capital Hospital, examined the appellant no.1, arrested him after his discharge and produced him before the Court of learned S.D.J.M., Khurda. He sent requisition to Tahasildar, Tangi for demarcation of the disputed spot and the Tahasildar deputed R.I., Tangi to demarcate the land, who prepared the sketch map (Ext.10).

After the death of the deceased, one U.D. case was registered in Mangalabag police station and in that U.D. case, inquest was conducted over the dead body of the deceased, dead body was sent for post-mortem examination and the I.O. (P.W.16) received the U.D. Case records from Mangalabag police station. He also seized the blood stained lungi and napkin of the deceased under seizure list (Ext.8). The seized katuri (M.O.IV) was sent to the doctor, who conducted post-mortem examination for his opinion and the said opinion (Ext.13) was received by the I.O. He examined some other witnesses and made a prayer in the Court of learned S.D.J.M., Khurda to send the material objects to S.F.S.L., Rasulgarh for chemical examination. On completion of investigation, P.W.16 submitted the charge sheet against the appellants on 23.10.2023 under Section 341/323/302/34 of the I.P.C. against the appellants and showing accused Aparti Nayak as absconder.

Framing of charges:

3. After submission of charge sheet, the case was committed to the Court of Session after complying due committal formalities. The learned trial Court framed charges against the appellants as aforesaid and since the appellants refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute them and establish their guilt.

Prosecution Witnesses, Exhibits & Material Objects:

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

P.W.1 Dr. Ezarun Bibi was the Medical Officer attached to U.G.P.H.C., Tangi, Khurda, who examined the injured (P.W.13) on police requisition and proved her report vide Ext.1.

P.W.2 Dandapani Sitha and P.W.7 Manguli Sitha are the witnesses to the seizure of blood stained earth and katuri as per seizure lists Ext.2 and Ext.3 respectively.

P.W.3 Sahadev Sahu, P.W.4 Bisika @ Fula Rout, P.W.5 Patitapaban Sahu and P.W.12 Sarat Pradhan did not support the prosecution case for which they were declared hostile by the prosecution.

P.W.6 Biranchi Sitha is a co-villager of the deceased. He stated that while he was taking meal, P.W.9 came and informed him that the appellant no.1, Lodha and Aparti had killed the deceased and immediately he rushed towards the land of the deceased and on the way, he saw that Rabin Sitha and the mother of the deceased were also proceeding towards the spot. He further stated that when they reached at the spot, an auto rickshaw also reached and they brought the injured to the police station and thereafter to the hospital and he found bleeding injury on the head and on the root of the left ear of the deceased and the deceased died at Cuttack hospital while undergoing treatment.

P.W.8 Shantilata Dei is the mother of the deceased and also a post-occurrence witness. She stated that that when she arrived at the spot, she found the deceased lying on the ground with severe bleeding injury. She further stated that she brought the deceased to Tangi Hospital and subsequently, he was referred to S.C.B. Medical College and Hospital, Cuttack where he died. She also stated that P.W.13 had cut injuries on his hand and left side leg.

P.W.9 Krushna Chandra Sitha is a co-villager and also a post-occurrence witness. He stated that when he went to pluck mango and jackfruit, he heard a shout from P.W.13 to save him and then he got up and saw labourers were running away and the appellants along with Aparti Nayak came back to the village. He further stated that P.W.13 came to him and told him that the deceased had sustained head injury. He returned back and informed P.W.8 that the deceased was lying with injuries in the land.

P.W.10 Janak Sasmal is the informant in the case. He stated that he saw the appellants and one Aparti coming to the land of the deceased holding katuri and gupti but by the time he reached the spot, the appellants had already left the place causing injury on the back side neck of the deceased. He further stated that he brought the injured to Tangi hospital from where he was shifted to Cuttack and as per the instruction of P.W.13, he drafted the F.I.R. and presented it to the police.

P.W.11 Pathani Pradhan was the auto driver, who took the patient to the hospital.

P.W.13 Bhaskar Sitha is the injured and the brother of the deceased and also an eye witness to the occurrence. He supported the prosecution case.

P.W.14 Baikunthanath Dhir was the A.S.I. of Police attached to Mangalabag police station, who held the inquest over the dead body of the deceased and sent the dead body for post mortem examination and after receiving the post mortem report, he sent the U.D. case record along with the inquest report, seizure list, dead body challan, post mortem report and the seized articles to the Officer in-charge of Tangi police station.

P.W.15 Sangram Keshari Biswal was the S.I. of Police attached to Tangi police station, who is the first Investigating Officer of the case. He stated that the injured succumbed to the injury, the Officer in-charge of Tangi police station took over charge of the case from him.

P.W.16 Bikash Ranjan Beura was the Officer in charge of Tangi police station, who took over investigation of the case from P.W.15 and submitted charge sheet against the appellants.

P.W.17 Tofan Sitha is an eye witness and also a witness to the inquest over the dead body of the deceased.

The prosecution exhibited seventeen documents. Ext.1 is the medical examination report of P.W.13, Ext.2, Ext.3, Ext.4/1 and Ext.8 are the seizure lists, Ext.5 is the F.I.R., Ext.6 is the inquest report, Ext.7 is the dead body challan, Ext.9 is the spot map, Ext.10 is the sketch map, Ext.11 is the post-mortem report, Ext.12 is the requisition (query) for opinion to doctor Sraban Kumar Nayak, Ext.13 is the opinion of Dr. S.K. Nayak, Ext.14 is the query to Dr. S.K. Nayak, Ext.15 is the opinion of Dr. S.K. Nayak, Ext.16 is the forwarding letter of S.D.J.M., Khurda dated 27.07.2002 to S.F.S.L., Rasulgarh, Bhubaneswar and Ext.17 is the Chemical Examination report.

The prosecution also marked five material objects. M.O.I is the stick, M.O.II is the green colour lungi, M.O.III is the white colour napkin, M.O.IV is the katuri and M.O.V is the spade.

Defence Plea:

5. The defence plea of the appellants was that on account of civil dispute between the parties, on the date of occurrence, the deceased and P.W.13 chased the appellants and the deceased assaulted the appellant no.1 on his head by means of a spade and the appellant no.1 snatched away the spade from the hands of the deceased and in order to save himself, he waived the spade.

In order to prove the defence plea, appellant no.1 Bichi Naik examined himself as D.W.1. On behalf of the defence, certified copy of the F.I.R., which was lodged by Aparti Naik, the cousin brother of the appellant no.1 on behalf of the appellants before the Officer in-charge of Tangi police station in Tangi P.S. Case No.105 dated 23.06.2002, charge sheet in the said case, injury report of the appellant no.1, requisition for final opinion of injury of the appellant no.1 and final opinion of the appellant no.1 relating to the injury so also the certified copy of the order dated 13.03.2003 in G.R. Case No.520 of 2002 which arises out of Tangi P.S. Case No.105 dated 23.06.2002 were marked as Exts.A, B, C, D, D/1 & E respectively.

Findings of the Trial Court:

6. The learned trial Court after assessing the ocular as well as documentary evidence on record came to hold that the deceased met with homicidal death. The learned trial Court did not accept the defence plea and relying on the evidence of the injured eye witness P.W.13, held the appellants guilty under section 302/34 of the I.P.C.

Contentions of the Parties:

7. Ms. Anima Dei, learned Amicus Curiae appearing for the appellant no.2 Mayadhar Naik argued that the evidence of the sole eye witness to the occurrence i.e. P.W.13 is not trustworthy and there are material contradictions in his evidence and he has failed to explain how the appellant no.1 sustained injury for which he was hospitalized. It is argued that P.W.13 is an accused in the case instituted from the side of the appellants relating to the occurrence in question and therefore, it would be very risky to accept his evidence to convict the appellant no.2 under section 302 of I.P.C. and therefore, it is a fit case, where benefit of doubt should be extended in favour of the appellant no.2.

Mr. Arupananda Das, learned Additional Government Advocate, on the other hand, supported the impugned judgment and submitted that the presence of P.W.13 being an injured witness, cannot be disputed at the spot. Evidence of P.W.13 relating to the assault on the deceased so also on him is getting corroboration from the medical evidence. He further argued that though some documents have been proved from the side of the defence and the appellant no.1 has been examined as D.W.1 to put forth the defence plea but in the accused statement, no such plea has been taken and therefore, no importance is to be attached to the defence plea and since the injuries were caused on the vital part of the body of the deceased and as per the post-mortem report (Ext.11), the cause of death was due to craniocerebral injury and the injuries received by the deceased were ante mortem in nature and the doctor has opined that the injuries were possible by the seized weapons, which were sent to him i.e. katuri and stick, the learned trial Court has rightly held the appellant not.2 guilty under section 302/34 of I.P.C. and even if the injury report, which has been proved from the side of the defence is taken into account, since the injuries sustained by the appellant no.1 were simple in nature, the prosecution is not duty bound to explain such injuries and therefore, the appeal should be dismissed.

Whether the deceased met with a homicidal death?:

8. Before adverting to the contentions raised by the learned counsel for the respective parties on other aspects, it is pertinent to note that the doctor, who conducted post mortem examination, could not be examined during trial. However, the post-mortem report has been marked as Ext.11 without objection. The doctor has noticed the following injuries:

> "1) A stitched lacerated wound of 5 c.m. long situated obliquely on the right temporoparietal region extending upward 6 c.m. behind right ear root to end 2.5 c.m. in front of right parietal eminence;
>
> 2) Contusion looking black of size 10 c.m. X 6 c.m situated on the right temporo mastoid region;
>
> 3) Contusion looking black 4 c.m. X 3 c.m. situated on the left mastoid region;
>
> 4) Abrasion looking reddish brown 5 c.m. X 0.7 c.m. situated transversely on the middle of left anterolateral aspect of the neck;

5) Multiple abrasions looking reddish brown colour of sizes varying from 0.5 c.m. to 1.5 c.m. X 0.5 cm. to 1 c.m. situated on the dorsum of right palm mid part of left arm, left lateral aspect of chest and left postero lateral aspect of the neck.

On dissection, the doctor found as follows:

1) Under surface of the scalp was contused over left parietal and entire right half associated with sub-scalp haematoma and contusion of both temporal muscles;

2) Depressed fracture of size 5 c.m. X 5 c.m. situated on right temporoparietal skull just below and lateral to right parietal eminence with a fissure fracture extending forward and to the left for 9 c.m.;

3) Extradural haematoma of 0.5 c.m thickness detected over right parietal region over an area 10 c.m. X 5 c.m. underneath the fissure fracture;

4) Undersurface of right temporal lobe was contused and associated with subdural haematoma.

The doctor also found from the depressed fracture one fissure fracture extended downward and forward to involve base of right middle cranial fossa up to the midline. The doctor opined that death was due to craniocerebral injuries. External injuries corresponding to internal injuries were opined to be fatal in ordinary course of nature. The doctor vide Ext.15 opined that the external injury no.1 with its corresponding internal injuries could be caused by spade.

In view of the inquest report marked as Ext.6, the post mortem report findings and the materials available on record, we are of the humble view that the learned trial Court has rightly come to the conclusion that the deceased met with homicidal death.

Appreciation of evidence of P.W.13:

9. The conviction of the appellant no.2 Mayadhar Naik is based on the testimony of solitary eye witness (P.W.13). There is no dispute over the proposition of law that the Court can and may act on the testimony of a single witness particularly when he is an injured one provided that he is wholly reliable and his evidence has a ring of truth and it is found to be cogent, credible and trustworthy. There is no legal impediment in convicting a person on the sole testimony of such a witness. This is the logic behind section 134 of the Indian Evidence Act, 1872. The evidence has to be weighed and not counted. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. Convincing evidence is required to discredit an injured witness. However, if there are doubts about his testimony, the Court shall insist on corroboration. When the testimony of the solitary eye witness does not come up to the mark and is replete with infirmities, the same can be overlooked.

The first information report according to P.W.10 was lodged as per the version of the injured (P.W.13). However, in the said report, there is nothing that the

appellant no.2 assaulted the deceased Dasa Sitha. It is specifically mentioned in the F.I.R. that only two persons participated in the assault of the deceased i.e. appellant no.1 Bichi Naik and one Aparti Naik. P.W.13 in his evidence has stated that the appellant no.1 was holding a katuri and the appellant no.2 was holding a gupti and seeing the accused persons coming to the land where the deceased was working with labourers, he got up and enquired as to what had happened. Appellant no.1 suddenly caught hold of the left hand of P.W.13 and the appellant no.2 gave fist blows on his face over the lips and then dealt a blow by the gupti on the back side of his head and then both the appellants caught hold the deceased and at that time, Aparti took out the gupti and threatened him and thereafter Aparti rushed towards the deceased and all three of them put the deceased on the land and then both the appellants assaulted the deceased by means of a katuri and spade on his head and the appellant no.2 called Aparti to leave the place saying the deceased was dead. However, it has been confronted to P.W.13 and proved through the Investigating Officer (P.W.16) that P.W.13 has not stated that the appellant no.1 assaulted the deceased with a katuri and then appellant no.2 assaulted on the back side head of the deceased with a spade. Rather, he has stated that when Aparti and appellant no.2 chased him to kill, he ran towards the land of Padmanava and after running to a distance, when he returned back, he saw the appellant no.1 had put the deceased on the land and assaulting on his head by snatching the spade from the deceased. Therefore, not only in the F.I.R., there is no accusation against the appellant no.2 to have participated in the assault of the deceased but also in the previous statement of P.W.13 before the I.O., there is nothing that the appellant no.2 assaulted the deceased. From the contradictions proved which appears to be material, the witness cannot be said to be absolutely reliable and truthful. Moreover, P.W.13 is an accused in the counter case which was instituted from the side of the appellants and he has also been charge sheeted under sections 447/427/323/324/34 of I.P.C. read with section 3 of S.C. & S.T. (PoA) Act in the said case.

From the side of the appellants, the F.I.R. was lodged at the first instance and the appellant no.1 was sent for medical examination on police requisition. Even P.W.13 has stated that the appellant no.1 was having bleeding injury on his right arm and the appellants arrived at the P.S. and at the hospital prior to them and that he saw the bandage on the head of the appellant no.1 at the hospital. P.W.13 has also admitted that the case was filed by Aparti Naik against him and the deceased for assaulting them on the same day of occurrence and he was arrested on the strength of warrant.

It is correct that no such specific defence plea has been taken in the accused statement, but law is well settled that even if the accused has not taken any specific plea of exercise of right of private defence but if the materials available on record suggest such exercise, the Court can consider the same and give benefit to the accused in appropriate case. Without even setting of a specific plea of private defence, the accused can even rely on the circumstances and admissions made by the witnesses in support of such plea. We find that not only the appellant no.1 has been

examined as D.W.1 to state about the defence case but also documents like F.I.R., charge sheet, the injury reports of appellant no.1 have been proved from the side of the defence and P.W.13 has not given any explanation as to how the appellant no.1 has received the injuries. In the case of **Lakshmi Singh -Vrs.- State of Bihar reported in A.I.R. 1976 Supreme Court 2263**, the Hon'ble Supreme Court held that if the prosecution does not explain the injuries on the person of the accused which were caused at the time of occurrence or in the course of altercation, it is a very important circumstance from which the Court can draw the following inferences:

> (1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
>
> (2) That the witnesses who have denied about the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;
>
> (3) That in case there is a defence version which explains the injuries on the person of the accused, it is rendered probable so as to throw doubt on the prosecution case.

It is further held that the omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution case. In the case at hand, when the evidence of solitary witness i.e. P.W.13 is full of material contradictions and even though at the first instance, there was no implication against the appellant no.2 to have assaulted the deceased, which has been developed during trial and it is proved through the Investigating Officer and moreover when the appellant no.1 has sustained injuries on the vital part of the body like his head as appears from Ext.C, even though the injuries have been opined to be simple in nature, but the said accused was hospitalized not only in Tangi Hospital but in Capital Hospital as stated by the Investigating Officer, we are of the view that the version of P.W.13 cannot be said to be clear, clinching, trustworthy and aboveboard so that this Court can place implicit reliance on his testimony to convict the appellant no.2. The learned trial Court was not justified in placing reliance on the evidence of P.W.13 to convict the appellant no.2.

Conclusion:

10. In view of the foregoing discussions, we are of the view that the impugned judgment and order of conviction of the appellant no.2 Mayadhar Naik under section 302/34 of I.P.C. is not sustainable in the eyes of law and the same is hereby set aside.

The appellant no.2, who is on bail by order of this Court, is hereby discharged from liability of the bail bonds and the surety bonds also stand cancelled.

Accordingly, the JCRLA is allowed. Trial Court records with a copy of this judgment be sent down to the concerned Court forthwith for information.

Before parting with the case, we would like to put on record our appreciation to Ms. Anima Dei, the learned Amicus Curiae for rendering her valuable help and assistance towards arriving at the decision above mentioned. She shall be entitled to her 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. Arupananda Das, learned Additional Government Advocate.

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2024 (I) ILR-CUT-1268

KRUSHNA RAM MOHAPATRA, J.

CMP NO. 21 OF 2024

BIJAYA KUMAR DAS & ORS. ……Petitioners

-V-

BIDULATA DAS & ORS. ……Opp.Parties

CODE OF CIVIL PROCEDURE, 1908 – Section 151 – The petitioners are running a Fly Ash Brick Factory on the land allotted to them in the final decree – After lapse of more than three years, the opposite parties filed CMA to recall the final decree – The Learned Trial Court passed an order of status quo while deciding the interim application arises out of CMA – By virtue of the order of status quo the petitioners are unable to operate the same and are restrained from earning their livelihood – Whether the impugned order of status quo is sustainable in the eyes of law? – Held, No – The impugned order has completely unsettled the settled position – The court should be extremely careful and see that, the rights of parties already accrued by virtue of the final decree which is not to be affected and a settled position is not be unsettled.

(Paras 11-12)

Case Laws Relied on and Referred to :-

1. (2007) 4 SCC 221: A.V. Papayya Sastry & Ors. v. Govt. of A.P. & Ors.
2. AIR 1962 SC 527 : Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal.

For Petitioners : Mr. Banshidhar Baug

For Opp.Parties : Mr. Prafulla Kumar Rath, Sr. Adv. with Mr. S.S. Mohanty

JUDGMENT Heard & Disposed of on : 04.03.2024

K.R.MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Order dated 22nd December, 2023 passed in IA No.01 of 2018 (arising out of CMA No.122 of 2015 and Final Decree Proceeding in CS No.57/714 of 2004/02) is under challenge in this CMP, whereby learned 1st Additional Senior Civil Judge, Bhubaneswar entertaining an application under Section 151 CPC directed the parties to maintain *status-quo* over the suit property till disposal of the CMA.

3. Mr. Baug, learned counsel submits that the Petitioners are LRs of late Atala Bihari Das. CS No. 57/714 of 2004/02 was filed for partition between the LRs of common ancestor late Golakha Bihari Das. During pendency of the suit, Bishnu Charan Das-Defendant No.2 died and he was substituted by his widow, namely, Swarnalata Das and son Ajit Das. No objection to the same was raised at any point of time during pendency of the suit. Judgment in the suit was passed on 24th April, 2006 and preliminary decree was drawn up accordingly on 11th May, 2006. Narayan Das-Defendant No.3, being aggrieved by the said preliminary decree, filed RFA No.46 of 2015 before this Court. During pendency of RFA No.46 of 2015, said Narayan Das expired and the Opposite Parties were substituted in his place. There was delay of 2920 days in filing the appeal. Hence, an application for condonation of delay was also filed along with the appeal memo. When the matter stood thus, Misc. Case No.183 of 2016 was filed for withdrawal of the appeal seeking leave to file an application for recalling the judgment and preliminary decree impugned in the appeal. The said Misc. Case was rejected vide order dated 4th August, 2016 (Annexure-1) holding it to be premature, as the delay in filing the appeal was not condoned by them. In due course, Final Decree Proceeding was initiated. Civil Court Commissioner submitted his report. Objection was filed by the Opposite Parties to the report of the Commissioner. The Commissioner was also cross examined. However, the report was accepted on 8th February, 2012 taking note of the objection filed and the submission of learned counsel for the parties. Assailing the same, Gagan Bihari Das preferred W.P.(C). No.5030 of 2012 (Annexure-3), which was dismissed as withdrawn vide order dated 17th August, 2015. Thereafter, the final decree was sealed and signed. After a lapse of more than three years, the Opposite Parties filed CMA No.122 of 2015 to recall the final decree dated 8th February, 2012. In the said CMA, IA No.01 of 2018 was filed with a prayer to restrain the Opposite Parties from changing the nature of the suit schedule property in the interest of justice. Objection was filed by the Petitioners to the said IA. However, the impugned order under Annexure-8 has been passed on 22nd December, 2023 directing the parties to maintain *status-quo* over the suit property till disposal of the CMA. Being aggrieved, this CMP has been filed.

4. It is submitted by Mr. Baug, learned counsel for the Petitioner that the allegation in the CMA was that the final decree was obtained by practicing fraud styling Ajit Kumar Das as son of Bishnu Charana Das, whereas he is the natural son of Atala Bihari Das. It is submitted that when final decree has been sealed and signed, the remedy available to the Opposite Parties was by filing the appeal under Section 97 CPC. Without adhering to the same, a novel method was adopted by filing an application under Section 151 CPC to recall the final decree. Further learned trial Court while adjudicating the petition under Section 151 CPC, also did not assign any cogent reason to pass a restraint order by directing the parties to maintain *status-quo* over the suit property. The Petitioners are running a Fly Ash Bricks Factory on the land allotted to them in the final decree. By virtue of the order

of *status-quo*, they are unable to operate the same and are restrained from earning their livelihood. The Fly Ash Bricks Factory was set up by taking loan from the bank. Due to closure of the unit, the Petitioners are also not in a position to repay the loan. Thus, the impugned order has caused irreparable loss to the Petitioners. Since the Petitioners have been allotted with the land in the final decree, which was a contested one and is yet to be set aside by any competent Court of law, they have a *prima facie* case and balance of convenience leans in their favour. These aspects were completely brushed aside by learned trial Court.

5. He, further submits that the judgment passed in Civil Suit clearly indicates that the LRs of Bishnu Charan Das and Narayan Das were being represented by one advocate. No objection to substitution of Ajit Kumar Das was raised at any time either before learned trial Court or during pendency of the Final Decree Proceeding. The CMA filed under Section 151 CPC itself is not maintainable. However, this Court should not delve into the same as the matter is still pending. When the Petitioners are in possession over the disputed property by setting up a Fly Ash Bricks Factory are earning their livelihood, no restraint order should be passed against them. It is his submission that till date, delay in filing the First Appeal from the preliminary decree has not been condoned and no endeavour is made by the Opposite Parties to get the delay condoned and move for an interim order therein. He, therefore, prays for setting aside the impugned order.

6. Mr. Rath, learned Senior Advocate appearing for the Opposite Parties vehemently objects to the same. At the outset, he submits that an application under Section 151 CPC to recall the Final Decree Proceeding is maintainable, when an allegation is made that it has been obtained by practicing fraud. In support of his case, he relied upon the decision in the case of ***A.V. Papayya Sastry and others vrs. Govt. of A.P. and others***, reported in ***(2007) 4 SCC 221***, wherein at para 31 it is held as under:

> *"31. In Indian Bank v. Satyam Fibres (India) (P) Ltd. referring to Lazarus Estates and Smith v. East Elloe Rural Distt. Council this Court stated: (SCC pp. 562-63, para 22)*
>
> *"22. The judiciary in India also possesses inherent power, specially under Section 151 CPC. to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour.* ***This power is necessary for the orderly administration of the court's business."*** *(Emphasis supplied)*

6.1. He further submits that the Court can exercise inherent power under Section 151 CPC to pass a restraint order to protect the lis during pendency of a proceeding where circumstances does not permit to move an application under Order XXXIX

Rules 1 and 2 CPC. He placed reliance in the case of ***Manohar Lal Chopra vrs. Rai Bahadur Rao Raja Seth Hiralal***, reported in ***AIR 1962 SC 527***, wherein Hon'ble Supreme Court at para 18 and 19 held as under:

> *"18. There is difference of opinion between the High Court's on this point. One view is that a Court cannot issue an order of temporary injunction if the circumstances do not fall within the provisions of Order 39 of the Code: Varadacharlu v. Narsimha Charlu; Govindarajulu v. Imperial Bank of India Karuppayya v. Ponnuswami; Murugesa Mudali v. Angamuthu Mudalis and Subramanian v. Seetaramas. The other vw is that a Court can issue an interim injunction under circumstances which are not covered by Order 39 of the Code, if the Court is of opinion that the interests of justice require the issue of such interim injunction: Dhaneshwar Nath v. Ghanshyam Dhar; Firm Bichchha Ram v. Firm Baldeo Sahai; Bhagat Singh v. Jagbir Sawhney and Chinese Tannery Owners' Association v. Makhan Lat. We are of opinion that the latter view is correct and that the Courts have inherent jurisdiction to issue temporary injunctions in circumstances which are not covered by the provisions of Order 39 CPC. There is no such expression in Section 94 which expressly prohibits the issue of a temporary injunction in circumstances not covered by Order 39 or by any rules made under the Code. It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression "If it is so prescribed" is only this that when the rules prescribe the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of Section 94 were not there in the Code, the Court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. No party has a right to insist on the Court's exercising that jurisdiction and the Court exercises its inherent jurisdiction only when it considers it absolutely necessary for the ends of justice to do so. It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of Section 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power.*
>
> *19. There is nothing in Order 39 Rules 1 and 2 which provide specifically that a temporary injunction is not to be issued in cases which are not mentioned in those rules. The rules only provide that in circumstances mentioned in them the Court may grant a temporary injunction."*

7. It is his submission that Ajit Kumar Das styling himself as the natural son of Bishnu Charan Das, entered into service, for which a criminal proceeding is pending against him and CBI has also filed charge sheet. In the Final Decree Proceeding Ajit Das by practicing fraud managed to get a share in his name. He described himself as the adopted son of Bishnu Charan Das, whereas said Bishnu Charan Das died issueless leaving behind his widow, Swarnalata. After death of Swarnalata share of Bishnu in the joint family property would have devolved upon the surviving legal heirs of Gagan, Atala and Narayan. Fraud vitiates everything. When the final decree has been obtained by practicing fraud, a petition under Section 151 CPC is maintainable and to protect the *lis* till disposal of the CMA, learned Trial Court has

passed an order of *status-quo*, which should not be interfered with. The land, over which the Fly Ash Bricks Unit has been established, is an agricultural land included in Consolidation Chaka. Thus, by running a Fly Ash Bricks Unit, the nature and character of the suit land will be changed. As such, learned trial Court has committed no error in passing the impugned order. Hence, he prays for dismissal of the CMP.

8. Heard learned counsel for the parties.

9. Perused the materials available on record.

10. There is no dispute to the fact that the preliminary decree was passed on contest against Defendant No.1, namely, Atala Bihari Das and on consent against other Defendants. Thus, Narayan Das and LRs of Bishnu Charan Das have consented to the preliminary decree passed in the suit. The Final Decree Proceeding was also contested by the parties and decree has already been drawn up since 8th February, 2012. The Petitioners are running a Fly Ash Bricks factory on their allotted land to earn their livelihood. In course of argument, Mr. Baug, leaned counsel for the Petitioners submits that the petition under Section 151 CPC in CMA No.122 of 2015 has been filed to recall the final decree on the allegation that it is obtained by practicing fraud in Court. No such allegation has been made in respect of the preliminary decree. Of course, an appeal against the preliminary decree filed by the Opposite Parties is stated to be pending. Admittedly, delay in filing the said appeal has not yet been condoned although it has been filed since 2015. A prayer was made to withdraw the appeal seeking leave to move an application to recall the preliminary decree. The said miscellaneous petition was dismissed by this Court vide order dated 4th August, 2016 (Annexure-1) holding it to be premature, more particularly, when the delay in filing the appeal has not been condoned. Thus, it appears that neither the preliminary decree nor the final decree has yet been set aside by any competent Court of law. Admittedly both the preliminary decree as well as final decree has been passed giving opportunity of hearing to the parties concerned. It also appears that the preliminary decree was passed on contest of predecessor of the Opposite Parties, namely, Narayan Das. Although the final decree was passed on 8th February, 2012 application under Section 151 CPC in CMA No.122 of 2015 was filed on 19th August, 2015, i.e., more than three years after such a final decree was sealed and signed.

11. Law is well settled that a petition under Section 151 CPC may be maintainable to recall a final decree without filing a regular appeal under Section 97 CPC, when an allegation of fraud on Court is made. A petition for interim protection can also be made in such a proceeding. When a Court is entertaining an application under Section 151 CPC to pass a restraint order filed in a petition to recall the final decree, it should be extremely careful and see that the rights of the parties already accrued by virtue of the final decree is not affected and a settled position is not unsettled.

12. This Court is not delving into the merit of the petition under Section 151 CPC (CMA No. 122 of 2015) or delay in filing the CMA, which is the subject matter of adjudication before learned trial Court. But the right accrued to the parties by the final decree should not be interfered with in any manner or by any order when the final decree was passed on contest and is still in vogue. In the instant case, the Petitioners are earning their livelihood by setting up a Fly Ash Bricks Factory. By the impugned order, they are restrained from operating the bricks unit. It is also submitted that the Petitioners are not in a position to repay loan as they are unable to operate the unit. The impugned order under Annexure-8 has completely unsettled the settled position since 2012, when the final decree was sealed and signed. In the instant case, the Petitioners have a prima facie case, as they have been allotted with the share in a contested Final Decree Proceeding over which they have set up a Fly Ash Bricks Factory. Balance of convenience also leans in their favour as they are in possession over the same and running a Fly Ash Bricks Factory. They will suffer irreparable loss if they are not allowed to operate the same, as they are earning their livelihood from the same. On the other hand, the Opposite Parties will not be at loss or inconvenience if the interim order of *status quo* is not continued further. These aspects were not taken into consideration by learned trial Court while passing the impugned order (Annexure-8).

13. Accordingly, the impugned order is not sustainable and the same is set aside.

14. The CMP is allowed to the aforesaid extent.

15. In the facts and circumstances, there shall be no order as to costs.

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2024 (I) ILR-CUT-1273

K.R. MOHAPATRA, J.

CMP NO. 26 OF 2024

MALATI NAYAK ……Petitioner

-V-

RUDRA PRASAD KAR & ORS. ……Opp.Parties

CODE OF CIVIL PROCEDURE, 1908 – Order VI, Rule 17 r/w Section 22 of Hindu Succession Act, 1956 r/w Section 4 of the Partition Act, 1893 and Section 44 of the Transfer of Property Act, 1882 – The petitioner filed petition for amendment to exercise the right of pre-emption – The Learned Trial Court rejected the petition – Whether any interference is needed? – Held, No – When the right of pre-emption is not permissible under law to be exercised by the plaintiff, amendment to that effect should not be allowed and learned trial court has committed no error in doing so. (Paras 9-10)

Case Laws Relied on and Referred to :-

1. AIR 1983 SC 319 : Haridas Aildar Thadani & Ors. v. Godrej Rustom Kermani.
2. 2023 (II) OLR 730 : Sulochana Parida & Ors. v. Kamini Parida & Ors.
3. 2022 SCC OnLine SC 1128 : L.I.C. of India v. Sanjeev Builders Pvt. Ltd. & Anr.

For Petitioner : Mr. Sidhartha Mishra

For Opp.Parties : Mr. Tusar Kumar Mishra,
Mr. S.S. Rao, Sr.Adv, Mr. H.E. Haque,
Mr. Bibekananda Bhuyan, Mr. Bibhuti Bhusan Mishra

JUDGMENT Heard & Disposed of on : 19.03.2024

K.R. MOHAPATRA, J.

1. This matter is taken up through hybrid mode.

2. Order dated 27th December, 2023 (Annexure-4) passed in C.S. No.296 of 2023 is under challenge in this CMP, whereby learned Senior Civil Judge, 1st Court, Cuttack rejected an application filed by the Plaintiff-Petitioner under Order VI Rule 17 CPC for amendment of the plaint.

3. Mr. Mishra, learned counsel for the Plaintiff-Petitioner submits that the suit has been filed for a declaration that the Plaintiff is the exclusive owner of the suit schedule property and the Registered Sale Deed dated 17th October, 2022 executed by Defendant No.1 in favour of Defendant No.2 as well as the Registered Gift Deed dated 21st March, 2022 executed by Defendant No.3 in favour of Defendant No.4 are illegal, invalid, void and not acted upon. The Plaintiff also prays for a declaration of permanent injunction against Defendant Nos.2 to 4 to restrain them from interfering and disturbing with peaceful possession of the plaintiff over the suit schedule property. Before commencement of trial, an application for amendment was filed with the following schedule of proposed amendment:

> ***"SCHEDULE OF THE PROPOSED AMENDMENTS***
>
> ***1***. *That, in the last line of para- 11 of the plaint, after the word, "one", the following, sentence, is to be added*
>
> *"being violative of the terms & conditions embodied in the compromise petition, which form part of the order/ Decree Dt. 20.03.2019 passed in O.J.C. No. 2921 of 2001 & if found valid, then the Plaintiff is entitled to purchase the same, exercising right of pre-emption."*
>
> ***2***. *That, at page -7 of the plaint, at the end of 4th line of 1st para thereof, after, the word "document,", the following sentence is to be added,*
>
> *"being violative of the terms & conditions embodied in the compromise petition, which form part of the order/ Decree Dt.20.03.2019 passed in O.J.C. No.2921 of 2001 & if found valid, then the Plaintiff is entitled to purchase the same, exercising right of pre-emption."*
>
> ***3***. *That, at-prayer (b) of the plaint, after, the word, "void," the following sentence is to be added,*
>
> *"& not binding on the Plaintiff, being violative of the terms & conditions stipulated in the compromise petition, which form part of the order decree Dt.20.03.2019, passed in O.J.C. No. 2921 of 2001. Alternatively, in case, those are found valid, then, the Plaintiff is entitled to purchase the property mentioned therein, by paying/depositing the valuation mentioned in the two respective documents, exercising the right of pre- emption, through process of law."*

4. Mr. Mishra, learned counsel further submits that the petition under Order VI Rule 17 CPC is bona fide. Prayer for pre-emption could not be made earlier, which is necessary for just adjudication of the suit. In order to introduce a prayer to exercise the right of pre-emption, foundational pleading was also sought to be introduced. It is his submission that the amendment should be considered liberally when it does not cause any irreparable loss to the Defendants. In the instant case, no serious injustice or irreparable loss would be caused to the Defendants if the amendment is allowed. Learned trial Court without taking into consideration the necessity of amendment for just adjudication of the suit and that the prayer sought to be introduced does not change the nature and character of the suit, rejected the same by a cryptic order under Annexure-4.

4.1 He also relied upon the case of **Haridas Aildar Thadani and others –v- Godrej Rustom Kermani**, reported in AIR 1983 SC 319, in which it is held as under:

> *"…….Neither the nature of the suit was altered nor was there any question of any valuable right of limitation having accrued to the defendant being taken away by the proposed amendment arise. In case of Pirgonda Hongonda Patil v. Kalgonda Shilgonda Patil 1957 SCR 595 this Court has held that the test for allowing the amendment is to find out whether the proposed amendment works any serious injustice to the other side. It is well settled that the Court should be extremely liberal in granting prayer of amendment of pleading unless serious injustice or irreparable loss is caused to the other side. It is also clear that a revisional Court ought not to lightly interfere with a discretion exercised in allowing amendment in absence of cogent reasons or compelling circumstances……"*

He also relied upon the case of **Sulochana Parida and others –v- Kamini Parida and others**, reported in 2023 (II) OLR 730, wherein at Paragraph-8, it is held as under:

> *"8. Considering the submissions of learned counsel for the parties, this Court finds that hearing of the suit has not yet commenced. Of course, the suit is of the year 2003 and is pending before learned Civil Judge (Junior Division), 2nd Court, Cuttack. Only because the pecuniary jurisdiction of the Court will be taken away by the amendment of the plaint, the same cannot be the sole ground to refuse the prayer. Since the Plaintiffs/Petitioners have prayed for declaration that the deed of partition as aforesaid to be null and void, learned trial Court should have considered the amendment to incorporate the pleadings as well as prayer with regard to validity of the RSD dated 30th April, 1999, as it is an consequence of such partition, which is under challenge. If the Petitioners/Plaintiffs are not permitted to incorporate such amendment at this stage, it may lead to multiplicity of litigations. In order to shorten the time for complete adjudication of the lis between the parties with regard to validity of partition as well as consequential execution of sale deed, this Court feels that learned trial Court should have allowed the amendment; which is of course subject to the question of limitation. If objection to the prayer for amendment is raised on the ground of limitation, the amendment sought for should not be thrown out at the threshold, more particularly when objection on limitation depends upon interpretation of materials on record. In such cases, question of limitation can also be decided by framing an issue to that effect."*

He, therefore, submits that the impugned order under Annexure-4 is not sustainable and is liable to be set aside and the amendment sought for by the Petitioner should be allowed.

5. Mr. Mishra, learned counsel for the Opposite Party No.1 made elaborate submission on the maintainability of the suit as well as on the application for amendment. It is his submission that the Petitioner by way of amendment seeks to challenge the order of compromise passed by this Court in OJC No.2921 of 2001, which is not permissible. Since the suit schedule property has already been divided pursuant to the order of compromise in OJC No.2921 of 2001, the prayer to exercise right of pre-emption is also not sustainable. It is his submission that by introducing the amendment, the Plaintiff wants to withdraw the admission already made in the plaint itself. Mr. Mishra, learned counsel for the Plaintiff-Petitioner further submits that at Paragraph-8 of the plaint, the Plaintiff has categorically stated *"....However the Plaintiff has/had every respect to the order of compromise of the Hon'ble High Court of Orissa and bound by same*." He also drew attention to the averments made in Paragraph-9 of the plaint, wherein it is stated that after compromise, the Plaintiff and Defendant No.3 jointly got an area of Ac.0.123 decimals out of schedule land, whereas the Defendant No.1 got an area of Ac.0.054 decimals out of the same. It is, however, alleged that in spite of the order of compromise, no physical delivery of possession was made to the parties till date. The Plaintiff still possesses the entire suit schedule land peacefully, openly and uninterruptedly to the knowledge of all. Thus, self-contradictory statements are being made in the plaint itself. He, therefore, submits that when the Plaintiff accepts the compromise, question of exercising the right of pre-emption does not arise.

6. Mr. Rao, learned Senior Advocate appearing for Defendant No.2-Opposite Party No.2 submits that the Defendant No.2 purchased the suit schedule property from Defendant No.1, which fell to his share pursuant to the compromise passed by this Court in OJC No.2921 of 2001. Reiterating the submission of Mr. Mishra, learned counsel for the Opposite Party No.1, he submits that the amendment is not at all necessary for just adjudication of the suit. It is only made to make the pleadings clumsier and to get benefit out of it. The amendment sought for is not at all *bona fide*. Hence, learned trial Court has committed no error in dismissing the petition for amendment.

7. Mr. Bhuyan, learned counsel for Defendant Nos.3 & 4-Opposite Party Nos.3 and 4 submits that the prayer for pre-emption is barred by limitation, as it should have been made within one year from the date of execution of the sale deed and gift deed. Admittedly, the petition for amendment was filed on 3rd October, 2023, whereas the sale deed was executed on 17th October, 2022 and the gift deed was executed on 21st March, 2022. Thus, the amendment sought for being barred by limitation, should not be allowed. If the case of the Plaintiff is accepted in toto, the prayer of pre-emption would not be maintainable as it does not satisfy the criteria of

either Section 22 of the Hindu Succession Act, 1956 or Section 4 of the Partition Act, 1893. A prayer which is not legally permissible should not be allowed to be introduced by way of amendment.

7.1. It is his submission that pursuant to the order of compromise, Ac.0.123 decimals of the land was recorded in favour of the Plaintiff and Defendant No.3 and Defendant No.1 got an area of Ac.0.054 decimals out of the property involved. Subsequently, the Plaintiff filed C.S. No.1037 of 2022 for partition and the suit was decreed on compromise allotting separate share to the plaintiff and Defendant No.3. Final decree proceeding has already been passed in the said suit. Thus, the question of exercising right of pre-emption does not arise in the case at all. He, therefore, submits that learned trial Court has committed no error in dismissing the petition for amendment.

8. Mr. Mishra, learned counsel for Opposite Party No.5 also supports the case of the Opposite Party Nos.1 to 4.

9. Taking note of the submissions made by learned counsel for the parties and on perusal of the record, this Court finds that the petition for amendment was filed prior to commencement of trial. Thus, the restriction under proviso to Order VI Rule 17 CPC does not apply to the present case. There cannot be any controversy to the settled position of law that an amendment, which is necessary for just adjudication of the suit should be considered liberally. The Hon'ble Supreme Court in the case of ***Life Insurance Corporation of India –v- Sanjeev Builders Private Limited and another***, reported in 2022 SCC OnLine SC 1128 has laid down the guidelines to entertain an application for amendment. In the instant case, perusal of the petition for amendment under Annexure-2 does not disclose, as to how, the amendments sought for are necessary for just adjudication of the suit. Admittedly, an order of compromise has been passed by this Court in OJC No.2921 of 2001 allotting Ac.0.123 decimals jointly in favour of the Plaintiff and Defendant No.3 and Ac.0.054 decimals in favour of Defendant No.1. Subsequently, C.S. No.1037 of 2022 was filed by the Plaintiff-Petitioner for partition in respect of Ac.0.123 decimals, which was also decreed on compromise. Final decree has already been passed in the said suit. Thus, the question of exercising right of pre-emption against any of the parties to the suit does not arise at all. Learned trial Court has rightly held in the impugned order under Annexure-4 that circumstances contemplated under Section 22 of the Hindu Succession Act, 1956 read with Section 4 of the Partition Act, 1893 as well as Section 44 of the Transfer of Property Act, 1882 operate in a limited sphere. In the instant case, a bare reading of the pleading as well as petition for amendment does not make out any case to exercise the right of pre-emption.

10. It is submitted by the learned counsel for the Petitioner that a relief to exercise the right of pre-emption can be sought to be introduced by way of amendment of the plaint. No doubt, Section 9 of Civil Procedure Code, 1908 does not bar a prayer for pre-emption to be made in a civil suit. But, in the instant case,

law does not permit to the Petitioner to exercise such a right. When the right of pre-emption is not permissible under law to be exercised by the Plaintiff in the facts and circumstances of the case, amendment to that effect should not be allowed and learned trial Court has committed no error in doing so. The rest of the amendments sought for are only foundational pleadings to introduce a prayer for pre-emption. Hence, those are not necessary to be introduced by way of amendment. Accordingly, this Court finds no infirmity in the impugned order under Annexure-4.

11. In view of the discussions made above, the CMP stands dismissed.

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2024 (I) ILR-CUT-1278

B.P. ROUTRAY, J.

FAO NO. 617 OF 2020

DIVISIONAL MANAGER, ORIENTAL INSURANCE CO. LTD. ……Appellant

-V-

KUNA BEHERA & ANR. ……Respondents

(A) EMPLOYEES' COMPENSATION ACT, 1923 – Section 4(1), Explanation II, (4-1-B) r/w notification dated 31st May, 2010 and 3rd January, 2020 – As per the above notification the compensation were prescribed stating the amount of monthly wage at rupees eight thousand and fifteen thousand respectively – The accident took place on 22nd September, 2017 – The commissioner fixed the monthly wage @Rs. 9500/- – Whether monthly wage as per 2010 notification would have the deeming cap on the wage of employee? – Held, No – The E.C. Act is undoubtedly a socio-beneficial legislation and its provision and amendments must not be interpreted to deprive the poor employee from the benefits under the Act. (Paras 7-8)

(B) COMPENSATION – Determining factors – Where there was no material or incomplete material to determine the actual monthly wage of the employee, then what would the recourse – Held, in such circumstance the rate prescribed by the govt. as minimum wage for unskilled, skilled, semi-skilled and highly skilled labour as the case may be read with wages prescribed U/s. 4(1-B) of the EC Act would govern the field. (Para 8)

Case Laws Relied on and Referred to :-

1. (2020) 4 SCC 594 : K. Sivaraman and Others v. P. Sathishkumar and Another.
2. 1976 (1) SCC 289 : Pratap Narain Singh Deo v. Srinivas Sabata and Another.
3. 2008 (3) T.A.C.793 : K.Janardhan v. United India Insurance Co. Ltd. and Another.

For Appellant : Mr. P.K. Mahali
For Respondents : Mr. A.S. Nandy

JUDGMENT Date of Judgment : 15.12.2023

B.P. ROUTRAY, J.

1. Present appeal by the Insurer is directed against the judgment dated 16th September 2019 passed by the Commissioner for Employees' Compensation-Cum-Divisional Labour Commissioner, Dhenkanal in E.C. Case No.15 of 2017, wherein compensation to the tune of Rs.10,95,198.00 has been granted along with interest on account of injuries sustained by the injured in course of his employment as a driver of Tata LPT Truck bearing registration no.OD-15F-0651.

2. The seminal issue raised by the Insurer is with regard to fixation of remuneration of the deceased-workman at Rs.9,500/- per month. It is the submission of the Insurer that as per Explanation II of Section 4(1) of the Employees' Compensation Act, 1923 (hereinafter referred to as 'the Act'), the same should not be more than Rs.8,000/- per month. According to the Insurer, the said Explanation of the Act prescribes the maximum limit of monthly wages of Rs.8,000/- only prevailing on the date of accident.

3. The case of the workman-Respondent is that, while he was serving as the driver in a Tata LPT Truck bearing registration no.OD-15F-0651, met with the accident due to dashing of the truck against a tree resulting sustenance of injury and permanent amputation of right hand below the elbow. The date of accident is on 22nd September 2017.

4. Presently, clause (a) & (b) of Section 4(1) of the Act does not contain any Explanation II, which has been deleted by Act 45 of 2009 w.e.f. 18-1-2010. Prior to its omission, Explanation II was read as follows:

> "*Explanation* II. - Where the monthly wages of a workman exceed four thousand rupees, his monthly wages for the purposesof clause (a) and clause (b) shall be deemed to be four thousand rupees only."

5. By way of Amendment, Explanation II was deleted with effect from 18th January 2010 and prior to that, the said Explanation had capped the monthly wages of an employee at four thousand rupees by prescribing that where the monthly wages of a workman exceed four thousand rupees, his monthly wages for the purpose of clause (a) & (b) shall be deemed to be four thousand rupees only. But, by way of Amendment on 18th January 2010, the same was deleted and subsequently vide Official Gazette No.SO1258 (E) dated 31.05.2010, the word four thousand was replaced by the word eight thousand.

6. It needs to be mentioned here that upon deletion of Explanation-II, Section 4(1-B) was introduced with effect from the same date, i.e. 18th January, 2010. Said Section 4(1-B) states that the Central Government may by notification specify for the purpose of Sub-Section (1) such monthly wage in relation to an employee as it

may consider necessary. In pursuance to the provisions of Section 4(1-B), subsequent notifications dated 31st May, 2010 and 3rd January, 2020 were prescribed stating the amount of monthly wage at rupees "eight thousand" and "fifteen thousand" respectively.

The issue involved herein is that whether such prescription of the amount of monthly wage after 18th January, 2010 would have the effect of deeming cap on the wage of the employee to be calculated for the purpose of compensation under the EC Act.

7. The Employee's Compensation Act, 1923 is undoubtedly a socio-beneficial legislation and its provisions and amendments must not be interpreted to deprive the poor employee of the benefits under the Act. In ***K. Sivaraman and Others v. P. Sathishkumar and Another*, (2020) 4 SCC 594** the Hon'ble Supreme Court have observed that the Legislature keeping in mind the purpose of EC Act, 1923 did not enhance the quantum in the deeming provision but deleted it altogether.
The relevant observation is reproduced below:-

> "26. Prior to Act 45 of 2009, by virtue of the deeming provision in Explanation II to Section 4, the monthly wages ofan employee were capped at Rs 4000 even where an employeewas able to prove the payment of a monthly wage in excess of Rs 4,000. The legislature, in its wisdom and keeping in mindthe purpose of the 1923 Act as a social welfare legislation didnot enhance the quantum in the deeming provision, butdeleted it altogether. The amendment is in furtherance of thesalient purpose which underlies the 1923 Act of providing to all employees compensation for accidents which occur in thecourse of and arising out of employment. The objective of theamendment is to remove a deeming cap on the monthly income of an employee and extend to them compensation onthe basis of the actual monthly wages drawn by them. However, there is nothing to indicate that the legislatureintended for the benefit to extend to accidents that took placeprior to the coming into force of the amendment."

8. When the question of compensation comes for determination, the interpretation must be on the principles of just compensation, whether it is under the Motor Vehicles Act or Employee's Compensation Act or under any other beneficial legislation. It is because no compensation should be an unjust compensation. The compensation to be computed cannot be inadequate or unjust. While determining compensation, the socio-economic condition and the cost factor at the relevant period of time in respect of the deceased and his family members are the common criteria required to be considered for the purpose of interpreting the provisions of the EC Act for fixing the minimum wage of the employee and for grant of compensation and a pragmatic approach should always be taken. Under the provisions of the EC Act, unless the monthly income of the employee is fixed, it would not be possible to determine a definite compensation. As per Section 5 of the EC Act the monthly wage of the employee should be the amount received for a continuous period of last 12 months preceding the accident divided by twelve. As per Section 4, the amount of compensation shall be, in case of permanent disablement, an amount equal to 60% of the monthly wage multiplied by the age factor prescribed in Schedule IV.

Therefore, the monthly wage of the deceased employee is an important consideration to quantify the compensation amount. As held by the Supreme Court in ***K. Sivraman's*** case (supra) the objective of 2010 amendment was to remove the deeming cap on the monthly income of the employee and extend him the compensation on the basis of the actual monthly wage drawn by him. It is now therefore settled that the actual monthly wage of the employee has to be taken into account for grant of compensation. But here the question arose that where there was no material or incomplete material to determine the actual monthly wage of the employee, then what would the recourse. In the humble opinion of this court, in such circumstance where there is no clear material or acceptable evidence with regard to the actual monthly wage of the employee, then the rates prescribed by the Government as minimum wages for unskilled, skilled, semi-skilled and highly skilled labourers, as the case may be, read with the wages prescribed under section 4(1-B) of the E.C. Act, would govern the field. However, in the case at hand since materials are available on record to determine monthly wage of the injured workman, the same is determined accordingly.

9. So from the above analysis and discussions it becomes clear that the actual monthly wage of an employee is to be taken into account in determining the compensation amount. The actual monthly wages has to be brought on record by way of acceptable evidence. If the evidences and materials are unclear to determine the actual monthly wages, then the prescription of minimum wage rate during that relevant period read with the amount notified by appropriate government under Section 4(1-B) of the E.C. Act, is to be followed for determining the compensation amount.

10. In the case at hand, it has been brought on record that the injured workman was receiving monthly salary of Rs.9,500/- as driver of the truck. The same has been duly assessed by the Commissioner based on the evidences brought on record and other relevant factors. The owner has not only admitted the employment of the injured as driver of the truck, but also stated that he was paid wages of Rs.9,500 per month. This Court accordingly agrees with the finding of the Commissioner in this regard to hold the wages of the injured workman at Rs.9,500/- per month.

11. It is further submission of the Insurer that considering the permanent disability of the workman i.e. amputation of his right hand below the elbow, the loss of earning capacity would be 70% as per the schedule of the Act. It is true that at Item-3 under Schedule-I, Part-II of the Act, the amputation of one hand would carry 70% loss of earning capacity. But, here it is to be remembered that the injured workman was a driver by profession and due such amputation of hand, he is forever debarred from driving any vehicle. Even he is not entitled for getting a driving license due to such disability. In ***Pratap Narain Singh Deo v. Srinivas Sabata and another*****, 1976 (1) SCC 289,** the Hon'ble Supreme Court in a case of injury of a carpenter where he lost his left hand above the elbow, has assessed the loss of

earning capacity at 100%. Further, in ***K.Janardhan v. United India Insurance Co. Ltd. and another*, 2008 (3) T.A.C.793,** concerning amputation of right leg from the knee of a tanker driver, the Supreme Court has assessed 100% loss of earning capacity. Keeping in view the nature of profession of the injured-workman in the case at hand, the Commissioner has rightly assessed his loss of earning capacity at 100% and therefore, no reason is seen to disturb the same.

12. In view of the discussions made above, the appeal being found devoid of merit is dismissed. The Insurer is directed to pay the entire compensation amount as per the impugned award. Since the entire award amount has already been deposited before the Commissioner for Employees' Compensation-Cum-Divisional Labour Commissioner, Dhenkanal, the same shall be disbursed in favour of the injured-claimant along with interest on such terms and proportion contained in the impugned award.

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2024 (I) ILR-CUT-1282

B.P. ROUTRAY, J.

W.P.(C) NO. 33169 OF 2023

SUBASH SITARI ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

ODISHA GRAMA PANCHAYATS ACT, 1964 – Section 26(2) – Petitioner is the elected Sarpanch of the Gram Panchayat – The Collector initiated an enquiry and basing upon such enquiry, it was observed that, the petitioner is disqualified from holding the post of Sarpanch – The enquiry report or any other report which are relied by the collector were never communicated to the petitioner – Whether the impugned order of disqualification is sustainable? – Held, No – The petitioner is an elected Sarpanch and the proceeding initiated against him is a statutory proceeding, where it is mandated to grant opportunity of hearing to the elected member – The opportunity of hearing includes service of copies of all such documents relied against him & to treat as disqualified. (Para 7)

Case Laws Relied on and Referred to :-

1. 2005(II) OLR-686 : Smt Pabani Gajendra v. State of Orissa & Ors.
2. W.P.(C) No.6754/2005: Gouranga Chandra Padhi v. State of Orissa & Ors.

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

For Opp.Parties : Mr. M. Mohapatra, Sr. Adv., Mr. S. Mishra, ASC

JUDGMENT Date of Judgment : 21.03.2024

B.P. ROUTRAY, J.

1. Mr. M.Mohapatra, Senior Advocate Mr. S.Mishra, Additional Standing Counsel JUDGMENT 21st March, 2024 Heard Mr. A.Mohanty, learned Senior Counsel for the Petitioner, Mr. M.Mohapatra, learned Senior Counsel for Opposite Party No.5 and Mr. S.Mishra, learned ASC for State-Opposite Parties.

2. The order of disqualification dated 30th September, 2023 passed by the Collector, Keonjhar under Section 26 of the Odisha Gram Panchayat Act is challenged in present writ petition.

3. The Petitioner is the elected Sarpanch of karakhendra Gram Panchayat. Opposite Party No.5 challenged his election to the Office of Sarpanch stating that he is the father of four children and therefore disqualifies to hold the Office of Sarpanch. The Collector proceeded an enquiry and come to the finding that the Petitioner is disqualified from holding the post of Sarpanch for having his 4th child born after the cutoff date.

4. As seen from the impugned order the Collector, he formed a committee for enquiry into the allegations comprising of the SubCollector, Champua, Executive Office of Barbil Municipality, CDPO of Joda and as per the enquiry report of the committee dated 4th September, 2023 as well as the birth report produced by the CHC, Barbil and birth register maintained by the Anganwadi Centre, Kolhabarpada, has concluded that the 4th child namely, Subhasree Sitari was born to the Petitioner after the cut-off date. It is further seen that the Collector having relied on the report of the committee and such other reports has come to the conclusion as such.

5. The Petitioner denies the fact that Subhasree Sitari is his daughter. According to him, Subhasree Sitari is the daughter of his younger brother and in support of the same he produced her birth certificate as well as the school admission register.

6. Section 26 of the OGP Act gives power to the Collector to make such enquiry in the matter of alleged disqualification. Sub Section 2 of Section 26 reads as follows:-

> (2) "The Collector may suo motu or on receipt of an application under Sub-section (1), make such enquiry as he considers necessary and after giving the person whose disqualification is in question an opportunity of being heard, determine whether or not such person is or has become disqualified and make an order in that behalf which shall be final and conclusive".

7. It is true that in the instant case the Petitioner was afforded opportunity of being heard by filing his written statement and documents. As stated above, he was neither given copy of the enquiry report of the committee nor did all such other reports rely on by the Collector to arrive at his conclusion regarding birth of Subhasree Sitari as 4th child to the Petitioner after the cut-off date. It is important to mention here that the Petitioner is an elected Sarpanch and the proceeding initiated

against him is a statutory proceeding, wherein it is mandated to grant opportunity of hearing to the elected member. This opportunity of hearing includes service of copies of all such documents relied on against the elected member. It is not only sufficient to grant any opportunity to file his written statement or to produce any document in support of his contention, but it is also important to provide the copies of such documents which are relied on against the Petitioner to treat him disqualified. Such opportunity should include the oral hearing and to adduce evidence. This Court in the case of ***Smt Pabani Gajendra v. State of Orissa & Ors.*, *2005(II) OLR-686*** have observed that,

> "a person against whom allegations are made under Section 25 of the Act and the Collector concerned proposes to proceed against him under Section 26 of the Act, such person should be provided with the particulars of allegations made against him and when an oral hearing is conducted by the Collector, he must be allowed to call witnesses, make submissions and crossexamine the witnesses on whose statements or reports the other parties relies. Copies of such reports should also be provided to such person against whom allegations are made so that he can be given a fair opportunity to answer the case against him by contradicting or correcting all allegations and by adducing evidence in support of his own case".

8. Further in the case of Sri. ***Gouranga Chandra Padhi v. State of Orissa & Ors.***, order dated 16th September, 2005 passed in W.P.(C) No.6754 of 2005 (D.B), it is held that when the public documents from W.P.(C) the custody of public officers are brought having the effect of contradicting each other, the Collector should have permitted an opportunity of hearing to the Petitioner after providing copies of such documents to him.

9. In the instant case, when the fact remains that the Collector has relied on the report of the Committee as well as the birth report and Anganwadi register, it is imperative on the part of the Collector to give copy of such reports to the Petitioner to have his reply in the matter. It is to be reminded her that according to the Petitioner said Subhasree Sitari was born to his younger brother and not to him. The birth certificate as well as school admission registers were produced by the Petitioner in support of his contention. Therefore, what is opined by the Collector that the Petitioner has managed to get such documents in his favour, is not found correct without serving a copy of the reports relied on by the Collector. In the circumstances, the impugned order of the Collector, Keonjhar is set aside and the matter is remanded back to him for fresh adjudication after granting due opportunity of hearing to the Petitioner as envisaged above including supply of such reports to him and considering his reply to that effect.

10. The writ petition is disposed of accordingly.

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2024 (I) ILR-CUT-1285

Dr. S.K. PANIGRAHI, J.

W.P(C) NO. 31525 OF 2022

PURNIMA BHOI ……Petitioner(s)

-V-

STATE OF ODISHA & ORS. ……Opp.Party(s)

COMPENSATION – Custodial death – Whether the legal heirs of the deceased (UTP) are entitled to receive compensation? – Held, Yes – It is duty of the Jail Authorities to ensure safety and security of the inmates of the Jail – In case of a custodial death the authorities being the employees of the State, the State is vicariously liable for the death of the deceased – Direction given to pay the petitioner compensation of ₹ 3,00,000/- as an interim compensation. (Paras 16-21)

Case Laws Relied on and Referred to :-

1. 1980 Cri.L.J. 426 : Niranjan Singh v. Prabhakar Rajaram Kharote.
2. AIR 1924 Rang 173 : Lay Maung v. Emperor.
3. 1993 SCR (2) 581 : Nilabati Behera v. State of Odisha.
4. AIR 1997 SC 1203 : People's Union for Civil Liberties V. Union of India & Anr.
5. 2009 (I) OLR 526 : Ahalya Pradhan v. State of Orissa.

For Petitioner(s) : Mr. Trilochan Panigrahi

For Opp.Party(s) : Mr. Gyanaranjan Mohapatra, ASC

JUDGMENT Date of Hearing : 05.12.2023 : Date of Judgment : 22.12.2023

Dr. S.K.PANIGRAHI, J.

1. The Petitioner in the above mentioned Writ Petition seeks a direction from this Court for a compensation of Rs.20,00,000/- due to negligence of jail warders and other jail staff of Puri Jail in the death of Siba Prasad Bhoi, Petitioner's husband, who died in prison custody on 29.09.2022, which is alleged to be a custodial death.

2. The relevant facts of the case are as follows:

a. Siba Prasad Bhoi ("the deceased") UTP NO. 89/2022 was admitted to Puri Jail in connection to involvement of G.R.Case No. 41/2022 under Section 376(1) of I.P.C. against I/C warrant issued by SDJM, Puri. The deceased was facing trial before the Court of Additional Sessions Judge (Special Track Court) Puri in S.T. Case No. 197 of 2022.

b. On the fateful day, it is alleged that Siba Prasad committed suicide by hanging himself from a mango tree at the back of the prison hospital unit with the use of a gamuchha. Following this he was immediately shifted to district Hospital Head quarter, Puri where the treating physician declared him as received dead on 29.09.2022 at 6.30 PM.

c. An F.I.R. was lodged at Ramachandi P.S. reporting the sudden death of UTP dated 29.9.2022 and sent to Magistrate under Section 174 Cr.P.C. along with letter to Ramchandi police station by Superintendent of District Jail, Puri. Getting information

from the deployed jail staff., a written report was submitted by the Superintendent of District Jail, Puri basing on which the instant U.D case vide Ramchandi PS UD case No.10 dated 29.09.2022 was registered and enquired into.

d. During course of enquiry of the UD case the E.O. sent requisition for depuration of Scientific Team and videographer as well as deputation of Executive Magistrate to remain present during inquest and Post-mortem. Spot was visited promptly, and an inquest was conducted on 30.09.2022 at 2.00 PM to 3.00 PM over the dead body of the deceased in presence of family members, Executive Magistrate Sri Ramachandra Pattna'k, OAS, Deputy Collector, Puri and other witnesses. The corpse was then sent to ADMO, DHH, Puri for post-mortem examination with a request to conduct autopsy by a team of doctors. Accordingly, postmortem was conducted by Dr. Amarend Nayak, Prof & HOD, Department of FMT and Dr. Priyambada Behera, Asst. Prof. Deptt of FMT, Sri Jagannath MC & H, Puri. The entire process of inquest and PM was videographed as per the guidelines of NHRC. After PM examination, the dead body of the deceased UTP 89/22 Siba Prasad Bhoi was handed over to his family members. The above U.D case is under enquiry.

3. Learned counsel for the Petitioner alleged that the deceased did including not commit suicide, rather, he was murdered by the prison personnel. It is insinuated that it is a case of homicidal death and his murder was pre-planned following the atrocities of jail staff including warders.

4. It was submitted that petitioner's husband was the only bread earner of his family. The family, which includes a son and a daughter and ailing parents of the deceased, are facing grave financial trouble. Now, after facing death of Siba; the petitioner's family is in a deplorable condition.

5. It was submitted that the suicidal death of the deceased is directly attributable to the negligence of the prison personnel and as such a compensation of Rs.20,00,000/- is genuine to meet the requirements of the petitioner's maintenance/ her children’s education and maintenance of old ailing parents-in-law.

6. *Per contra*, Learned counsel for the Opp. Party No. 4 submitted that no atrocity was committed against the deceased by the wardens and/or other jail staff of Puri Jail and therefore, the allegation of negligence and atrocity is false and fabricated

7. It was also submitted that a Departmental Enquiry has already been initiated against the staff by the Senior Superintendent of Circle Jail, Berhampur and it is under process.

8. It was further submitted that the deceased has clearly committed suicide and it was not a case of custodial death. Till the time the trial is pending, the liability of State, if any, cannot be determined. The claim of the petitioners, for the time being, should not be unconditionally accepted. It is contended that this Court cannot draw inferences but has to go by the record in the form of the statements recorded in the ongoing investigation.

9. I have gone through the pleadings and heard learned counsels for the parties.

10. In the context of Section 439 of the Code of Criminal Procedure, Supreme Court has provided the definition of "custody" in ***Niranjan Singh v. Prabhakar Rajaram Kharote***[1] wherein inter alia it was observed as under:-

> *"When is a person in custody, within the meaning of Section 439, Cr.P.C.? When he is in duress either because he is held by the Investigating Officer or other police or allied authority or is under the 11980 Cri.L.J. 426 control of the Court having been remanded by Judicial order, or having offered himself to the Court"s jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the Court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibbling and hideand- seek niceties sometimes heard in Court that the police have taken a man into formal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubiotics are unfair evasions of the straightforwardness of the law.... Custody, in the context of Section 439 (we are not, be it noted, dealing with anticipatory bail under Section 438) is physical control or at least physical presence of the accused in Court coupled with submission to the jurisdiction and orders of the Court."*

11. Furthermore, in ***Lay Maung v. Emperor***,[2] the Court inter alia observed as under:-

> *"As soon as an accused or suspected person comes into the hands of a police officer he is, in the absence of any clear and unmistakable evidence to the contrary, no longer at liberty and is therefore, in "custody" within the meaning of Sections 26 and 27 of Evidence Act"*

12. It is the conceded position that the deceased died while in custody of the police on 29.09.2022. A perusal of contentions of the Opp. Parties shows that even though the identity of the persons guilty of negligence for the death of Siba Prasad is in dispute but the fact that he died in police custody due to negligence of officials is not in dispute.

13. This Court has given its anxious consideration to this unfortunate episode and it feels that in the circumstances of the case it is necessary for the police/prison personnel to show that there was no negligence on their part. After all when a prisoner is in custody, it is the duty of the police/prison personnel to keep him alive and well till judicial remand.

14. It is not known how the deceased was able to roam in the premises unsupervised and devised a setup for suicide without anyone interfering or at least witnessing the episode until it was too late. It is not stated why the prison premises was left unmanned by any person. It is impossible to believe that the prison premises would have been left empty without any prison personnel being present there. All

1. 1980 Cri.L.J. 426 **2**. AIR 1924 Rang 173

these matters would be cleared after the completion of the investigation of this whole episode and medical/chemical examination of the dead body of the deceased.

15. When a person is taken into custody, it is the paramount duty of the state to keep him safely. If there is any dereliction of that duty, undoubtedly the onus will be on the prison staff and the personnel in-charge to show that there was no negligence on their part. Even assuming for a moment that the case before this Court is one of suicide, I would like to state that there is a duty on the part of the state to show that there was no negligence on the part of its staff. However, it cannot be ruled out that there may be some cases where in spite of best efforts by the prison staff and security; a prisoner commits suicide by a method that is beyond the control of anyone. In those cases, if the prison personnel can show that they were not negligent, then it is possible that they may be absolved of the blame. Ultimately, it all depends on the facts of each case.

16. However, in all situations of custodial fatalities, whether by suicide or crimes committed by the police, the onus is unquestionably on the state to demonstrate that there was no carelessness on their side. I may at this stage refer to a decision of the Supreme Court reported in the case of ***Nilabati Behera v. State of Orissa***.[3] While dealing with this case the Apex Court has held as follows :

> *"In this context, it is sufficient to say that the decision of this Court in Kasturilal upholding the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme, and is no defence to the constitutional remedy under Arts. 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights, when the only practicable mode of enforcement of the fundamental rights can be the award of compensation. The decisions of this Court in Rudul Shah in that line relate to award of compensation for contravention of fundamental rights, in the constitutional remedy under Arts. 32 and 226 of the Constitution. On the other hand, Kasturilal related to value of goods seized and not 31993 SCR (2) 581 Page returned to the owner due to the fault of Government servants, the claim being of damages for the tort of conversion under the ordinary process, and not a claim for compensation for violation of fundamental rights. Kasturilal is, therefore, inapplicable in this context and distinguishable."*

17. The Supreme Court while reiterating the powers of the Court in granting compensation further held that:

> *"**18.** This view finds support from the decisions of this Court in the Bhagalpur binding cases: Khatri (II) v. State of Bihar and Khatri (IV) v. State of Bihar . Wherein it was said that the Court is not helpless to grant relief in a case of violation of the right to life and personal liberty, and it should be prepared to forge new tools and devise new remedies for the purpose of vindicating these precious fundamental rights. It was also indicated that the procedure situable in the facts of the case must be adopted for conducting the inquiry, needed to ascertain the necessary facts, for granting the relief, as the available*

3. 1993 SCR (2) 581

mode of redress, for enforcement of the guaranteed fundamental rights. More recently in Union Carbide Corporation v. Union of India , Misra, C.J. stated that 'we have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future .....there is no reason why we should hesitate evolve such principle of liability .....'. To the same effect are the observations of Venkatachaliah, J. (as he then was), who rendered the leading judgment in the Bhopal gas case, with regard to the Court's power to grant relief."

18. Similar view has been taken in ***People's Union for Civil Liberties v. Union of India and another,***[4] wherein the ratio decided in ***Nilabati Behera's*** case (supra) was relied upon and it was further held that in assessment of the compensation, the emphasis has to be on the compensatory and not on punitive manner. Moreover, a Division Bench of this Court in ***Ahalya Pradhan v. State of Orissa,***[5] wherein the custodial death was levelled as a suicide the Division Bench of this Court came to the conclusion that the legal heirs of the deceased are entitled to receive compensation.

19. It is duty of the jail authorities to ensure safety and security of the inmates of the jail. Only when there is negligence on their part, such an incident could take place. Though the authorities have termed the incident as a suicide, foul play cannot be ruled out at this stage. Irrespective, the police/prison authorities owe a duty of care to an arrested person and must take reasonable care to ensure that he does not suffer from any physical injury as a consequence of his own acts, or the acts of a third party. Therefore, this Court comes to the conclusion that it is a case of custodial death and the authorities are responsible for the same. The authorities being the employees of the State of Odisha, the State is vicariously liable for the death of the aforesaid deceased.

20. In light of the aforesaid discussion, it is pertinent to award compensation to the petitioner. However, in my opinion, the counsel for the Opp. parties has rightfully contended that a full 4 AIR 1997 SC 1203 5 2009 (I) OLR 526 compensation cannot be granted without the completion of inter alia the investigation of the death, departmental inquiry, etc. Ergo, it would be reasonable, at this stage, to award an interim compensation to take care of the necessary expenses of the petitioner and her family.

21. In the facts and circumstances of the case, I feel that it would be appropriate to order that State of Odisha to pay to the petitioner compensation of Rs. 3,00,000/- as an interim compensation. The said amount shall be deposited by the State in the bank account of the Petitioner within eight weeks from today. This direction to pay the compensation is without prejudice to the rights of the legal representatives to claim compensation in private law proceedings, if so entitled in law, against those found responsible for his death.

4. AIR 1997 SC 1203 **5**. 2009 (I) OLR 526

22. The State of Odisha is directed to take proactive measures to complete the investigation and the following trial as well as the disciplinary proceedings against those who are responsible for the death of Siba Prasad and order accordingly.

23. With the aforesaid observations, the present Writ Petition stands disposed of. No order as to costs.

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2024 (I) ILR-CUT-1290

Dr. S.K. PANIGRAHI, J.

CRLREV NO. 558 OF 2023

SWEEKAR NAYAK ……Petitioner

-V-

STATE OF ORISSA ……Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – Sections 482, 397 – Scope of interference and exercise of Jurisdiction U/s. 397 at the stage of framing of charge – Discussed with reference to case laws.

(Paras 9-15)

Case Laws Relied on and Referred to :-

1. (2010) 9 SCC 368 : Sajjan Kumar v. CBI
2. (2019) 7 SCC 148 : Asim Shariff v. National Investigation Agency
3. (2020) 2 SCC 217 : Bhawna Bai v. Ghanshyam

For Petitioner : Mr. Ananta Narayan Pattanayak
For Opp. Party : Mr. Gyanaranjan Mohapatra, ASC

JUDGMENT Date of Hearing : 19.12.2023 : Date of Judgment : 13.03.2024

Dr. S.K. PANIGRAHI, J.

1. The petitioner has filed this criminal revision challenging the order dated 01.09.2023 in rejecting the application for discharge vide Section 227 Cr.P.C and framing of charge under Section 302, 201, 34 IPC by the learned Addl. Sessions Judge, Rayagada in connection to C.T. No. 50 of 2017 (arising out of Rayagada P.S. Case No. 04 of 2009 & CID, CB, P.S. Case No. 02 of 2010) on the ground that there is no legal evidence to connect the petitioner in the alleged crime and on the basis of incomplete investigation, the learned trial court not only framed charge but has also been proceeding with the trial.

I. FACTS OF THE CASE:

2. The concise yet comprehensive factual record of the case, pertaining to the matter at hand, is presented succinctly as follows:

(i) The prosecution case, in short, is that on 05.01.2009, at 12.10 A.M., one Rajib Dash (since "deceased") of Bolangir and his two associates occupied Room No. 202 of Hotel

Sunrise at Rayagada. On the next morning, the hotel boy, Ajay Khosla, knocked the door of the room for the purpose of cleaning the room, but they found that the door was neither locked nor attended by anybody in the room. He entered the room and found that the deceased was lying in the bathroom stained with blood and foot prints. The hotel boy intimated the incident to the manager Sri Misal Venkat Ravana who is the informant of the present case, he then entered the room and found that one person was lying dead and other two persons were not present.

(ii) On the basis of the said information a case under Section(s) 302, 201, 34 IPC was registered against two unknown persons vide Rayagada P.S. Case No. 4 of 2009 corresponding to G.R. Case No.66 of 2010 of the court of learned S.D.J.M., Rayagada. After registration of the case, the I.O. made inquest over the dead body, sent the dead body for post mortem examination, recorded statement of the witnesses, prepared the seizure list.

(iii) During the investigation, it was revealed that Subash Nayak and Sweekar Nayak (the present petitioner) from Udbhav Construction Pvt. Ltd. in Karnataka undertook a project from Bharati Airtel in 2007 to lay cable wires from Bolangir to Bargarh. However, due to local resistance, they faced challenges in completing the project. In order to overcome this hurdle, they sought assistance from Rajib Dash (deceased), who took an interest in the project and successfully completed the cabling work on time.

(iv) However, a misunderstanding between the aforementioned accused persons and the deceased arose due to a disagreement over the sharing of profits with Rajib Dash. The deceased also obstructed the financial payments to Udbhav Construction Pvt. Ltd. by making allegations against the accused individuals to the Chief of Bharati Airtel in Odisha. Despite the petitioner's promise to Rajib Dash and his father to pay their share, they failed to fulfill their commitment. As a result, the deceased resorted to forcibly detaining the company's property in Bolangir due to the non-payment of dues.

(v) In response, the petitioner and the co-accused resorted to threatening the deceased over the phone, expressing their intent to even kill him if the property was not released. As per the prosecution, the accused persons Sweekar Nayak and Subash Nayak made conspiracy to kill Rajib Dash and engaged hired killers (two unknown persons) to commit the murder of the deceased and in pursuance to their criminal conspiracy, Rajib was murdered in cold blood.

(vi) While matter stood thus, the matter has been transferred to the file of Crime Branch for investigation. Accordingly, the case was registered and renumbered as CID Case No. 02 of 2010 and the crime branch investigated into the matter. The I.O. collected phone call details and found that accused Subash Nayak who is the uncle of the present petitioner as well as employee of the Company had contacted the petitioner on numerous occasions over mobile phone during the relevant period.

II. SUBMISSIONS ON BEHALF OF THE PETITIONER:

3. Learned counsel for the Petitioner has brought forward the following contentions:

(i) It is submitted that neither the accused persons who have committed the alleged murder have yet been traced out nor does the co-accused Subash Nayak on whose instance the crime alleged to have been committed has been arrested. In such circumstance, framing of charge against the petitioner on presumption that he has committed the murder and charging under Sections 302,201,120-B of the I.P.C is perverse,

abuse of process of law and mockery of judicial system. There is no material to show that the petitioner was present at the relevant point in time and date in the said hotel where the deceased was alleged to have murdered. Hence, the first charge failed as the allegation is quite imaginary, perverse, based on surmises and conjectures.

(ii) It is submitted that from bare perusal of the statements of the aforesaid witnesses, it is crystal clear that the petitioner is no way connected with the alleged crime and there are no materials to show that neither the petitioner had threatened to kill the deceased nor had he any bitter relationship with the deceased which compelled him to join hand with the accused persons to kill the deceased. But, after a year the Crime Branch Police rerecorded statement of the witnesses under section 161 Cr.P.C., wherein the interested witnesses developed their story and for unlawful gain entangled the present petitioner to the extent that in one occasion i.e. much prior to the occurrence, the petitioner threatened over telephone.

(iii) It is an admitted fact that the petitioner is one of the partner of the Udbhab Construction and accused Subas Nayak was an employee and project in charge of the works executed in different part of the state of Odisha. Therefore, the petitioner might have contacted him on different occasions to know about the progress of the works, but the same cannot be a basis to presume that the petitioner had contacted the accused Subas Nayak to create a plot to murder the deceased. Further, the mobile number stands in the name of M/s. Udbhav Construction and there are five Managing Partners of the said Company. Therefore, it cannot be presumed that the present petitioner was using the said mobile at the relevant point of time.

(iv) It is submitted that for the sake of argument, even assuming though not admitting, the petitioner was using the alleged mobile phone bearing Nos.9938187423 and 9448457161 stands in the name of Udbhab Construction, then also the call details record discloses that there was no contact from the aforesaid numbers from 28th of December 2008 till the date of occurrence i.e. till 6.1.2009 with the accused Subash Nayak. So, there is remote chance of involvement of the petitioner in the alleged crime. Hence the charge under Section 120-B IPC is not made out.

(v) It is submitted that the I.O. had recorded statement of the petitioner in three occasions i.e. on 27th October, 2009 and on 30.8.2013 and after released on bail. The statements of the petitioner reveals that the father of the deceased demanded rupees Six lacs from the petitioner after the alleged occurrence. As the petitioner refused to full fill his illegal demand, the family members of the deceased developed their case before the Crime Branch in order to implicate the petitioner in the alleged crime. The statements before the Rayagada police as well as Crime Branch are self-contradictory and afterthought. Therefore, the statements recorded by the Crime Branch after more than one and half year old is not trustworthy and reliable.

(vi) It is submitted that while recording statement of the witness Sudhir Kumar Singh under Section 161 of the Cr.P.C. who is very close friend of the deceased narrated the entire story about the involvement of the deceased in the business transactions with accused Subas Nayak. The said witness also has not uttered the name of the petitioner in his statement. Further, the statement of the inquest witness Mr. Raj Kishore Jena, who is a close person of the deceased, revealed that, at the interference of the petitioner, the bills which was held up had been released, but the so-called accused Mr. Subas Nayak failed to pay the same to the deceased, as he says. As such the name of the petitioner does not find place anywhere except that he had tried his best to resolve the issue. Taking advantage of the involvement of the petitioner in resolving the issue, the police suspected the petitioner, to have involved in the incident and submitted charge sheet.

(vii) It is submitted that though the petitioner is no way connected with the present case, he has been implicated without any basis and only on mere surmises, suspicion and imaginations. The FIR as well as statements of the witnesses recorded soon after the occurrence do not recite the source of information particularly in respect of the petitioner's implication in the offence. But the learned trial court in an arbitrary fashion even without going through the police papers frame charge as such the petitioner has committed the murder, tried to screen the offence and conspired with other accused persons. Hence, the charges in all three heads are defective and liable to be set aside.

III. ORDER OF THE ADDITIONAL SESSIONS JUDGE, RAYAGADA:

4. The Sessiosn Judge held that on perusal of the FIR and the statement of the witnesses, it is found that on the alleged day, the deceased along with two persons had resided in the Room No.202 of Hotel Sunrise at Rayagada, though the room was booked in the name of the deceased. The statement of the witnesses recorded by the IO along with the connected documents show the involvement of the petitioners along with the co-accused in this case. Further, the investigation of the IO reveals that Subash Nayak and Sweekar Nayak (present petitioner) of Udbhav Construction Pvt. Ltd., Karnataka had taken contract work from Bharati Airtel for laying of cable wire from Bolangir to Bargarh in the year, 2007, but due to local resistance, the same could not completed as such they took assistance of Rajiv Dash (deceased) who took interest and completed the cabling work in time.

5. Further, the misunderstanding between the above two accused persons and for the deceased arose due to not sharing of profit due to Rajib Dash. The deceased also held up the financial payment of Udbhav Construction Pvt. Ltd by alleging against the accused persons at Chief of Bharati Airtel, Odisha. Thereafter, though the petitioner had promised Rajib Dash and his father to pay his share, but they evaded the same. For the non-payment of dues, the deceased forcibly detained the property of the company at Bolangir, for which the petitioner and the co- accused used to threaten to kill him over phone. As per the prosecution, the accused persons Sweekar Nayak and Subash Nayak made conspiracy to kill Rajib Dash and engaged hired killers (two unknown persons) to commit the murder of the deceased and in pursuance to their criminal conspiracy, the deceased died. Since prima facie material is forthcoming against the accused persons including the petitioner, he was charge sheeted for the offences punishable under section 302/201/120(B) of IPC.

6. As far as the plea of the defence counsel that the CID & CB has charge sheeted him along with the co-accused only on the basis of the CDRs and without having any concrete proof, but the same has to be established during the process of trial and need to be analysed during the appreciation of the evidence on merit of the case. The relevancy as well as the admissibility of the CDRs and their nexus with the crime has to be established. At this stage, no findings can be given as to the innocence of the petitioner.

7. The Sessions Judge observed that the aforesaid discussion prima facie reveals that the facts to implicate the petitioner with the offences punishable under

section 302/201/120(B) of the IPC is very much available on record. Thus, there are sufficient materials available on the case record to proceed against the petitioner for the offences punishable under Sections 302/201/120(B) of the IPC as the prima facie case under the above mentioned Sections is made out against him.

IV. COURT'S REASONING AND ANALYSIS:

8. Before averting to the submissions made by both the parties, this Court deem it appropriate to discuss the law of charge and discharge. As far as statutory law on framing of charge and discharge is concerned, the same is governed by Sections 228 and 227 of Cr.P.C. respectively. These provisions read as under:

> *"**227. Discharge.** If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.*
>
> ***228. Framing of Charge.** (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which— (a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report; (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.*
>
> *(2) Where the Judge frames any charge under clause (b) of Sub-Section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."*

9. The Apex Court, in the case of ***Sajjan Kumar v. C.B.I.***[1] , held that at the time of framing of charge, the Court has to look at all the material placed before it and determine whether a prima facie case is made out or not, and the Court is not required to consider the evidentiary value of the evidence as any question of admissibility or reliability of evidence is a matter of trial. The relevant portion of the judgment is reproduced below:

> *"21. On consideration of the authorities about scope of Sections 227 and 228 of the Code, the following principles emerge: (i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case. (ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial. (iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution*

1. (2010) 9 SCC 368

but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial. (iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. (v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible. (vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. (vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

10. It was observed by the Supreme Court in ***Asim Shariff v. National Investigation Agency***[2], that at the stage of framing of charge, the Trial Court is not expected to hold a mini trial for the purpose of marshalling the evidence on record. The relevant observations are as under:

"18. Taking note of the exposition of law on the subject laid down by this Court, it is settled that the Judge while considering the question of framing charge under Section 227 CrPC in sessions cases(which is akin to Section 239 CrPC pertaining to warrant cases) has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the material placed before the Court discloses grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing the charge; by and large if two views are possible and one of them giving rise to suspicion only, as distinguished from grave suspicion against the accused, the trial Judge will be justified in discharging him.

It is thus clear that while examining the discharge application filed under Section 227 CrPC, it is expected from the trial Judge to exercise its judicial mind out or not. It is true that in such proceedings, the Court is not supposed to hold a mini trial by marshalling the evidence on record." (Emphasis Supplied)

11. The Supreme Court in ***Bhawna Bai v. Ghanshyam***[3] , has observed as under:

"13. ...At the time of framing the charges, only prima facie case is to be seen; whether case is beyond reasonable doubt, is not to be seen at this stage. At the stage of framing the charge, the court has to see if there is sufficient ground for proceeding against the accused. While evaluating the materials, strict standard of proof is not required; only prima facie case against the accused is to be seen."

2. (2019) 7 SCC 148 3. (2020) 2 SCC 217

12. Thus, the law is well settled that although it is open to a High Court entertaining a petition under Section 482 of the Cr.P.C. or a revision application under Section 397 of the Cr.P.C. to quash the charges framed by the trial court, yet the same cannot be done by weighing the correctness or sufficiency of the evidence. In a case praying for quashing of the charge, the principle to be adopted by the High Court should be that if the entire evidence produced by the prosecution is to be believed, would it constitute an offence or not. The truthfulness, the sufficiency and acceptability of the material produced at the time of framing of a charge can be done only at the stage of trial. To put it more succinctly, at the stage of charge the Court is to examine the materials only with a view to be satisfied that prima facie case of commission of offence alleged has been made out against the accused person.

13. It is also well settled that when the petition is filed by the accused under Section 482 Cr.P.C. or a revision Petition under Section 397 read with Section 401 of the Cr.P.C. seeking for the quashing of charge framed against him, the Court should not interfere with the order unless there are strong reasons to hold that in the interest of justice and to avoid abuse of the process of the Court a charge framed against the accused needs to be quashed. Such an order can be passed only in exceptional cases and on rare occasions. It is to be kept in mind that once the trial court has framed a charge against an accused the trial must proceed without unnecessary interference by a superior court and the entire evidence from the prosecution side should be placed on record. Any attempt by an accused for quashing of a charge before the entire prosecution evidence has come on record should not be entertained sans exceptional cases.

14. The scope of interference and exercise of jurisdiction under Section 397 of Cr.P.C. has been time and again explained by this Court. Further, the scope of interference under Section 397 Cr.P.C. at a stage, when charge had been framed, is also well settled. At the stage of framing of a charge, the court is concerned not with the proof of the allegation rather it has to focus on the material and form an opinion whether there is strong suspicion that the accused has committed an offence, which if put to trial, could prove his guilt. The framing of charge is not a stage, at which stage the final test of guilt is to be applied. Thus, to hold that at the stage of framing the charge, the court should form an opinion that the accused is certainly guilty of committing an offence, is to hold something which is neither permissible nor is in consonance with the scheme of Code of Criminal Procedure.

15. Section 397 Cr.P.C. vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law or the perversity which has crept in the proceeding.

16. In the present case, the statement of the witnesses recorded by the IO along with the connected documents show the involvement of the petitioners along with

the co-accused in this case. As per the prosecution, the accused persons Sweekar Nayak and Subash Nayak made conspiracy to kill Rajib Dash and engaged hired killers (two unknown persons) to commit the murder of the deceased and in pursuance to their criminal conspiracy, the deceased died. Since prima facie material is forthcoming against the accused persons including the petitioner, he was charge sheeted for the offences punishable under Sections 302/201/120(B) of IPC.

17. Thus, in view of the aforementioned judicial precedents on the law of charge and discharge, this Court notes that at the stage of framing charges, the Court's primary concern lies in determining a prima facie case against the accused. It is essential to emphasise that at the time of framing of charge, the Court need not delve into the realm of whether the case is proven beyond reasonable doubt. That determination comes at a later stage, i.e. after the conclusion of trial. The pivotal criterion for the Court, while framing charges, is to assess if there exist sufficient grounds to proceed against accused further by framing charges against them and began the trial. A strict standard of proof is not required while evaluating the material on record, simply a prima facie view of the matter is to be considered to reach a conclusion as to whether strong suspicion exists on the basis of material on record for the purpose of framing of charge against them.

V. CONCLUSION:

18. The High Courts should refrain from interfering with the criminal cases before the trial is completed. Allowing the trial process to unfold without undue interference ensures that justice is served impartially and without prejudice. Premature intervention by the High Court could disrupt the lower court's proceedings, potentially impeding the thorough examination of evidence and testimony crucial for a just verdict.

19. With respect to the aforesaid discussion, this Court is not inclined to interfere with the order of the court below. This criminal revision petition is, accordingly, disposed of.

20. Interim order dated 18.10.2023 passed in I.A. No.773 of 2023 arising out of CRLREV No.558 of 2023 stands vacated.

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2024 (I) ILR-CUT-1297

Dr. S.K.PANIGRAHI, J.

W.P(C) NO. 649 OF 2015

BIBHUTI BHUSAN BARIK ……Petitioner

-V-

STATE OF ORISSA ……Opp.Party

COMPENSATION – The University wrongly declared petitioner as 'fail' in +3 Commerce examination – Being aggrieved by the lackadaisical approach of the University Authority, the petitioner seeks compensation from the University for losing some valuable years of his life – Held, the petitioner has endured significant hardship and lost ten years of his professional life, a loss that cannot be compensated in any other way, this court orders the University to pay the petitioner a sum of ₹ 5,00,000/- lakhs as compensation.

Case Laws Relied on and Referred to :-

1. AIR 1991 KER 396 : University of Kerala v. Sandhya P. Pai
2. Civil Writ Jurisdiction Case No. 7185/2019 (Patna HC) : Manoj Kumar & Another vs. The State of Bihar

For Petitioner : Mr. Tanmay Mishra & Mr. S. Sourav

For Opp.Party : Mr. Sanjeev Udgata

JUDGMENT Date of Hearing : 22.02.2024 : Date of Judgment : 28.03.2024

Dr. S.K.PANIGRAHI, J.

1. The Writ Petition has been filed seeking a direction to the Opposite Parties to pay a monetary compensation to the petitioner whose career and further prospect of studies has been marred by nine years due to a totally irresponsible conduct of the affairs of the University in the matter of conduct of the examination, checking/marking of the candidate answer sheets therein, and late publication of his result.

I. CASE OF THE PROSECUTION

2. Succinctly put, the facts of the case are as follows:

(i) The petitioner fulfilled all eligibility criteria for appearing in the +3 commerce course as a private candidate of Sambalpur University. The petitioner appeared in the +3 Commerce examination in the year 1999 through Panchayat College, Bargarh, the centre held for the examination under the University Roll No. 04599PCP004 and Registration number 916/97.

(ii) The petitioner took the first exam but failed in English with 25 out of 100 marks, falling short of the passing score of 30. Further, despite attending, he was marked absent for the Commercial Law paper. Ergo, the petitioner retook the English paper and simultaneously sat for the final +3 Commerce Pass Examination. Despite appearing, he was marked absent for the English retake. He was shown to have scored 23 in Commercial Law, where he was previously marked absent. His final exam result was withheld due to his 'absentee' status in the English retake.

(iii) The petitioner retook the English paper of the first exam, but was again marked absent on the result sheet. Unexpectedly, he was also marked absent in the Core-III papers, Accountancy and Commercial Law, despite previously scoring 38 and 23 respectively and passing these papers.

(iv) Over the course of a decade, from 2001 to 2011, the petitioner persistently approached the University Authorities, highlighting inexplicable discrepancies in his

mark sheets. Despite numerous appeals to the University for elucidation and reassessment of his academic record, the petitioner's efforts remained fruitless.

(v) After numerous attempts by the petitioner, the Principal-in-Charge of Trust Fund Degree College, Bargarh, wrote to Sambalpur University affirming the petitioner's presence at the exam. He requested the Controller-of-Exam to verify the petitioner's result and enclosed an attendance sheet with the petitioner's signature. Despite being marked absent, the petitioner had indeed attended the exam.

(vi) Following the Principal's letter, a result sheet was published on 22.12.2011. It showed that the petitioner, previously marked absent, had attended the 2001 English Back paper examination but had scored only 02 marks, thus failing the exam which again was another variant of the result of the English Exam.

(vii) On 02.04 2012, the petitioner submitted a representation to the Vice-Chancellor of Sambalpur University. Later, on 02.06.2012, he filed Section 6 application under the RTI Act, 2005 requesting to supply his marks in English paper. The RTI response included a copy of a letter from the examination controller dated 15.06.2012, and a notification of the petitioner's pass result, reportedly published on 17.05.2012. It was noted that the petitioner's result was declared as failed due to a missing mark entry from 1999.

(viii) In the end, vide a back date notification dated 17.05.2012, the University released the petitioner's results, indicating that he had successfully passed all the papers of the initial examination, where he was previously marked as either absent or failed. Given that the final examination result was previously withheld due to the non-clearance of the first examination, it was subsequently released, affirming that the petitioner had successfully completed and passed the +3 Commerce course. Being aggrieved by the lackadaisical approach of the University Authority, the Petitioner seeks compensation from the University for losing some valuable years of his life.

II. SUBMISSIONS:

A. <u>On behalf of the Petitioner:</u>

3. The counsel appearing on behalf of the petitioner urged the following submissions:

(i). The University has failed and/or neglected to publish the correct result of the petitioner, and as a result where of a serious injustice has been done to his case.

(ii). It is because of the acts of omission and commission on the part of the Opposite party University that the writ petitioner has suffered immense damages. The professional life of the petitioner has been made to suffer harshly at the hands of the authorities of the university by sheer negligence of the authorities and the petitioner even after several attempts in all these years could not get the authorities to correct it until he filed application under the RTI Act.

(iii). The sheer neglect of the University officials led the petitioner to deprive of getting his degree in +3 Commerce and hence could not get employment anywhere. In today's competitive world, it is very difficult to get an employment and get a steady source of income and the petitioner without a job suffered harshly and has led a miserable life with no source of income.

(iv). The University must be held responsible for the negligent acts of its officers and it must repair the damage done to the citizens by its officers for violating their indefeasible

fundamental right. It is well settled in law that the award of compensation against the State is an appropriate and effective remedy for redressal of an established infringement of a fundamental right under Article 21, by the negligence of the state. In the present case the violation of Article 21 of the present petitioner is patent and incontrovertible. Due to the callous and negligent way that the opposite party authorities dealt with the mark sheet of the petitioner, he has lost the opportunity to grab those aspects of life which go on to make a man's life meaningful, complete and worth living, as he could not obtain the degree which he was entitled to and hence could not further pursue his career.

(v). The petitioner was failed for no fault of his but the rest of the students of his batch, who deserved to pass like the petitioner, passed the examination, got their respective degree and pursued their career. The petitioner wanted to do further studies but could not do so due to the callous manner in which the University authorities dealt with his case. The petitioner would have been employed for many years had it not been for such wrongful act of the opp. parties.

(vi). That the act of the Opposite party University in not publishing the correct result has led to violation of Article 21 of the Constitution of India. The life and career of the petitioner has been severely affected owing to the callous and recalcitrant acts on the part of the authorities

B. <u>On behalf of the Opposite Parties</u>

4. Per Contra, the counsel appearing on behalf of the Opp.Party Nos.2 and 4 urged the following submissions:

(i). The petitioner had not put any effort in following up the matter until 2012. If he was a sincere student he could have followed with the University Authority.

(ii). The result of the petitioner was not declared to have passed in 2002, but the petitioner did not take any step to obtain his marksheet or making any representation to the university anout the defect in the marksheet.

(iii). The situation in which the petitioner was put in, was neither deliberate nor on account of any negligence on the part of the University but due to advertence. Though there has been inadvertent error in preparing his marksheet, he too was negligent in representing his case before the university timely.

(iv). The University conducts examination of thousands of students and publishes its results in due time. So, the case of the petitioner is a rare outlier of the University modus operandi. Hence, it cannot be called a negligence on the part of the University.

III. COURT'S ANALYSIS AND REASONS:

5. Having heard learned counsel for the parties, this Court finds no difficulty in coming to a conclusion that the action of the Controller of Examination of the University and its officials/ staffs whosoever is there, in firstly, recording an incorrect/wrong marks in the result of the petitioner and showing him 'Fail' , and second, marking him absent in the exams in which he diligently appeared, is a totally irresponsible kind of act which has had an adverse consequence upon the career and future prospect of petitioner.

6. Universities hold a significant responsibility towards their students, particularly in the efficient administration of examinations and the timely publication

of results. These processes are fundamental to the academic journey of students and any lapse can have serious implications on their academic progress, career prospects, and overall well-being.

7. Efficient examination conduction ensures that students are assessed in a fair and standardized manner. It involves proper scheduling, ensuring the availability of necessary resources, and maintaining an environment conducive to fair testing. Any discrepancies or inefficiencies can lead to undue stress and may not accurately reflect a student's capabilities.

8. Timely result publication is equally important. Delays in result declaration can cause anxiety and uncertainty among students. It can also hinder their ability to make informed decisions about their future, such as applying for higher studies or jobs.

9. If universities fail in these responsibilities, it can be argued that they should provide compensation to the affected students. This could be in the form of financial compensation, course credits, or other measures that acknowledge and rectify the inconvenience caused. Such a provision not only serves as a remedial measure but also underscores the accountability of educational institutions.

10. However, it's important to note that while compensation can provide some relief, it does not absolve universities of their responsibilities. Universities must strive to prevent such lapses in the first place through robust systems, regular audits, and a commitment to student welfare.

11. In ***University of Kerala v. Sandhya P. Pai***,[1] the Kerala High Court has held that serious errors that negatively impact the lives of diligent students cannot be ignored. The relevant excerpts of the judgment is produced hereinbelow:

> *"The University states that it has to determine the destiny of many thousand students and within a compressed time, and that the court should be appreciative of the practical difficulties in running and managing any massive human organisation. While appreciating the massiveness of the works that have to be done and even the time limit within which they have to be done and with perfection, we cannot, on that ground, exonerate the University of its fundamental obligation to complete the valuation of the merit of a student within time. Difficulties do not permit an authority to act in derogation of its duty such as the duty to observe principles of natural justice, (vide R. v. Havering Justice, (1974) 3 All ER 484 at 488). If men and material are inadequate, it is for the University to address itself on those questions and to find out appropriate and adequate remedies. It is not for the court to give an advice or guideline in such matters. The Universities were not born yesterday. The hallowed institutions carry with them the rich and ripe experiences of bygone ages, and of a rare variety of human species the cream of the intelligential. New situations-require modulations. That is precisely the duty of those with whom the functions of a University are entrusted by a solemn legislative enactment. A University is not yet another factory where production by number is fixed as the sole standard for payment of wages. The University cannot*

1. AIR 1991 KER 396

compromise with quality. The followers of Darwin cannot reconcile with anything imprecise in their life, even in the course of an innocent narrative in an informal meeting. (Darwin woke up from his sleep, to tell his lively awake friends in a dinner party, about an inaccurate statement which had crept in in an earlier narrative he had made). We will not be justified in winking our eyes, at grievous lapses when they mar precious lives of a studious generation of students. If additional posts are required to cope up with the increased volume of work, it is the duty of the State to find out the resources needed for the same, and to resort to sophisticated and scientific methods which would destroy the tedium in the work and facilitate precision and speed simultaneously. The delay of about 8 months in the despatch of the revaluation marks is murderous in character in relation to the educational life of a young student. Every second of the victim of the erroneous valuation is a lynching experience for the student. No court win permit such cruelties to pass unnoticed. (See the stern action taken by the Supreme Court in Board of High School and Intermediate Education, U. P. v. Chitra Srivastava, AIR 1970 SC 1039)"

12. Similarly, Patna High Court in ***Manoj Kumar and Another vs. The State of Bihar***[2] directed the Bihar School Examination Board to pay a monetary compensation of Rs 2 Lakh to a girl who was wrongly declared 'fail' in a paper of the Secondary School Examination, 2017 (Annual) conducted by the Bihar School Examination Board. The Court held as follows:

"In the totality of the facts and circumstances of the case, considering the fact that the petitioner no. 2 being a girl student who had in fact passed her matriculation examination in 1st division but because of the irresponsible act of the Board and its officials, she has suffered in her life and has lost her valuable time and studies which cannot be otherwise compensated, this Court directs the Board to pay a sum of Rs.2 lakhs to the petitioner no. 2 as compensation and Rs. 25,000/- as cost of litigation."

13. Given the entirety of the situation and the fact that the petitioner has endured significant hardship and lost ten years of his professional life, a loss that cannot be compensated in any other way, this Court orders the University to pay the Petitioner a sum of Rs.5.00 lakhs as compensation. This amount shall be paid to the Petitioner within three months from the date of presentation of this order before the University Authority.

14. This Writ Petition is disposed of being allowed.

2. Civil Writ Jurisdiction Case No. 7185 of 2019 (Patna HC)

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2024 (I) ILR-CUT-1302

MISS SAVITRI RATHO, J.

BLAPL NO. 434 OF 2024

"B" ……Petitioner

-V-

STATE OF ODISHA ……Opp.Party

(A) CODE OF CRIMINAL PROCEDURE, 1973 – Sections 437 & 439 – The petitioner is in custody since 08.08.2023 for the offence U/s. 20(B)ii(B), and 21(b) of the NDPS Act, due to seizure of 26.720gms. of brown sugar – The petitioner is suffering from HIV(+ve) and he is taking ART as prescribed by ARTC SCB,MCH, Cuttack regularly and is in stable condition – Whether the petitioner is entitle to be released on bail? – Held, Yes – As the petitioner is suffering from HIV(+ve), even though the jail authorities have claimed that he is being extended proper treatment, the petitioner is entitled to live with dignity in an environment which is congenial to him, as it is not possible inside the jail.

(B) THE HUMAN IMMUNODEFICIENCY VIRUS AND ACQUIRED IMMUNE DEFICIENCY SYNDROME (PREVENTION AND CONTROL) ACT, 2017 – Section 34(1)(C) – Necessary directions given to protect the dignity and identity of the petitioner. (Paras 9-10)

Case Law Relied on and Referred to :-

1. Special Leave to Appeal (Crl.) No. 2225/2022 : Bhawani Singh vs. State of Rajasthan

For Petitioner : Mr. Rakesh Kumar Das on behalf of Mr. Sujit Ku. Das
For Opp. Party : Mr. M.R. Mishra, Addl. Standing Counsel

JUDGMENT Date of Judgment : 29.02.2024

SAVITRI RATHO, J.

This is the third application of the petitioner under Section 439 of the Cr.P.C. in connection with Dhenkanal Sadar P.S. case No. 660 of 2023 corresponding to C.T. (Special) Case No. 11 of 2023 pending in the Court of the learned Judge, Special Court, Dhenkanal, under Section 21(b) of the N.D.P.S. Act.

2. BLAPL No.10664 of 2023 filed by the petitioner and co-accused Jitu @ Jitendra Pradhan had been disposed of on 05.10.2023 granting liberty to the petitioner to move for bail afresh after completion of the investigation.

3. BLAPL No. 13029 of 2023 had been filed by the petitioner and co-accused Jitu @ Jitendra Pradhan after completion of the investigation. On 21.11.2023, the prayer for bail of the co-accused Jitu @ Jitendra Pradhan had been allowed, while the prayer of the petitioner had been rejected as he had one criminal antecedent under Section 20(b)(ii)(B) of the NDPS Act, but liberty had been granted to the petitioner to move the learned Court below for bail afresh after annexing his medical documents as submission had been made that the petitioner is suffering from HIV AIDs and needs regular treatment and monitoring.

4. Thereafter, the petitioner has moved the learned Court below for bail and his prayer for bail has been rejected on 30.11.2023. While rejecting the prayer for bail, the learned Court below has observed as follows:

"Though the learned counsel for the accused by filing a document before this Court has submitted that the accused is a chronic HIV/AIDs patient, that cannot be considered as change circumstance as the Jail Authority, Dist. Jail, Dhenkanal must have taken care of him by giving proper treatment to him for the aforesaid disease."

5. Report had been called for from the Superintendent Dist. Jail on 07.02.2024. The report of the Medical Officer, District Jail, Dhenkanal reveals that the petitioner had been admitted to District Jail, Dhenkanal on 08.08.2023 with the green booklet from ARTC S.C.B. Medical College & Hospital, Cuttack, which indicates that he is suffering from H.I.V. (+ve) from 30.03.2009. Since the time he has been in the District jail, Dhenkanal, he is taking ART, AS prescribed by ARTC SCB MCH, Cuttack, regularly and he is going to SCB MCH, every month from health check up at ARTC and he is taking ART regularly and in stable condition.

6. Mr. Rakesh Kumar Das, learned counsel appearing for the petitioner submits that the petitioner is in custody since 08.08.2023 and in BLAPL No. 13029 of 2023, liberty has been granted to the petitioner to move the learned Court below for bail afresh along with his medical documents but his prayer has been rejected on the ground that the jail authorities must be looking after him. He submits that although it has been stated by the jail authorities that the petitioner is being given treatment in jail, but considering the nature of his ailment, he is not able to lead a normal life inside the jail, as the other inmates are avoiding contact with him, for which he is leading a secluded and miserable life in jail. He further submits that under Section 437 of the Cr.P.C., a sick or infirm person is entitled to be released on bail. He finally submits that in view of the quantity of brown sugar allegedly seized from his exclusive and conscious possession, Section 37 of the N.D.P.S. Act will not be a bar for consideration of his prayer for bail and his criminal antecedent is one under Section 20 (B) (ii) B of the NDPS Act which does not attract the restrictions under Section 37 of the NDPS Act. He relies on the decision of the Supreme Court in the case of ***Bhawani Singh vs. State of Rajasthan in Special Leave to Appeal (Crl.) No. 2225 of 2022*** disposed of on 11.04.2022.

7. Mr. M.R. Mishra, learned Additional Standing counsel opposes the prayer for bail stating that 26.720 gm of Brown Sugar has been seized from the conscious and exclusive possession of the petitioner (from his pant pocket) and as he has one criminal antecedent, he does not deserve to be released on bail. He further submits that after considering the submission of the learned counsel that the petitioner is suffering from AIDs, the prayer for bail of the petitioner had been rejected by this Court in BLAPL No. 13029 of 2023, while prayer of the co-accused had been allowed and there is no change in circumstance.

8. In the case of ***Bhawani Singh*** (supra), the Appeal of the accused who had criminal antecedents was pending disposal before the High Court. While directing for early disposal of his appeal, the Supreme Court has held as follows :

"Having regard to the peculiar circumstances of the case given that the petitioner is suffering from HIV and appears to be immuno compromised, this Court is of the opinion that a case for grant of bail is made out.

In the circumstances, the petitioner shall be enlarged on bail subject to such terms and conditions imposed by the Trial Court.

In addition to the usual conditions, the concerned court shall also impose appropriate conditions with regard to the periodic reporting by the concerned petitioner at the concerned Police Station, since several cases are pending against him."....

9. The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 (16 of 2017) (in short " the Act") has been enacted " *to provide for the prevention and control of the spread of Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome and for the protection of human rights of persons affected by the said virus and syndrome and for matters connected therewith or incidental thereto.*" The Act has come into force on the 10th day of September, 2018, vide Notification No. S.O. 4715(E) of the Central Government.

Section 34 of the Act which is relevant is extracted below :

Section 34(1) *In any legal proceeding in which a protected person is a party or such person is an applicant, the court, on an application by such person or any other person on his behalf may pass, in the interest of justice, any or all of the following orders, namely:—*
(a) that the proceeding or any part thereof be conducted by suppressing the identity of the applicant by substituting the name of such person with a pseudonym in the records of the proceedings in such manner as may be prescribed;
(b) that the proceeding or any part thereof may be conducted in camera;
(c) restraining any person from publishing in any manner any matter leading to the disclosure of the name or status or identity of the applicant.
(2) In any legal proceeding concerning or relating to an HIV-positive person, the court shall take up and dispose of the proceeding on priority basis.

10. The name of the petitioner is not reflected in the order in order to protect his identity.

11. As the petitioner is HIV+, even though the jail authorities have claimed that he is being extended proper treatment, the petitioner is also entitled to live with dignity in an environment in which is congenial to him, which is not possible inside the jail.

12. After considering the submission of the counsel, the decision of the Supreme Court and the provisions of the Act, the quantity of brown sugar seized from the petitioner who is admittedly HIV+ and under treatment, even though he has one criminal antecedent under the NDPS Act, I am inclined to allow his prayer for bail.

13. The petitioner shall be released on bail by the learned Court in seisin over the matter on such terms and conditions as deemed fit and proper by it.

14. The BLAPL is accordingly allowed.

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2024 (I) ILR-CUT-1306

MISS SAVITRI RATHO, J.

BLAPL NO. 11467 OF 2023

SRI RAJESH PANDA @RAJESH PANDA ……Petitioner

-V-

STATE OF ODISHA ……Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 439 – Bail – Direction with regard to streamline of the proceeding and avoid anomalies with reference to bail application.

Case Laws Relied on and Referred to :-

1. 2024 INSC 46 : Kusha Duruka vs. State of Odisha
2. (1995) 1 SCC 421 : Chandra Shashi v. Anil Kumar Verma.

For Petitioner : Mr. Abhijit Mohanty

For Opp. Party : Mr. S.S. Mohapatra, A.S.C

ORDER Date of Order : 20.03.2024

SAVITRI RATHO, J.

1. This is an application under Section 439 of the Cr.P.C. in connection with Sahadevkhunta P.S. Case No. 350 of 2023 corresponding to C.T. Case No. 729 of 2023 pending in the Court of the learned S.D.J.M., Balasore registered for commission of offences punishable under Sections 498-A, 302, 304-B, 34 of IPC read with Section 4 of D.P. Act.

2. Mr. Abhijit Mohanty, learned counsel for the petitioner files a memo stating that the case has in the meanwhile been committed to the Court of the learned District and Sessions Judge, Balasore and re-numbered as S.T. Case No. 14 of 2024 and is posted for framing of charge. As per instructions received from the client, the bail application may be permitted to be withdrawn with the liberty to renew the prayer before the learned Court below after framing of charge.

3. On 07.03.2024, Mr. P.C. Jena, learned counsel for the petitioner has submitted that after submission of charge sheet dated 16.11.2023, the co-accused Mina @ Sashikala @ Sashikala Panda had moved the learned Sessions Judge, Balasore for bail and her prayer for bail has been allowed on 24.11.2023 in BLAPL No. 1286 of 2023 and he has produced a certified copy of the order which was taken on record. On perusal of the order dated 24.11.2023 passed in BLAPL No. 1286 of 2023, I found that there is no mention in the order regarding BLAPL No.11020 of 2023 filed before this Court by the said accused. So the learned counsel for the petitioner had been directed to file a copy of the application in BLAPL No. 1286 of 2023 which has been filed in the Court of the learned District and Sessions Judge, Balasore, for perusal of this Court. The Registry had also been directed to call for a copy of the Bail Application No. 1286 of 2023 filed by the co-accused Mina @

Sashikala @ Sashikala Panda in the Court of the learned District and Sessions Judge, Balasore.

4. Copy of the bail application in BLAPL No. 1286 of 2023 has not been filed by the learned counsel for the petitioner in this Court, but there is no note by the Registry to that effect, for reasons best known to the concerned Dealing Assistant.

5. Copy of the application in BLAPL No. 1286 of 2023 as well as the order dated 24.11.2023 passed in BLAPL No. 1286 of 2023 has been received from the Court of the learned District and Sessions Judge, Balasore. I have perused both.

6. In the petition filed under Section 439 of Cr.P.C. in BLAPL No. 1286 of 2023, it is found that there is no mention regarding the order dated 11.10.2023 passed by this Court in BLAPL No.11020 of 2023 or any averment that BLAPL No.11020 of 2023 had been filed by her in this Court. The certificate at the foot of the bail application is extracted below:

> *"Certified that there is no bail petition is pending and sub-judice before any court of law between the self same parties. One bail petition bearing No.945/2023 was disposed of by this Hon'ble Court on 21.09.2023"*

7. In first paragraph of the order dated 24.11.2023, there is a reference to the Memo filed by the counsel before that Court which reeks of suppression of fact. The relevant paragraph is extracted below :

> *"Learned counsel for the accused-petitioner filed a memo indicating therein that no other bail application is filed, pending or disposed of before any higher forum as on today, in addition to the certificate given at the foot of the bail application"*

8. From this, it is apparent that incorrect submissions have been made and relevant facts have been suppressed when the BLAPL No. 1286 of 2023 was heard.

9. I think it apposite to extract the relevant paragraphs of the judgment of the Supreme Court in the recent case of ***Kusha Duruka vs. State of Odisha : 2024 INSC 46***, (decided on 15.01.2024), which are as follows :

> *"About three decades ago, this Court in **Chandra Shashi v. Anil Kumar Verma : (1995) 1 SCC 421**, was faced with a situation where an attempt was made to deceive the Court and interfere with the administration of justice. The litigant was held to be guilty of contempt of court. It was a case in which husband had filed fabricated document to oppose the prayer of his wife seeking transfer of matrimonial proceedings. Finding him guilty of contempt of court, he was sentenced to two weeks' imprisonment by this Court. This Court observed as under:*
>
> *"**1.** The stream of administration of justice has to remain unpolluted so that purity of court's atmosphere may give vitality to all the organs of the State. Polluters of judicial firmament are, therefore, required to be well taken care of to maintain the sublimity of court's environment; so also to enable it to administer justice fairly and to the satisfaction of all concerned.*
>
> ***2.** Anyone who takes recourse to fraud, deflects the course of judicial proceedings; or if anything is done with oblique motive, the same interferes with the administration of*

justice. Such persons are required to be properly dealt with, not only to punish them for the wrong done, but also to deter others from indulging in similar acts which shake the faith of people in the system of administration of justice.

* * *

14. *The legal position thus is that if the publication be with intent to deceive the court or one made with an intention to defraud, the same would be contempt, as it would interfere with administration of justice. It would, in any case, tend to interfere with the same. This would definitely be so if a fabricated documents is filed with the aforesaid mens rea. In the case at hand the fabricated document was apparently to deceive the court; the intention to defraud is writ large.*

Anil Kumar is, therefore, guilty of contempt."

With a view to streamline the proceedings and avoid anomalies with reference to the bail applications being filed and in the cases pending trial and for suspension of sentence, the Supreme Court has directed as follows :

"20. In our opinion, to avoid any confusion in future it would be appropriate to mandatorily mention in the application(s) filed for grant of bail:

(1) Details and copies of order(s) passed in the earlier bail application(s) filed by the petitioner which have been already decided.

(2) Details of any bail application(s) filed by the petitioner, which is pending either in any court, below the court in question or the higher court, and if none is pending, a clear statement to that effect has to be made.

This court has already directed vide order passed in ***Pradhani Jani****'s case (supra) that all bail applications filed by the different accused in the same FIR should be listed before the same Judge except in cases where the Judge has superannuated or has been transferred or otherwise incapacitated to hear the matter. The system needs to be followed meticulously to avoid any discrepancies in the orders.*

In case it is mentioned on the top of the bail application or any other place which is clearly visible, that the application for bail is either first, second or third and so on, so that it is convenient for the court to appreciate the arguments in that light. If this fact is mentioned in the order, it will enable the next higher court to appreciate the arguments in that light.

(3) The registry of the court should also annex a report generated from the system about decided or pending bail application(s) in the crime case in question. The same system needs to be followed even in the case of private complaints as all cases filed in the trial courts are assigned specific numbers (CNR No.), even if no FIR number is there.

(4) It should be the duty of the Investigating Officer/any officer assisting the State Counsel in court to apprise him of the order(s), if any, passed by the court with reference to different bail applications or other proceedings in the same crime case. And the counsel appearing for the parties have to conduct themselves truly like officers of the Court."

10. In view of the absence of any mention about BL APL No. No. 11020 of 2023 and the contents of the Memo which have been mentioned in paragraph 1 of the order of the learned District and Sessions Judge and quoted above, I am satisfied that there has been deliberate suppression of facts during consideration of BLAPL No. 1286 of 2023. The order dated 24.11.2023 granting bail to Mina @ Sashikala @ Sashikala Panda is therefore liable to be recalled.

11. Considering the submission of Mr. Abhishek Mohanty, learned counsel and the Memo filed, this BLAPL is dismissed as withdrawn.

12. It is open to the petitioner Rajesh Panda @ Rajesh Panda to move the learned trial Court for bail afresh after framing of charge.

13. Urgent certified copy of the order be granted on proper application.

14. Registry shall send a copy of the order to the Court of the learned Sessions Judge, Balasore along with the order dated 11.10.2023 passed in BLAPL No.11020 of 2023 for necessary action.

15. List this case on 04.04.2024 awaiting report of the learned Sessions Judge, Balasore regarding action pursuant to this order.

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2024 (I) ILR-CUT-1309

R.K.PATTANAIK, J.

W.P.(C) NO. 24066 OF 2023 WITH BATCHES

[W.P(C) NOs.24085,24200,24271,24272,24276,24277,24279,24280,24282,24284, 24292,24293,24296,24299,24313,24315,24365,24367,24369,24371,24372,24476, 24600,24634,24635,24640,24642,24643,24663,24665,24667,24729,24799,24804, 24806,24807,24808,24809,24810,24822,24938,24939,24940,24982,25407,26017, 26523,26714,27302,27304,27306,27307,27705,27752,27754 & 27827 OF 2023]

AAKASH KUMAR AGRAWAL & ANR. ……Petitioners

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – Article 21 r/w Section 254 of the Odisha Municipality Act – The Executive Officer, Bargarh Municipality passed an order of eviction and demolition against the unauthorized encroacher/the petitioners – Petitioners challenge the decision of demolition on the ground of violation of principle of natural Justice and an Act of colourable exercise of power – Effect of – Held, Article 21 of the Constitution of India commands that, no one shall be deprived of life and personal liberty except according to the procedure established by law – The Municipality shall issue a fresh notice in the manner prescribed under law giving all the petitioners a clear fifteen days time to respond. (Paras 11-13)

Case Laws Relied on and Referred to :-

1. (2008) 13 SCC 506 : Municipal Corporation Ludhiana Vrs. InderjIt Singh & Anr.
2. AIR 2019 SC 5435:(2019) 20 SCC 781: Municipal Corporation of Greater Mumbai & Ors. Vrs. Sunbeam High Tech Developers Private Limited & Ors.
3. (2010) 8 SCC 383 : Meghmala & Ors. Vrs. G. Narasimha Reddy & Ors.
4. 2018 (I) OLR 379 : Berhampur Municipality Vrs. Mahalaxmi Sahoo.
5. 2006 (I) OLR 419 : Prakash Chandra Padhi & Ors. Vrs. State of Odisha & Ors.

6. (1970) 78 ITR 728 (Cal.) : CIT Vrs. Panna Devi Saraogi.
7. (2009) 12 SCC 40 : Umanath Pandey Vrs. State of U.P.
8. (1982) Tax LR (NOC) 200 Orissa : Asiatic Oxygen Ltd. Vrs. STO.
9. AIR 1978 SC 597 : Maneka Gandhi Vrs. Union of India.
10. 1985 SCC(3) 545 : Olga Tellis & Ors. Vrs. Bombay Municipal Corporation & Ors.

For Petitioners : Mr. Biplab Mohanty, Mr. A.P. Bose, Mr. S. Mishra, Mr. A.K. Panda, Mr. S. Das, Mr. M. Mohanty, Mr. D.R. Parida, Mr. R. Sharma, Mr. V. Kar, Mr. R.K. Agrawal, Mr. G. N. Parida, Mr. B.R. Behera, Mr. S.K. Pradhan, Mr. A. Patnaik, Mr. A.K. Chaudhury, Mr. S.K. Samal, Mr. B. Mohanty, Mr. J. Sahu.

For Opp.Parties : Mr. P K. Rout (AGA), Mr. J.K. Panda (for Bargarh Municipality)

JUDGMENT Date of Judgment : 01.02.2024

R.K.PATTANAIK, J.

1. Since the cause of action is similar, the matters are clubbed together with all the writ petitions being disposed of by the following common order.

2. Heard learned counsel for the respective parties.

3. Instant writ petitions have been filed by the petitioners assailing the impugned action of the Executive Officer, Bargarh Municipality (hereinafter referred to as 'the EO') declaring their eviction as arbitrary, unreasonable and unfair and also for a direction to the authority concerned to provide them an opportunity of hearing before proceeding with eviction and demolition with such other reliefs.

4. The action is at the behest of the EO. In individual cases, more or less similar pleas have been advanced challenging the demolition drive declared by the EO. In couple of cases, the petitioners have raised claims over the lands in question opposing eviction. In fact, the standing structures over the schedule lands, as according to the EO, are over the Government lands, which are required to be removed. The reason for eviction and demolition in view of the EO is on account of congestion of roads due to the alleged encroachment. Citing other reasons as well, such demolition drive with eviction was announced in the month of July, 2023. Some of the petitioners have pleaded that they do not have other means of shelter and in the event, the demolition is allowed, all of them would be put to severe hardship. The action of the EO is primarily questioned by the petitioners for having not been provided reasonable time to respond to the decision of demolition, which according to them, is not only against the principle of natural justice but also an act of colourable exercise of power. It has been contended that prior notice with all fairness is the requirement of law before eviction, unfortunately, however, the EO failed to comply the same before proceeding with the demolition drive.

5. In course of hearing, learned counsel for the respective parties urged the Court to consider many aspects related to the eviction and demolition which is claimed to be not in accordance with law, even questioned the authority of the EO. It has been claimed that before demolition, prior permission of the State Government

to be necessary, which in the present case, to be conspicuously absent and that apart, there has been no compliance of the provisions of Odisha Public Premises (Eviction of Unauthorized Occupants) Act (in short 'the OPP Act'), inasmuch as, such an action is being dealt with by the Estate Officer, who is conferred with the powers to initiate eviction process and while stating so, circulars of the Government dated 28th September, 1989 and 9th January, 2014 to the rejoinder affidavit filed in W.P.(C) No. 24276 of 2023 are referred to. It is also contended that if the purpose and object of demolition is for improvement of the town, the same has to be in accordance with a Scheme in place in view of Section 44 of the Odisha Town Planning and Improvement Trust Act and in absence of the same, the action of the EO is bad in law. The manner in which, the demolition drive has been initiated on the basis of representations or requests received is also questioned. The further contention is that the provisions of the Odisha Municipal Rules read with Section 62-A of the Odisha Municipal Act since relate to town planning, in absence of any draft development, the eviction and demolition to be not in confirmity with law. A reference is made to other provisions of the said Act dealing with and in relation to public streets, removal of encroachment etc. by claiming that due process has not been followed before taking the impugned decision and while advancing such an argument, the following case laws, such as, **Municipal Corporation Ludhiana Vrs. InderjIt Singh and Another (2008) 13 SCC 506; Municipal Corporation of Greater Mumbai and others Vrs. Sunbeam High Tech Developers Private Limited and others AIR 2019 SC 5435:(2019) 20 SCC 781; Meghmala and others Vrs. G. Narasimha Reddy and others (2010) 8 SCC 383** and a judgment of this Court in the case of **Jasobant Parida Vrs. State of Odisha and Others** (W.A. No.506 of 2016) disposed of on 21st November, 2023, which is with reference to an action on the issuance of notice initiating an encroachment proceeding under the OPLE Act being challenged in juxtaposition to the OPP Act have been referred to. The further argument is that a declaration for eviction and demolition within the limits of the Municipality ought to have been by invoking the provisions of the OPP Act. Such other grounds are raised to meet the challenge and action opposing the demolition drive on the premise that fairness and law was not sincerely observed and complied with by the EO before proceeding with the demolition and declaring it with no reasonable time left for anyone to react and respond.

6. The petitioner in W.P.(C) No.24200 of 2023 claimed himself not to be an encroacher, having owned the residential building standing over the land for more than 50 years and that such action without initiating the process of acquisition and paying compensation in lieu thereof would be grossly illegal. The source of having acquired the land is claimed to be on the strength of a sale deed. It is further pleaded in the alternative that Section 254 of the Odisha Municipal Act has been given a go bye as any such occupation of the premises even by encroachment or obstruction provides the occupier a prescribed title thereto with the demand against the Municipality to make reasonable compensation on account of its removal or alteration,

but in the case of the petitioner, such as an exercise was never contemplated. It is contended that due process of law has not been followed keeping in view Section 254 of the Odisha Municipal Act read with Section 602 of the Odisha Municipal Rules as the law prescribes notice to be served on the owner or occupier of any premises before the same to be removed as issuance of a proper notice is *sine qua non* for removal of encroachment as held by this Court in **Berhampur Municipality Vrs. Mahalaxmi Sahoo 2018 (I) OLR 379** with a consequential hearing considering the show cause as held in **Prakash Chandra Padhi and Others Vrs. State of Odisha and Others 2006 (I) OLR 419** and in the case of the petitioners, since there has been no such opportunity provided for a show cause to be filed, the decision of the EO is unilateral and hence, unsustainable in the eye of law. Furthermore, referring to the following decisions, namely, **CIT Vrs. Panna Devi Saraogi (1970) 78 ITR 728 (Cal.); Umanath Pandey Vrs. State of U.P. (2009) 12 SCC 40; and Asiatic Oxygen Ltd. Vrs. STO (1982) Tax LR (NOC) 200 Orissa**, it has further been contended that the principle of natural justice has been violated as there was no due notice served on the petitioners nor any occasion was there for them to file a rely and to put forth grievance since a mike announcement just two days ahead of the demolition drive was made which by no means can be said to be proper notice by the Municipality. One of the limbs of argument which is common to all is with reference to the Government circular dated 9th January, 2014 and to the effect that the action should have been followed as per the OPP Act and hence, therefore, the EO acted without jurisdiction to carry out the demolition. The Court is not to repeat the grounds which have been raised by individual set of learned counsel appearing for respective parties. The common ground is that there has been no opportunity to respond to the action of the EO immediately after declaring eviction and demolition and the same is without authority and by not following due process of law in view of the fact that the area situates within the limits of the Municipality to which the provisions of the OPP Act would govern and apply. That apart, it has been brought to the notice of this Court that on the demand for widening of the road, the Municipality constituted a Committee later to which the EO was authorized to take steps for eviction and demolition which was declared through a public announcement by mike to be held on 31st July, 2023. It has been alleged that on a combined reading of Annexure-A/2 to the counter affidavit filed in W.P.(C) No. 26017 of 2023 and Annexure-3 series of the rejoinder affidavit filed in W.P.(C) No. 24066 of 2023, it is revealed that the demands for removal of encroachment have been received from the District Bar Association, Bargarh besides a local organization later to which a Committee was constituted by the Collector, Bargarh with some of the office bearers of the said Bar Association as the members of it and on the recommendation of the Committee, the action was initiated with the contention that the members of the local Bar Association could not have been a part of such a Committee when it equally demanded action. It is contended that the recommendation of the Committee suffers from the principle of *nemo in propria causa judex, esse debet* meaning thereby that no one shall be a judge of his own

cause. The further is contention is that the decision also stands vitiated by not following the principles of *audi alteram partem* (or *audiatur et altera pars*) and for want of due process observed as per law which requires a thing to be done in a particular manner referring to the provisions of the OPP Act. The petitioners, in all cases, alleged bias and impropriety on the part of the local Administration and the Municipality, while dealing with the exercise. On the contrary, the same is stoutly denied by the Municipality and the State claiming that adequate measures with proper planning, demolition drive was declared for removal of encroachment and such an exercise is by virtue of the authority conferred to the Municipality under Section 254 of the Odisha Municipal Act.

7. Considering the pleadings on record and submissions of learned counsel for the respective parties and taking into account the stand of the Municipality with the counter affidavit filed, the following issues arise for consideration, such as:

> (i) Whether the Municipality has jurisdiction to initiate the process of eviction and demolition?
>
> (ii) Whether the principle of natural justice has been followed before initiation of the demolition drive within the limits of the Municipality?
>
> (iii) Whether the process of eviction and demolition may be allowed without the rights of the parties vis-à-vis interest and ownership over the lands being adjudicated upon and determined?
>
> (iv) Whether initiation of the process of eviction and demolition and exercise of authority by the EO in that regard to remove the encroachment is justified?

8. In **Inderjit Singh** (supra), it has been held that demolition without any opportunity of hearing and prior notice being served having been issued against a dead person is not in accordance with law. In the case of **Sunbeam High Tech Developers Private Limited** (supra), the Apex Court held that 15 days notice prior to taking action for demolition is statutorily necessary which was with reference to the provisions of the Mumbai Municipal Corporation Act. In **Meghmala** (supra), it has been held that illegal forcible eviction from the land even by Government on the strength of an executive order is not permissible. It is fairly settled that any such action by the local authority or the Government shall have to be accomplished by due process of law. In an action by a demolition drive, notice with a reasonable time is always expected. Even as per Section 254 of the Odisha Municipal Act, though it does not contemplate any provision for show cause reply, notice is required to be served on the owner or occupier before the encroachment can be removed. Nevertheless, in **Prakash Chandra Padhi** (supra), the Court held that such an exercise under the Odisha Municipal Act with a notice for the purpose of removal or alteration, as the case may be, should be preceded by a show cause and hearing. Thus, it has to be held that any such demolition drive should be initiated with a notice and opportunity to respond. In the considered view of the Court, a notice for the sake of notice with no reasonable time or breathing space for the occupiers is no compliance in the eye of law. Furthermore, in **Umanath Pandey** (supra), the Apex

Court held that notice should apprise the party to respond with reasonable time so as to enable him to reply and without any such opportunity being provided, if the action is followed, it shall become fully vitiated. So to say, principle of natural justice shall have to be followed at the time of such action. In the instant case, as earlier stated, public announcement was made declaring demolition drive to take place barely two days later with no time left for any of the petitioners to respond. The petitioners prima facie do not appear to be rank trespassers, which is, however, subject to correction. Nonetheless, in the case of a demolition drive, if not adequate, reasonable time with a proper notice is absolutely necessary. By no stretch of imagination, the action of the EO can be said to be justified with a public notice at the office of the Municipality and mike announcement for eviction and demolition which was to take place just two days after quite curiously intervened by holidays as has been alleged by the petitioners. In fact, the petitioners doubted the credibility and real intention of the Municipality behind the demolition drive declared leaving only two days for them to face the inevitable consequence. In the considered view of the Court, there was too little time for the petitioners to respond to the action which was declared through a public announcement.

9. The undisputed facts are that on the requests received from certain quarters, the local Administration constituted the Committee and on receiving recommendation of the said Committee, eviction was declared with the demolition drive. As earlier stated, one of the contentions is that the EO does not have the authority under law to initiate such an action within the limits of the Bargarh Municipality, as the provisions of the OPP Act would rather apply. One is aware of the fact that either the OPLE Act applies for removal of encroachment from the Government land or OPP Act in respect of public premises within the limits of the Municipality and NAC, etc. as the case may be. Though, the above laws deal with removal of unauthorized occupation from the Government land but in view of the clarification issued by the Government of Odisha in Revenue and Disaster Management Department by letter dated 9th January, 2014 addressed to the Secretary, Board of Revenue, Odisha, Cuttack, the OPP Act is applicable to the land situate within the Municipality, NAC or Industrial area etc. and eviction from the public premises by the encroachers shall have to be in terms of Section 4 of the said Act. In the instant case, no such proceeding under the OPLE Act has been initiated, inasmuch as, the impugned action is by and at the instance of the EO with a public notice. But at the same time, the Court is of the humble view that the Municipality does have the jurisdiction under Section 254 of the Odisha Municipal Act, a provision dealing with removal of encroachment, which is not in any way trampled in view of the OPP Act.

10. In so far as, other provisions of the Odisha Municipal Act and Odisha Town Planning and Improvement Trust Act are concerned, there has been no material on record to show that the demolition drive has been initiated later to any development plan. In other words, it is not claimed that the action at the behest of the local

Administration with the assistance of the Municipality is on the strength of any improvement scheme in accordance with Section 44 of the Odisha Town Planning and Improvement Trust Act, hence, therefore, there is no need for the Court to consider any such ground as advanced by the petitioners while opposing the eviction and demolition. The Court is also of the conclusion that in some of the cases, where right, title and interest is claimed over the land of the Government, liberty should always remain for the occupants to approach the civil court. Yet, in all the cases, the Court considers it just and proper to provide the petitioners, a reasonable time to respond to the public notice before any such action is being initiated with a demolition drive. Simultaneously, it is concluded that the demolition drive cannot be challenged on the ground that the Collector, Bargarh may exercise authority under Section 115 of the Motor Vehicles Act to regulate and restrict use of vehicle on a particular road. It is made clear that any such public premises, if has been under encroachment, eviction and demolition cannot be circumvented by taking a plea that discretion and jurisdiction under the provisions of the Odisha Motor Vehicles Act and Rules could be exercised to regulate the vehicular movement with respect to a specific route or for that matter, due to the OPP Act in place. Thus, therefore, the inescapable conclusion of the Court is that due process is required to be followed by the Municipality in order to remove the encroachment from the Government land with reasonable time for the petitioners to respond. A large scale encroachment of the public premises cannot be justified through a short circuit way bypassing established procedure of law. So considering the different grounds raised by the petitioners, it would serve the purpose, if action is preceded by a proper notice with reasonable time and at the same time, leaving any of the petitioners to seek appropriate remedy under the common law and such option in case gets affected and is unable to be exercised in a situation like resolution of the local Bar Association, as alleged by the petitioners, which is quite not expected from a learned fraternity, the court of competent jurisdiction is to usurp the role to address it.

11. To sum up, with answers to the questions framed, the Court is of the humble view that (i) the Municipality possesses the jurisdiction or the authority to remove encroachment under the Odisha Municipal Act which is not in a way outwitted in view of the provisions of the OPLE Act or OPP Act or any other statute referred to herein before, the intent, purpose and applicability of the laws being independent of each other and mutually exclusive in nature; (ii) there is, however, a ground made out to show that the impugned action was in a haste leaving no time for any of the petitioners to react and respond to it as public announcement was to be followed with demolition just few days later; (iii) whether, pending decision on the rights of the occupants, eviction and demolition is to be allowed, of course preceded by a reasonable notice in terms of Section 254 of the Odisha Municipality Act, the same is not entirely impermissible, inasmuch as, such exercise of power before the defences put forth are decided against the owner or occupier can be held to be bonafide in certain circumstances, where for instance, the encroachment isunendurable

for reasons like serious dangers or other emergent situations of like nature in the larger and greater interest of the public; (iv) the action by the Municipality since exercisable under the Odisha Municipal Act, it is to be held as justified provided due process of law is followed which includes a notice with reasonable time to respond, as without it, there would be no compliance at all.

12. Furthermore, the Court is alive to the legal position that Article 21 of the Constitution of India commands that no one shall be deprived of life and personal liberty except according to the procedure established by law and the dictum of the Apex Court in **Maneka Gandhi Vrs. Union of India AIR 1978 SC 597** which expanded the scope of procedure established by law with a ruling that such procedure has to be fair, just and reasonable and not fanciful, oppressive or arbitrary thereby introducing the principle of procedural due process and the fact that any such action is certainly to affect the petitioners their right to livelihood which is an integral part of right to life as highlighted upon in **Olga Tellis and others Vrs. Bombay Municipal Corporation and others 1985 SCC(3) 545** and being conscious of the moral code of conduct emanating from the **Universal Declaration of Human Rights** considers it just and expedient to issue the following directions, such as,(i) despite earlier notice, the Municipality shall issue a fresh one in the manner prescribed under law leaving all the petitioners a clear 15 (fifteen) days time to respond; (ii) within the above stipulated period, the petitioners shall avail all such remedy available under law in order to safeguard individual interest and may even approach the authority issuing the notice with a presentable and satisfactory explanation to avoid eviction and demolition; and (iii) the Municipality shall on expiry of the notice period proceed in accordance with law keeping in view the spirit of the law discussed and observations made herein above.

13. In the result, the writ petitions stand disposed with the directions as aforesaid.

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2024 (I) ILR-CUT-1316

R.K. PATTANAIK, J.

W.P.(C) NO. 23364 OF 2013

KSHIROD KUMAR MAJHI ……Petitioner

-V-

STATE OF ORISSA & ORS. ……Opp.Parties

SERVICE LAW – The petitioner belong to the caste of "kaibarta" – He joined in the service as Junior Auditor in 1977 being qualified in the recruitment process – The kaibarta caste was being treated as S.C. in 1981 – The SLSC in its impugned order stated that, petitioner is not entitled to post retiral benefits and furthermore liable for criminal action

under the law on account of fraud made by him at the time of appointment – Whether the petitioner is guilty of having committed fraud with production of fake caste certificate? – Held, No – In absence of any evidence on record to show that, a forged certificate was submitted, the candidate cannot be held responsible if any wrong entry has been made in his service roll maintained by the department with regards to his caste.

Case Laws Relied on and Referred to :-

1. AIR 1995 SC 1994 : Kumari Madhuri Patil & Anr. Vrs. Addl. Commissioner, Tribal Development & Ors.
2. 2023 SCC Online SC 977 : Bbsr Development Authority Vrs. Madhumita Das & Ors.
3. (2019) SCC 166 : District Collector, Satara & Anr. Vrs. Mangesh Nivrutti Kashid.
4. 2015 (II) ILR-CUT-1077 : Renuka Majhi & Ors. Vrs. State of Orissa & Ors.
5. (2012) 1 SCC 333 : Dayaram Vrs. Sudhir Batham & Ors.
6. (2008) 13 SCC 170 : Regional Manager, Central Bank of India Vrs. Madhulika Guruprasad Dahir & Ors.
7. (1996) 3 SCC 576 : Nityananda Sharma & Anr. Vrs. State of Bihar & Ors.
8. (2001) 1 SCC 4 : State of Maharashtra Vrs. Milid & Ors.
9. (2011) 111 CLT 90 : Lochan Majhi Vrs. State of Orissa & Ors.
10. 2012(Supp.I) OLR 480 : Bipra Charan Digal Vrs. State of Orissa & Ors.
11. V-49 1980 CLT 47 : Narayan Behera Vrs. State of Orissa through Secretary, Trial & Welfare Department & Ors.
12. 114 (2012) CLT 298 : Damodar Mohapatra Vrs. Union of India & Ors.

For Petitioner : Mr. Sanjib Mohanty
For Opp.Parties : Mr. J.P. Patra, ASC

JUDGMENT Date of Judgment : 15.02.2024

R.K.PATTANAIK, J.

1. Instant writ petition is filed by the petitioner challenging the impugned order under Annexure-7 of the State Level Scrutiny Committee (in short as 'the SLSC') with consequential relief.

2. In fact, the petitioner is a retired DPO and he has assailed the impugned decision dated 23rd August, 2013 of the SLSC. The contention of the petitioner is that he belongs to Kaibarta (Dewar) caste which is admittedly one of the castes declared as SC as per the Presidential Order as at Annexure-1. It is also claimed by referring to Annexure-2, a copy of the RoR and the entry made therein that the petitioner is a Scheduled Caste since Kaibarta is synonymous to Dewar which finds place at Serial No.24 of Annexure-1. As a matter of fact, in 1977, the Panchayat Raj Department, Government of Odisha had an advertisement for recruitment to the post of Junior Auditor pursuant to which the petitioner applied and appeared in the writing test and viva voce and was selected, whereafter, he was given appointment. It is stated that thereafter the petitioner was promoted to the rank of SDPO and continued in such capacity till 5th March, 2000 and then, joined as DPO, Kendrapara after promotion. The contention is that the decision of the SLSC duly

communicated vide Annexure-7 is liable to be interfered with and set aside since the onus to prove and substantiate the allegation has not at all been discharged and the action against the petitioner amounts to double jeopardy. It is contended that a complaint was received in the year 2011 and the matter was enquired into and caste of the petitioner was verified which revealed him to be a Scheduled Caste with a report i.e. Annexure-4 submitted by the local Tahasildar. The enquiry report under Annexure-6 also revealed that the petitioner may belong to Scheduled Caste being a Sub-Caste Kaibarta, however, despite the aforesaid reports, the SLSC reached at a conclusion otherwise and the same is, therefore, not legally tenable.

3. Perused Annexure-7, such as, the decision of the SLSC.

4. Heard Mr. Mohanty, learned counsel for the petitioner and Mr. Patra, learned ASC for the State.

5. Mr. Mohanty, learned counsel for the petitioner submits that the petitioner faced disciplinary proceeding in the year 2001 which was finalized in 2005, wherein, the charges could not be established against the petitioner, nevertheless, the punishments, such as, stoppage of two increment without cumulative effect and period of suspension from 25th July, 2001 to 2nd January, 2002 was treated as such and in that view of the matter, any further action pursuant to Annexure-7 would prejudice him immensely. The contention of Mr. Mohanty is that the petitioner is not found guilty of any fraud committed and in the meantime, he having retired from service, the matter should not have been reopened with an order under Annexure-7.

6. On the contrary, Mr. Patra, learned ASC for the State justifies the impugned order under Annexure-7 and submits that the petitioner availed the benefit of reservation as a Scheduled Tribe and not only in the initial recruitment but also in subsequent promotions to the posts of SDPO and DPO when he neither belongs to ST or SC at the time of appointment in 1977. It is further contended that even after 1981, the petitioner availed promotion as an ST. Even assuming for the sake of argument that he was a Scheduled Caste since the initial appointment is invalid, so therefore, all such subsequent benefits the petitioner has availed of being treated as an SC, according to Mr. Patra, stands invalidated on account of fraud and hence, rightly the SLSC concluded that he is not entitled to post retiral benefits and furthermore, liable for criminal action under the law.

7. Pursuant to the decision of this Court in **Kumari Madhuri Patil and Another Vrs. Addl. Commissioner, Tribal Development and Others AIR 1995 SC 1994**, the verification of the caste status of the petitioner was referred to the SLSC in 2012 before which the petitioner filed Written Statement claiming himself as a Scheduled Caste and even produced a recently issued caste certificate but not the original. The SLSC allowed the petitioner time to submit evidence with respect to the original caste certificate produced at the time of recruitment, however, it could not be failing which it was presumed that no such certificate was produced by him. The decision under Annexure-7 is on the premise that Kaibarta caste was treated as a

Scheduled Caste in 1981, whereas, the petitioner joined in Government service as Junior Auditor in 1977 and which was by availing reservation as a Scheduled Tribe. It has been held by the SLSC that by then petitioner was not a Scheduled Tribe which he is admittedly not and was revealed during the departmental proceeding nor was a Scheduled Caste as Kaibarta was included as a SC in 1981, hence, the initial appointment as a Scheduled Tribe has to be held as illegal.

8. In course of hearing, Mr. Patra, learned ASC for the State refers to Annexure-A/2 to contend that the Dewar caste was included at Entry 24 after amendment to the Presidential Order with a notification dated 18th December, 2002 introduced by the Constitution (Scheduled Castes) Orders (Second Amendment) Act, 2002. A copy of the gradation lists for GP Audit and Selection in SDPO as at Annexures-A/2 and D/2 series respectively are placed reliance on to claim that the petitioner availed the benefit of reservation as a Scheduled Tribe which he was not. A copy of the charge head i.e. Annexure-C/2 is with respect to the departmental proceeding initiated against the petitioner in 2000. All such matters on record are pressed into service from the side of the State to justify the impugned decision under Annexure-7. The sum and substance of the argument of Mr. Patra, learned ASC for State is that fraud was perpetuated by the petitioner from the time of initial appointment as he was never a Scheduled Tribe and therefore, all such benefits availed as an ST is illegal, inasmuch as, the appointment promotion are outrightly invalid. Mr. Patra, learned ASC for the State refers to the following decisions, such as, **Bhubaneswar Development Authority Vrs. Madhumita Das and Others 2023 SCC Online SC 977; District Collector, Satara and Another Vrs. Mangesh Nivrutti Kashid (2019) SCC 166; Renuka Majhi and Others Vrs. State of Orissa and Others 2015 (II) ILR-CUT-1077; Dayaram Vrs. Sudhir Batham and Others (2012) 1 SCC 333; Regional Manager, Central Bank of India Vrs. Madhulika Guruprasad Dahir and Others (2008) 13 SCC 170; Nityananda Sharma and Another Vrs. State of Bihar and Others (1996) 3 SCC 576; State of Maharashtra Vrs. Milid and Others (2001) 1 SCC 4; Lochan Majhi Vrs. State of Orissa and Others (2011) 111 CLT 90** and finally, **Kumari Madhuri Patil** (supra).

9. Mr. Mohanty, learned counsel for the petitioner has cited a judgment of the Apex Court in the case of **Bipra Charan Digal Vrs. State of Orissa and others 2012(Supp.I) OLR 480** and it is contended that the petitioner never produced a forged certificate at the time of initial appointment and therefore, the conclusion under Annexure-7 that such appointment was based on any such forged certificate as ST cannot not be sustained. The contention is that in absence of any such record to show that a fake ST certificate was produced at the time of selection and appointment by the petitioner, the SLSC was incorrect to assume it with a conclusion that fraud was committed by him. In the decision (supra), the question was whether the petitioner therein furnished any caste certificate claiming himself as a ST Kandha while the petitioner therein seeking appointment as a peon but this

Court concluded that no such fraud was committed since the record did not disclose it. In fact, in the said decision, the Court noticed that a wrong entry was made in the service roll maintained by the department with regard to the caste of the petitioner and hence, in under such circumstances, production of a forged caste certificate as concluded by the SLSC was held to be unjustified. In so far as the present case is concerned, the facts are no similar as the petitioner continued in service and finally retired but the Court finds that there is no record available to ascertain as to if any such fake ST certificate was ever produced by the petitioner at the time of recruitment in 1977. Interestingly, the petitioner was perhaps held to be a Scheduled Caste with a departmental proceeding culminated and penalty imposed revealed from Annexure-7 itself. The question is whether the petitioner is guilty of having committed fraud with production of any fake ST certificate? Admittedly, Dewar is a Scheduled Caste as according to the Presidential Order and it was included by the Central Act 108 of 1976 published in the Odisha Gazette in the month of July, 1978. In so far as Annexures-2 and 3 are concerned, there is no denial to the fact that the petitioner is stated to be a Kaibarta by caste with the entry in the RoR and issued with a caste certificate in 1997 as a Scheduled Caste since Kaibarta is held to be synonymous with Dewar. The report vide Annexure-6 after an enquiry suggested that the petitioner may be a Scheduled Caste since belong to Sub-Caste Kaibarta. It has been concluded by the SLSC that the petitioner availed the benefit of reservation as a Scheduled Tribe and managed the selection and appointment as a Junior Auditor in 1977. Whether such a claim is borne out of record that the petitioner furnished a fake ST certificate at the time of initial appointment? Admittedly, the gradation lists show that the petitioner was treated as a Scheduled Tribe. In fact, the promotion to different ranks of the petitioner from Junior Auditor by the decision of the Inquiring Officer was directed to be modified treating him as a Scheduled Caste. So the crux of the matter is whether the petitioner did initially produce a fake ST certificate. The appointment of the petitioner is questioned by the SLSC on the ground that he was not a Scheduled Tribe. It is not in dispute that Kaibarta has been treated as a caste synonymous to Dewar as at Entry No.24 of the Presidential Order applicable to the State of Odisha. A Government circular and clarification was issued in 1972 followed by another dated 6th March,1978 by the State Government in Tribal & Rural Welfare (T& RW) Department addressed to the Collectors requesting them to exercise due caution while issuing caste certificates in respect of the persons, who claim themselves as Dewar and even recommended exclusion of the said caste, however, later to the judgment in the case of **Narayan Behera Vrs. State of Orissa through Secretary, Trial & Welfare Department and Others V-49 1980 CLT 47**, it was introduced with a notification published after the amendment incorporated by Act No.61 of 2002.

10. In **Bipra Charan Digal** (supra), this Court held that in absence of any evidence on record to show that a forged certificate was submitted, the candidate cannot be held responsible if any wrong entry has been made in his service roll

maintained by the department with regard to his caste. Referring to the aforesaid decisions, it issubmitted by Mr. Mohanty, learned counsel for the petitioner that the decision of the SLCS is erroneous as there has been no proof of the petitioner having committed any mischief and with regard to his caste status mentioned in the service record, rather, the department was at fault. On the contrary, it is made to reveal that the petitioner was promoted considering him as a Scheduled Tribe which was though later on corrected after the decision and penalty imposed at the end of a disciplinary proceeding, which has been the reply and response of the State referring to Annexure-B/2 series. In **Damodar Mohapatra Vrs. Union of India and others 114 (2012) CLT 298**, a decision which has been referred to from the side of the petitioner relates to a disciplinary proceeding, wherein, this Court found no acceptable evidence in support of the charge levelled against him and stood exonerated by the Inquiring Officer but held guilty by the disciplinary authority ignoring the finding of a Division Bench and therefore, he was deemed to be continuing in service from the date of termination till superannuation and held entitled to all financial benefits. In the said case, after the delinquent was found not guilty of the charge of having produced fake caste certificate, he was exonerated in full. By placing reliance on the decision in **Madhumita Das** (supra), it is contended that the petitioner applied for a post reserved for Scheduled Tribe or for that matter, Scheduled Caste, when he was not but managed to get an appointment depriving and displacing a genuine candidate. Mr. Patra, leaned ASC for the State would submit that when the petitioner was not a Scheduled Caste as Kaibarta a Sub-Caste of Dewar was held as Scheduled Caste in 1981 only, he managed to get through the selection process as a Scheduled Tribe, hence, therefore by the time of appointment he was not a candidate of reserved category. With the above submission, Mr. Patra justifies the decision of the SLSC.

11. In **Mangesh Nivrutti Kashid** (supra), the Apex Court held that issuance of caste verification certificate is not a casual exercise and the SLSC must take assistance of the Vigilance Cell to ensure that non-entitled persons do not get benefited at the cost of genuine candidates. In **Renuka Majhi** (supra), this Court held that extra-ordinary and equitable jurisdiction under Article 226 of the Constitution of India cannot be exercised in favour of a person, who approached with unclean hands since it was found therein that the father of the petitioners obtained fake ST certificate by tampering School Admission Register and took unfair advantage in securing their employment. In **Dayaram** (supra), the Supreme Court considered the effect of the decision in **Madhuri Patil** (supra) in absence of suitable legislation and the laudable purpose it is intended to achieve. **Madhulika Guruprasad Dahir** (supra), it is held and observed that the appointment based on false caste certificate despite delay in taking decision by the SLSC or that the appointee had put in long service in the meanwhile cannot be a ground to overturn it since equity, sympathy and generosity have no place in such a situation. In **Nityanand Sharma** (supra), the Apex Court declined judicial intervention vis-à-vis

the Presidential Order with a conclusion that alteration, inclusion, substitution or exclusion therefrom cannot be ordered by the Court nor it can declare synonyms of the SCs/STs or parts or groups thereof mentioned therein. The petitioner is alleged of having committed fraud since he has not been a Scheduled Caste or Scheduled Tribe but treated as an ST and continued to receive promotions with other citations referred to above, which are not elaborately and separately discussed since the law on the subject is well settled.

12. The materials on record through Annexure-B/2 series show that the petitioner was considered as an ST during the time of promotions. It is also admitted that on complaint received, an enquiry was held with a disciplinary proceeding initiated against the petitioner and though the Inquiring Officer recommended that the charges could not be established and hence he may be exonerated, the Government was pleased to impose the punishments withholding two increments without cumulative effect and treated the period of suspension as such without relieving him from service. So to say, the petitioner as it appears was allowed to continue in service being treated as an SC. The question hence is, whether any such SC certificate was produced by the petitioner at the time of initial appointment? Or if the petitioner did submit an ST certificate initially while appearing for the recruitment looking at the service record and for availing promotions with such caste status as held by the SLSC? As stated before, the petitioner was provided an opportunity to submit the document produced with the information collected under the RTI Act and since he failed to do so, the SLSC finally proceeded to consider and verify his caste status taking into account the available materials at its disposal.

13. To hold that the petitioner had produced an ST certificate at the time of his initial recruitment in absence of any evidence in that regard is unacceptable. Not merely for the reason that during the time of promotions, the service record revealed the petitioner as an ST by itself cannot be a ground to reach at a conclusion that a false and fake caste certificate was produced by him at the time of initial recruitment. There has to be clear and unimpeachable evidence to hold someone guilty of fraud for having produced a fake certificate. To assume such mischief to have been committed by the petitioner without any such material on record, which the SLSC could have directed to be produced by the parent department, would not be just, fair and proper. No evidence is also on record to substantiate the allegation that the petitioner produced a fake SC certificate which admittedly he was not since Sub-Caste Kaibarta was treated as SC in the year 1981, whereas, the recruitment was held much earlier. It could be possible that an SC certificate was produced having been obtained issued under the impression that the caste Kaibarta is synonymous to Dewar, which is a Scheduled Caste as per the Presidential Order but again the Court is not to presume or assume it. The disciplinary proceeding was initiated and the penalties were imposed on the petitioner and he has apparently been treated as a Scheduled Caste since then for whatever reasons. So, therefore, the Court is left with no option except to hold that the conclusion of the SLSC that the petitioner is guilty

of fraud ever since his initial appointment is indefensible in absence of evidence on record to support it. The Court is alive to the settled position of law and principles enunciated by the Apex Court in the decisions referred to above but is of the humble view that the recommendation of the SLSC for action against the petitioner as per the final order dated 23rd August, 2013 cannot be sustained.

14. Hence, it is ordered.

15. In the result, the writ petition stands allowed for the reasons assigned. As a logical sequitur, the final order dated 23rd August, 2013 of the SLSC vide Annexure-7 is hereby quashed, however, in the circumstances, there is no order as to costs.

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2024 (I) ILR-CUT-1323

SASHIKANTA MISHRA, J.

W.P(C) NO. 30550 OF 2011 WITH BATCHES
[W.P(C) NOS. 31489/2011, 9619/2012 & 13949/2014]

BINODINI SENAPATI ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – Articles 226, 227 – Judicial interference – The Director Secondary Education being the fact-finding authority decided the dispute between the parties – Nothing is placed before the Court to show as to how the order of the Director is wrong – Whether the order passed by the Director should be interfered? – Held, No – This court exercising writ jurisdiction would be slow to enter into the factual aspects of the issue against the order of a fact finding authority.

For Petitioners : Mr. L.K. Mohanty, Mr. S.K. Das,

For Opp.Parties : Mr. A.R. Dash, A.G.A,
Mr. B. Sahoo, Mr. S.K.Das & Mr. L.K. Mohanty

JUDGMENT Date of Judgment : 10.04.2024

SASHIKANTA MISHRA, J.

All these Writ Petitions having been filed by the same parties involve the same facts and law. As such, they were heard together and are being disposed of by this common judgment.

2. The Petitioner (Binodini Senapati) in W.P.(C) No.30550/2011 has filed this Writ Petition challenging the order dated 25.10.2011 passed by the Director, Secondary Education, Odisha, in Appeal No.5/2011 whereby the Opposite Party No.5 (Jyostna Mahanta) was held to be the Senior most Teacher.

3. W.P.(C) No.31489/2011 has been filed by Jyostna Mahanta with prayer for implementation of the aforementioned order of the Director with further direction to allow her to remain as Headmistress in-charge of the School.

4. W.P.(C) No.9619/2012 has been filed by Binodini Senapati challenging the order dated 20.4.2012 of the Director whereby the suspension of Jyostna Mahanta was set aside and certain directions were issued in consequence thereof.

5. W.P.(C) No.13949/2014 has been filed by said Jyostna Mahanta with prayer to quash the Managing Committee Resolution dated 20.6.2011 placing her under suspension and the order dated 10.2.2012 of the Inspector of Schools approving such Resolution as also the order dated 11.2.2012 of the President of the Managing Committee in intimating the Petitioner that she had been placed under suspension.

6. For convenience and to avoid confusion, the parties shall be referred to by their respective names.

7. Though much has been pleaded and argued by the parties, this Court deems it prudent to refer only to those facts that are relevant for deciding the lis involved in all these Writ Petitions.

8. Chitrada Girls' High School, situate under Marda P.S. in Mayurbhanj District was a private unaided educational institution having been established in the academic year 1988-89. The Petitioner was appointed against Trained Graduate Teacher post on 20.9.1988 and joined as such on 01.10.1988. She being the senior-most Teacher of the School was allowed to function as Headmistress-in-charge by the Managing Committee. She acquired B.Ed. degree on 20.5.1991. On the other hand, Binodini Senapati was appointed as another T.G. Teacher in the School. The School was notified as an Aided High School on 22.9.2007. The Managing Committee of the School was approved by the prescribed authority on 03.2.2010 and Jyostna Mahanta was approved as the Headmistress-in-charge-cum-Secretary. On 21.5.2010, the Managing Committee took a decision to oust Jyostna Mahanta from the post of Headmistress on several allegations and to permit Binodini Senapati to act as the Headmistress. Her name was sent for approval to the Inspector of Schools even though Jyostna Mahanta was functioning as Headmistress. On 02.5.2011, the Inspector of Schools allowed Binodini Senapati to deal with the financial matters of the School. On 20.6.2011, the Managing Committee passed Resolution placing the Petitioner under suspension on the ground that she did not hand over the charge of Headmistress to Binodini Senapati. According to Jyostna Mahanta however, no such meeting of the Managing Committee was ever convened and that the Resolution was prepared subsequently and ante-dated.

9. Being thus aggrieved Jyostna Mahanta approached this Court by filing a Writ Petition being W.P.(C) No.17195/2011. By order dated 01.7.2011, this Court disposed of the Writ Petition directing the Director Secondary Education to decide the issue. By order dated 16.11.2011, the Director held that the order of the Inspector of Schools granting approval to the Managing Committee's decision to

permit Binodini Senapati to function as the Headmistress-in-charge was not correct and that Jyostna Mahanta being the senior-most Teacher among them should be allowed to function as such. Surprisingly however, on 10.2.2012, the Inspector of Schools approved the Resolution dated 20.6.2011 of the Managing Committee placing Jyostna Mahanta under suspension. On 11.2.2012, the President of the Managing Committee intimated such fact to her. Being aggrieved, Jyostna Mahanta approached the Director, who by order dated 20.4.2012, set aside the order of suspension and directed to take steps for supersession of the Managing Committee for not obeying the order and instructions of the authorities.

10. Heard Mr. Laxmikanta Mohanty, learned counsel for Binodini Senapati, Mr. Sameer Kumar Das, learned counsel for Jyostna Mahanta and Mr. A.R.Dash, learned Addl. Government Advocate.

11. Mr. Mohanty has forcefully argued referring to the letter dated 04.2.2011 of the Sub-Collector, Baripada vide Annexure-16 to W.P.(C) No.30550/2011 that Jyostna Mahanta herself had given in writing to the President of the School on 13.2.2002 not to remain as Headmistress-in-charge because of her personal problems. As per the relevant norms laid down by the Government, once a Teacher expresses her unwillingness to act as the Headmaster/Headmistress, she is not entitled to be given such change again. Further, because of repeated non-cooperation with the Managing Committee in development activities, the then Inspector of Schools rightly held that Binodini Senapati is more efficient than Jyostna Mahanta and accordingly, the Management's decision to allow her to function as Headmistress was approved. As regards the order of the Director, Mr. Mohanty submits that the Director did not grant opportunity of hearing to Binodini Senapati and also did not appreciate the report of the Inspector dated 24.9.2011 in the correct perspective. As regards the order of the Director in setting aside the order of suspension passed against Jyostna Mahanta, Mr. Mohanty would argue that the Director has not taken into consideration the reasons for which the Managing Committee took the decision to place Jyostna Mahanta under suspension. Instead of conducting an inquiry or verifying the records, which would have proved the misconducts of Jyostna Mahanta, the Director straight away set aside the order of suspension, which cannot be countenanced in law.

12. Per contra, Mr. Sameer Kumar Das, learned counsel appearing for Jyostna Mahanta would submit that there is no dispute that the Petitioner had joined much earlier than Binodini Senapati and had also acquired B.Ed. qualification before her joining. Determination of seniority depends on the date of joining which, according to Mr. Das the Director has rightly considered and held Jyostna Mahanta as senior to Binodini Senapati. He further argues that the Management appears to have taken a contradictory stand in the matter inasmuch as on one hand, it is alleged that Jyostna Mahanta had herself requested to be relieved of the charge of Headmistress and yet on the other, it is stated that the Managing Committee resolved to allow Binodini

Senapati to function as Headmistress-in-charge as Jyostna Mahanta was not cooperating with it in development activities of the School nor remaining present in the Managing Committee meetings. Mr. Das further argues that the report of the Inspector dated 19.1.2011 and 24.9.2011 cannot be taken into consideration for the reason that the said officer was found to have committed several irregularities in service as admitted by the Government in its counter affidavit filed in W.P.(C) No.9619/2012. On the question of suspension, Mr. Das has invited the attention of the Court to the Resolution dated 20.6.2011, which was approved on the same day instead of in the next meeting. That apart, no order of suspension was ever served upon Jyostna Mahanta, which was purportedly approved by the Inspector of Schools on 10.2.2012. So the President of the Managing Committee could not have intimated the Petitioner on 11.2.2012 of the fact of approval of her order of suspension, which amounts to retrospective approval of the same and not permissible in the eye of law.

13. Mr. A.R.Dash, learned Addl. Government Advocate, has supported the orders dated 16.11.2011 and 20.4.2012 passed by the Director by submitting that the same are strictly in accordance with law inasmuch as, as per Government norms any Teacher preferably, the senior-most is to be kept as Headmistress in-charge. In the case at hand, Jyostna Mahanta was admittedly functioning as the Headmistress-in-charge since 1988. The Inspector in his report admitted that he had approved the Management's decision permitting Binodini Senapati to function as Headmistress of the School by wrongly holding that she is senior to Jyostna Mahanta on the basis of acquisition of B.Ed. qualification. Mr. Dash contends that the Director therefore rightly found fault with the report and held Jyostna Mahanta as senior to Binodini Senapati. Similarly, the Director found that the order of suspension purportedly passed against Jyostna Mahanta was without prior approval and therefore, rightly set aside the same. Mr. Dash concludes his argument by submitting that the impugned orders do not warrant any interference for such reasons.

14. A ground has been taken that Binodini Senapati was not granted opportunity of hearing by the Director. This Court, however, finds from the impugned order that the Director has specifically mentioned therein the direction of this Court in W.P.(C) No.17195/2011 to take a decision on the representation of the appellant (Jyostna Mahanta) after hearing Jyostna Mahanta and Binodini Senapati and that pursuant to such order 'hearing of both the parties were conducted on 14.9.2011 and 28.9.2011'. This obviously implies that both Jyostna Mahanta and Binodini Senapati were heard. No material has been placed before this Court to hold otherwise.

15. On merits of the case, having heard learned counsel for the parties at length and on going through the materials on record, this Court finds that the date of appointment of Jyostna Mahanta, i.e. 01.10.1988 is not disputed. It is also not disputed that she acquired B.Ed. qualification on 20.5.1991. Binodini Senapati, on the other hand, having B.Ed. qualification joined the institution on 15.7.1991. It goes without saying that the inter-se seniority of Teachers is to be reckoned from the date of their joining and not from the date they acquired B.Ed. qualification. This

Court finds that in the report dated 24.9.2011, the Inspector held Binodini Senapati as senior to Jyostna Mahanta on the basis of B.Ed. qualification which is untenable.

16. As to the stand taken by the Management that Jyostna Mahanta had requested in writing not to remain as Headmistress-in-charge, a document marked Annexure-26 to W.P.(C) No.30550/2011 has been pressed into service. It purports to be a written application submitted by Jyostna Mahanta addressed to the Secretary of the Managing Committee of the School, which was accepted on 13.2.2002. If such written request of Jyostna Mahanta was accepted way back on 13.2.2002, then how could she be found to be functioning as the Headmistress-in-charge by the Inspector of Schools during his visit to the School on 6.12.2010 as stated in the letter dated 19.1.2011 (copy enclosed as Annexure-15 to W.P.(C) No.30550/2011). The position that emerges thus is, even accepting that Jyostna Mahanta had submitted in writing not to remain as Headmistress-in-charge, the same was never acted upon at least till 06.12.2010 when the Inspector of Schools had visited the School.

17. It is further seen that according to the Inspector, the Managing Committee in its Resolution dated 25.5.2010 resolved to allow Binodini Senapati to act as Headmistress-in-charge of the School as Jyostna Mahanta was not cooperating in developmental activities of the Schools nor remaining present in the meetings. No acceptable evidence has been adduced by the Management in this regard. Be that as it may, it appears that further to the inquiry conducted by the Inspector on 6.12.2010, the Sub-Collector, Baripada, submitted his views to the Director on 04.2.2011 (Annexure-16 to W.P.(C) No.30550/2011) more or less stating the same thing. However, the Director in the letter communicated on 11.3.2011 directed the Inspector to decide the matter of the School at his level by allowing one of the Teachers of the Institution, preferably the senior-most to remain in-charge of the Headmistress. Significantly, he did not make any observation with regard to the other issues cited by the Inspector and the Sub-Collector in their respective reports. Despite such order, the Inspector approved the functioning of Binodini Senapati as in-charge of the Headmistress, which he justified in his report dated 24.9.2011 in the manner as already stated herein before.

18. Perusal of the impugned order dated 16.11.2011 reveals that the Director has duly considered the material evidence put forth by both parties and the report of the Inspector dtd.24.9.2011. It was held that in view of the earlier joining of Jyostna Mahanta, she is senior to Binodini Senapati and therefore, as per norms prescribed by the Government (D.O. No.44025/E dated 21.9.1991) preferably, the senior-most T.G. Teacher is to be kept as the Headmistress-in-charge of the School. Obviously, the Director was not inclined to accept the allegations made against Jyostna Mahanta regarding her alleged non-cooperation to the Managing Committee etc. It has not been demonstrated before this Court as to how non-acceptance of the material facts relating to alleged non-cooperation by Jyostna Mahanta is perverse or untenable so as to persuade this Court to interfere.

19. The Director being the fact-finding authority decided not to accept the factual aspects reported by the Inspector though it was not explicitly stated so. This Court exercising writ jurisdiction would be slow to enter into the factual aspects more so when nothing is placed before it to show as to how the order of the Director is wrong.

20. As regards the other impugned order, i.e. 20.4.2012, without entering into the factual controversy referred to by Mr. Sameer Kumar Das relating to the date of issuance of the order of suspension and its approval by the Inspector, this Court finds from the counter affidavit filed by the District Education officer in W.P.(C) No. 9619/2012 that the very same order being challenged before this Court earlier in W.P.(C) No. 8516/2012 was refused to be interfered with on the ground that there is no illegality and irregularity therein. Furthermore, the order of suspension was passed without prior approval of the competent authority as has been duly reflected in the order dated 20.4.2012. As per Rule 21(2) proviso, of the Odisha Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974, prior approval of the Inspector is required to be taken before placing an employee under suspension. In the instant case, the Managing Committee purportedly resolved to place the Petitioner under suspension on 20.6.2011 but the same was approved on 10.2.2012. This Court therefore, finds no infirmity much less illegality in the order passed by the Director so as to be persuaded to interfere therewith.

21. Thus, from a conspectus of the analysis of facts and the discussion made hereinbefore, this Court finds no reason to interfere with the order dated 25.10.2011 and 20.4.2012 passed by the Director, Secondary Education. In such view of the matter, W.P.(C) Nos.30550/2011 and 9619/2012 are hereby dismissed.

22. W.P.(C) No.31489/2011 is allowed to the extent of directing the Managing Committee of the School to implement the order dated 20.11.2011 of the Director in letter and spirit without any further delay.

23. In view of the order passed in the aforesaid Writ Petitions, no order needs to be passed in W.P.(C) No.13949/2014, which is disposed of as such.

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2024 (I) ILR-CUT-1328

SASHIKANTA MISHRA, J.

TRP(C) NO. 44 OF 2024

SAROJINI SAHOO @SWAIN ……Petitioner

-V-

JAPAKRUSHNA SAHOO ……Opp.Party

CODE OF CIVIL PROCEDURE, 1908 – Section 24 – The Petitioner deliberately mis-represent the fact in the transfer application regarding

her stay with her father (who died before 2011) with an intention to seek a favourable order – Effect of – Held, this court finds the petitioner not having come to the court with clean hands does not deserve any sympathy what-so-ever.

Case Law Relied on and Referred to :-

1. (2003) 3 SCC 851 : United India Insurance Co. Ltd. V. Rajendra Singh

For Petitioner : M/s. Sudarsan Behera & B.K. Nayak-3

For Opp.Party : M/s. Rashmi Ranjan Sinha & A.K. Bilash

JUDGMENT Date of Judgment : 10.04.2024

SASHIKANTA MISHRA, J.

The present application for transfer has been filed by the petitioner, who claims to be the wife of sole opposite party. The prayer is to transfer C.S. No. 14 of 2020 filed by the opposite party in the Court of learned Civil Judge (Senior Division), Kujang to the Court of learned Judge, Family Court, Nayagarh.

2. The facts of the case, relevant only to decide the present application, are that the petitioner claims to be the wife of the sole opposite party having supposedly married him on 04.02.2011. Because of dissension arising between them, the opposite party allegedly drove the petitioner away from his house on 10.03.2014 and since then she has been residing with her father. On 23.04.2019, the opposite party husband filed C.S. No. 538 of 2019 under Section 7(1), Explanation (b) of the Family Courts Act, 1984 in the Court of learned Judge, Family Court, Jagatsinghpur for a declaration that the petitioner is not his wife. The learned Judge, Family Court passed an ex-parte judgment on 10.12.2019 in favour of the husband. Subsequently, the petitioner having come to know about the passing of the ex-parte judgment, filed CMC No.2 of 2020 in the Court of learned Judge, Family Court which was allowed vide order dated 31.08.2023. The said matter is presently pending. In the meantime, on an application filed by the petitioner in the Court of learned J.M.F.C., Nayagarh for grant of maintenance under Section 125 of Cr.P.C. being CMC No. 66 of 2014, the opposite party was directed to pay monthly maintenance of Rs.4,000/- in the first week of every month with cost of Rs.300/- vide order dated 30.06.2015. Subsequently, as per application filed under Section 127 of Cr.P.C. being Crl.M.P. No. 10 of 2019 by the petitioner, the learned Judge, Family Court, Nayagarh, vide order dated 23.11.2019 enhanced the quantum of interim maintenance to Rs.5,000/-. While the matter stood thus, the opposite party filed a suit being C.S. No. 14 of 2020 in the Court learned Civil Judge (Senior Division), Kujang for recovery of the maintenance amount, which was deducted from his salary. The petitioner, on the other hand, has filed execution cases being Crl.M.P No. 29 of 2020 and Crl.M.P. No. 142 of 2021 before the Judge, Family Court, Nayagarh.

3. This Court therefore, finds that C.S. No. 14 of 2020 filed by the opposite party is pending in the Court of learned Civil Judge (Senior Division), Kujang and

CP No. 538 of 2019 in the Court of learned Judge, Family Court, Jagatsinghpur. However, Crl.M.Ps. No. 29 of 2020 and 142 of 2021 are pending before the learned Judge, Family Court, Nayagarh.

4. It is stated that the petitioner resides with her father at Nayagarh, which is more than 300 Kms. away from Kujang. Further, she has no source of income and therefore, it will be difficult on her part to attend to the case at Kujang.

5. On the other hand, it is stated on behalf of the opposite party husband that the petitioner wife is guilty of suppression of facts inasmuch as her claim of residing with her father is out and out false as her father has expired long back and in any case prior to 2011.

6. Heard Mr. S. Behera, learned counsel for the petitioner and Mr. R.P. Sinha, learned counsel appearing for opposite party.

7. Having heard the parties at length, the first thing that strikes to the mind of the Court is the apparent falsehood resorted to by the petitioner in her transfer application to the effect that she has been residing with her father at Nayagarh. In paragraph-3 of the transfer application, the following has been stated.

> *"That prior to the marriage, the Opp.Party has 4 daughters. After some days, the daughters ill-treated the petitioner. As this situation continued, by the intervention of the local police, the matter was resolved. On 10.03.2014 the Opp.Party drove the petitioner from house and since then, the petitioner has been staying with her father."*
>
> [Emphasis supplied]

8. In the counter affidavit filed by the opposite party it is stated that the father of the petitioner died before 2011. Such averments in the counter affidavit being pointed out, learned counsel for the petitioner submits that the averments made in paragraph-3 of the transfer application were made inadvertently and on instructions of the client. In other words, the fact that the father of the petitioner is no longer alive has not been denied. In such view of the matter, the averments in paragraph-3 of the transfer application amount to deliberate misrepresentation of fact on the part of the petitioner. This is nothing but playing fraud on the Court with the apparent intent of seeking a favourable order. This is something that cannot be countenanced in law. The above principle was reiterated by the Supreme Court in the case of ***United India Insurance Co. Ltd. v. Rajendra Singh***[1] by observing that "Fraud and justice never dwell together" (*fraus et jus nunquam cohabitant*) is a pristine maxim which has never lost its temper over all these centuries. In the instant case it is obvious that the petitioner wanted to persuade the Court to transfer the case from Kujanga to Nayagarh by falsely projecting that she is helplessly dependant on her father and residing with him at Nayagarh, even though her father is no more. This also amounts to swearing false affidavit and giving false declaration as appended to the transfer application. This Court therefore, finds that the petitioner not having come to the Court with clean hands does not deserve any sympathy whatsoever.

1. (2000) 3 SCC 581

9. Even otherwise, on merits this Court finds no compelling necessity of directing transfer of the case from Kujanga to Nayagarh, more so as the petitioner can always seek permission of the Court to attend the proceeding through virtual mode by submitting appropriate application. It is needless to mention that if such application is filed by the petitioner, the same shall be considered by the concerned Court in accordance with law.

10. In the result, the transfer application is dismissed.

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2024 (I) ILR-CUT-1331

A.K. MOHAPATRA, J.

W.P.(C). NO. 40936 OF 2023 WITH BATCHES
[W.P(C) NOS. 38200, 38203, 38478 & 38741 OF 2023]

B. AJAYA PATRO ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

(A) ODISHA GRANT OF WEIGHTAGE IN MARKS IN RECRUITMENT FOR SHORT-TERM COVID 19 HEALTHCARE WORKERS' RULES, 2022 – Rules 2(C) and 3 r/w Articles 14 & 16 of Constitution of India – As per Rules 2(C) & 3, though the petitioners have been engaged in private hospitals, but have not been recommended by the Health & Family Welfare Department & also not been awarded 5% weightage mark like similarly situated candidates who have been appointed by the govt. as short term COVID-19 health worker – Whether such discrimination is sustainable? – Held, No – The conduct of the Opp. Parties in restricting the benefit under Rules to a certain class of persons without any valid and Justifiable reason is definitely violation of Articles 14 & 16 of the Constitution of India.

(B) CONSTITUTION OF INDIA, 1950 – Articles 226, 309 – Jurisdiction of Court to interfere in Legislation/Rules or Policy of the state – Held, whenever there is arbitrariness in state action, whether be of the legislature or of the executive, the Court has the jurisdiction to test the rules with the touch stone of Articles 14 & 16 of the Constitution of India – In the event the impugned legislation/Rules or the Policy fails to pass such tests, this court would be justified in interfering with the Rules/Policies/Scheme and may pass a suitable direction.

(C) DOCTRINE OF "ARBITRARINESS" – Explained with reference to case laws.

Case Laws Relied on and Referred to :-

1. AIR 1998 SC 1050 : A.K. Krishna Vs. State of Karnataka.
2. AIR 1979 SC 1060 : Distt. Registrar v. M.B. Koyakutty
3. AIR 1981 SC 411 : S.L. Sachdev v. Union of India.
4. (Civil Appeal No.11141 of 2018) : National Highway Authority of India Vs. Madhukar Kumar.
5. AIR 1981 SC 487 : Ajay Hasia Vs. Khalid Mujib Sehravardi
6. AIR 1974 SC 555 : E.P. Royappa Vs. State of T.N.
7. AIR 1978 SC 597 : Maneka Gandhi Vs. Union of India
8. (2002) 2 SCC 188 : Sharma Transport Vs. Govt. of A.P.
9. (2006) 3 SCC 434 : Bombay Dyeing & Mfg. Co.Ltd Vs. Bombay Environmental Action Group
10. AIR 2007 SC 2276 : Bidhannagar (Salt Lake) Welfare Assn. Vs. Central Valuation Board
11. (2009) 5 SCC 342 : Grand Kakatiya Sheraton Hotel and Towers Employees and workers union Vs. Srinivasa Resorts Ltd.
12. (2011) 9 SCC 286 : A.P. Dairy Development Corpn. Federation Vs. B. Narasimha Reddy
13. (1997) 9 SCC 495 : Krishnan Kakkanth Vs. Govt. of Kerala
14. (1993) Supp. 4 SCC 595 : S. Nagaraj Vs. State of Karnataka
15. (1991) 1 SCC 212 : Shrilekha Vidyarthi (Kumari) Vs. State of U.P.

For Petitioners : Mr. S.K.Mishra, Mr. S.K. Samal, Mr. Tanmay Mishra.

For Opp.Parties : Mr. N.K. Praharaj, A.G.A

JUDGMENT Date of Hearing : 21.02.2024 : Date of Judgment : 01.03.2024

A.K. MOHAPATRA, J.

1. The present batch of writ applications have been filed by some of the candidates who have applied pursuant to the advertisement under Annexure-1 dated 21st January, 2023 for appointment as Nursing Officers against a total of 7483 advertised posts of district cadre Group-C post of Nursing Officer, 2023. The petitioners in all the writ applications are all qualified Nursing staff having received their post-Nursing Diploma/Degree certificate from the recognized institutions. The present writ application has been filed with a specific prayer to quash the reject-list dated 08.08.2023 and for a further direction to the opposite parties to consider the case of the petitioners by granting the weightage mark of 5% as has been provided for the Healthcare Workers who have rendered their services during the Covid-19 Pandemic in the State of Odisha. Accordingly, the petitioners have also prayed for a direction that in the event the petitioners are found to be eligible with such weightage mark of 5%, they shall also be given appointment to the post of Nursing Officer as has been advertisement under Annexure-1 to the writ application.

2. Heard Sri. B.Routray, learned Senior Counsel, Sri. Manoj Mishra, learned Senior Counsel, Mr. Sukant Kumar Mishra, learned counsel and many other counsels appearing for the petitioners in the present batch of writ petitions. Heard Mr. N.K. Prharaj, learned Additional Government Advocate for the State-Opposite

Parties. Perused the writ application as well as the documents/materials placed in record by the petitioners.

3. Since the batch of writ applications referred to hereinabove involve a common question of law, this Court deems it proper to dispose of all the writ applications by the following common order. For the sake of convenience the facts involved in case of the Lipsarani Parida in W.P.(C) No.38200 of 2023 is being taken up for analysis of the factual background of the above noted batch of writ applications.

4. The factual background of the abovenoted batch of writ applications leading to the filing of the present writ applications, in short, is that the petitioners have completed Diploma in GNM, 2020 from the Subham School of Nursing situated in Bhadrak district, after completing her +2 Science degree course from Salandi Residential College, Bhadrak. In the abovenoted Diploma GNM course, the petitioners had secured 76.44% mark. It appears from the record that the petitioners was engaged as short-term Covid Worker during the Covid-19 Pandemic, which has been duly certified by the authorities. On perusal of the certificate attached to the writ application, it appears that the petitioners were engaged by the Tata Steel Medical Hospital at Jajpur under the Covid scheme from 29.08.2022 to 02.02.2022 as such the petitioners were eligible for being appointed against regular vacancy post by giving her the weightage marks as provided in the Rules, as well as in the advertisement.

5. While the matter stood thus, the Odisha Subordinate Staff Selection Commission published an advertisement on 21st January, 2023, under Annexure-1 to the writ application, to fill up 7483 posts of district cadre Group-C Nursing Officer, 2023. Such advertisement reveals that the applications were to be filed online from the starting date of application on 27.01.2023 to the end date of application on 17.02.2023. It has been stated in the writ application that the present petitioners satisfies all the eligibility criteria as has been provided under clause 3 of the said advertisement. Further, the said advertisement under clause 3(A)(III) provides for grant of weightage for Covid-19 health workers. Pursuant to Rule 3 of Odisha grant of weightage in marks in the Recruitment for Short-Term COVID-19 Healthcare workers Rules, 2022, the aforesaid clause in the advertisement also provides that the persons who have rendered the service as covid-19 healthcare workers and have been engaged to perform such duties for a minimum period of 3 months shall be allowed 5% extra mark on the total marks secured by him/her in the recruitment examination. It is further contended that although the petitioners are entitled to the weightage mark of 5% as has been provided pursuant to the Rules, 2022 and as per the advertisement under clause 3(A)(III), such weightage mark has not been awarded to the petitioners. Being aggrieved by such conduct of the OSSSC the petitioners have approached this Court by filing the present writ application.

6. Learned Senior Counsels as well as other counsels appearing for the petitioners, at the outset, contended that the petitioners in the batch of writ applications have all submitted their documents in support of their contention that they have worked as Short-term Covid-19 Health Workers for more than three months in different hospitals/ healthcare institutions in the State of Odisha. It was also contended that during the Covid-19 Pandemic both hospitals run by the Government as well as the private hospitals were engaged in Covid-19 duty under active & direct supervision of the Govt. of Odisha. Learned senior counsel appearing for the petitioners also contended that since the covid-19 healthcare operation was being conducted under the direct supervision of the Government and the local bodies, almost all the hospitals were following a common protocol so far as the Covid-19 patients are concerned. Keeping in view the valuable service rendered by the petitioners in the present batch of writ applications, the Government took a policy decision and accordingly the Rules, 2022 was formulated thereunder providing a 5% weightage mark to such Health Workers who had worked as short-term Covid-19 healthcare workers for more than three months.

7. Accordingly, learned Senior counsels appearing for the petitioners in the batch of writ applications submitted that it is not open to the Government to discriminate amongst the petitioners and to create a sub-class by classifying and differentiating the applicants with regard to the grant of weightage mark by denoting one group as health workers serving in the Government hospitals and the other as health workers serving in private hospitals. It was further emphatically contended by learned senior counsel that the same would be violative of the underlying principles of Article 14 and 16 of the Constitution of India. Therefore, such an approach, in the event same is adopted by the State Government while granting such weightage mark to the applicants, would be against the spirit of law as well as the mandate of the Constitution.

8. In view of the aforesaid submissions, learned counsels appearing for the petitioners in the present batch of writ applications submitted that the Opposite Parties be directed to consider the case of the petitioners afresh by keeping in view the certificate submitted by them in support of their contention for grant of 5% weightage mark under clause 3(A)(III) of the advertisement, as well as pursuant to the rules of the year 2022. With a further direction to the Opposite Parties, including the OSSSC, to recommend such eligible candidates for appointment to post of Nursing Officer immediately within a stipulated period of time, since many such posts are still lying vacant at the moment.

9. In course of their arguments Mr. Routray & Mr. Mishra, leaned senior counsels appearing for the petitioners in the present batch of writ petitions, referred to the Health & Family Welfare department, Govt. of Odisha letter No.6599 dated 03.07.2020 and submitted that the same contains a guideline for management of Covid-19 positive cases in Covid care centers by PSUs, Corporate Institutions,

Private and NGO Sector. In such view of the matter, learned Senior Counsel submitted that the entire healthcare operation during the Covid-19 pandemic was being supervised and was being carried out under the active & direct control of the Health & Family Welfare department, Govt. of Odisha.

10. The guidelines attached to the aforesaid letter also provides the details with regard to the treatment of such Covid-19 positive patients. Further, referring to the said guidelines under the heading "human resources" learned senior counsels for the petitioners submitted that the guideline provides one GDMO/Ayush Doctor, two Pharmacist/Staff nurse/ANM, two attendants, two cleaning staffs and one BLS ambulance should be attached per 50 persons per shift. Therefore, he submitted that it is beyond any doubt that all the hospitals during Covid-19 Pandemic were governed and guided by the aforesaid guideline of the state Govt. and accordingly, such healthcare workers were engaged pursuant to such guidelines.

11. For better appreciation of the factual background of the petitioners' case, this court deems it proper to quote the letter dated 13.07.2020 of the Health & Family Welfare Department, Government of Odisha as well as the relevant portion of such guidelines:-

"GOVERNMENT OF ODISHA
HEALTH & FAMILY WELFARE DEPARTMENT
File No.HFW-MEII-COVID-0006-2020-16599/H&F.W.
Dated 13.07.2020

From
Shri P.K. Mohapatra, IAS
Additional Chief Secretary to Government

To
All Collector & District Magistrates
All Municipal Commissioner
All CDM & PHOs,

Sub:- Guideline for management of COVID-19 positive cases in COVID Care Centres by PSU, Corporate, Institutions, private and NGO sectors.

Sir,

In inviting a reference to the subject cited above, I am directed to send herewith the guideline for management of COVID-19 positive cases in COVID Care Centres by PSU, Corporate, Institutions, private and NGO sectors for information and necessary action.

You are therefore requested to take necessary steps to circulate the above guideline among all concerned and to instruct them to follow the guideline scrupulously.

Yours faithfully
Additional Chief Secretary to Government"

"COVID CARE CENTRES BY CORPORATE, PRIVATE AND NGO SECTOR

The COVID care centres (CCC) Created by the Govt. in the state are facilities to accommodate mild and asymptomatic COVID-19 positive cases without requiring advanced medical attention. These facilities have either separate room or dormitories

with confortable beds with adequate spacing and required hygiene and care by trained manpower. Such facilities can be replicated to isolate and monitor the health of the COVID-19 positive cases till they recover and the discharged to return to their homes, in accordance with the protocols laid down by health authorities."

"Human Resource :

- One Authorised Medical Officer/Nodal Officer to be attached to the CCC.
- One GDMO/AYUS Doctor, two Pharmacists/staff Nurse/ANM, two attendants, two cleaning staff (M&F) and one BLS Ambulance should be attached per 50 persons per shift."

"The local authorities i.e., District Collectors/Municipal Commissioners shall administer local/specific required stipulation in addition to the above to meet with any unforeseen contingencies."

12. Learned Additional Government Advocate on the other hand, referring to the instruction received from the OSSSC vide letter dated 15th December 2023, submitted before this Court that some of the candidates who are petitioners in the abovenoted batch of writ applications had not applied and thereby not claimed the weightage mark for short-term covid-19 healthcare workers, in their online applications. They OSSSC on such instruction has specifically referred to the case of Smt. Lipasrani Parida in W.P.(C) No.38200 of 2023 and Smt. Lori Hati in W.P.(C) No.38203 of 2023. In respect of other applicants in other writ applications in the present batch, the OSSSC has instructed the learned Additional Government Advocate that after verification of such applicaitons by the Health & Family Welfare department, a list of candidates who are eligible to get the weightage mark of 5% towards short-term Covid 19 health workers has been prepared and on such basis their cases have been recommended for appointment to the post of Nursing officer. The instruction dated 15th December, 2023 further reveals that 26 petitioners who are not eligible to get weightage as short term covid-19 healthcare worker, as per the report received from H & FW department, their cases have not been considered and they have not been awarded the weightage mark as has been prescribed under clause 3(A)(III) of the advertisement.

13. In course of his argument learned Additional Government Advocate referred to the gazette notification dated 29th November 2022, whereunder the 'Odisha grant of weightage in marks in the Recruitment for Short-Term COVID-19 Healthcare workers Rules, 2022' has been duly notified. Further, referring to Rule 2(C), learned Additional Government Advocate submitted before this Court that the words "short term Covid-19 health workers" has been defined in the aforesaid rules of the year 2022. The definition contained in Rule 2(C) provides that the persons specially engaged by Health and Family Welfare department as Nursing Officers, Pharmacists, Laboratory Technicians, Radiographers, MPHW(M) MPHW(F) for covid-19 duty, for a minimum period of 3 months are to be certified by family welfare department. In such view of the matter, learned Additional Government Advocate submitted that weightage as provided under Rule 3 of 2022 rules notified on 29th November, 2022 by the GA & PG Department Govt.of Odisha applies to the

persons who have been engaged by the Health and Family Welfare department as Nursing officers in different capacities as has been provided under Rule 2(c) of 2022 Rules.

> *Rule-2(c)- "Short-Term COVID-19 healthcare workers" means the persons specially engaged by the Health and Family Welfare Department as Nursing Officers, Pharmacists, Laboratory Technicians, Radiographers, Multipurpose Health Workers (Male) and Multipurpose Health Workers (Female) for COVID-19 duty for a minimum period of 3 months to be certified by the Health and Family Welfare Department."*
>
> *"Rule-3 – Notwithstanding anything contained in the relevant recruitment rules, the Short-Term COVID-19 healthcare workers who have been engaged in and performed COVID-19 duty for a minimum period of 3 months shall be allowed 5 per cent extra marks on the total marks of the recruitment examination under the said relevant recruitment rules subject to the award of marks upto the maximum marks for which recruitment is conducted, as an onetime measure only for the next one recruitment process to be conducted after commencement of these rules."*

Therefore, it was contended that petitioners having been engaged in private hospitals and their cases having not been recommended by the Health and Family Welfare department, they have not been awarded the 5% weightage mark that has been given to similarly situated other candidates who have been appointed by the Government as short-term covid-19 healthcare workers. In such view of the matter, learned Additional Government Advocate submitted that in view of the aforesaid provision in the rules, the petitioners are not eligible to get such weightage mark.

14. In reply to the aforesaid contention raised by the learned Additional Government Advocate, learned senior counsels appearing for the petitioners in the above noted batch of writ petitions on the other hand, contended that the aforesaid Rules of the year 2022 have been formulated in exercise of the powers conferred upon the State Government by the proviso to Article 309 of the Constitution of India. They further contended that the definition contained in clause 2(C), which defines short-term covid-19 health workers, has been given a restrictive interpretation. In other words, by interpreting the rules in a restrictive manner, the Government has confined the benefit under Rule 3 to a particular class of persons, i.e. the short-term covid-19 healthcare workers specially engaged by the Health and Family Welfare department in different capacities as mentioned in Rule 2(C).

15. Moreover, such sub-classification within a broader class is unreasonable and the same has no nexus with the objects sought to be achieved through the Rules of the year 2022. Accordingly, learned senior counsel appearing for the petitioners submitted that creation of such a sub-class would not be protected under Article 14 and 16 of the Constitution of India as the same is not based on any sound principle and reasoning. Accordingly, learned senior counsels appearing for the petitioners further contended that the provision contained in Rule 2(C) cannot be interpreted in such a restrictive manner, so as the same would not pass the test of Article 14 and 16 of Constitution of India. In such background, it was also prayed that the aforesaid rules should have been modified to include the short-term COVID-19 healthcare

workers who have worked in any hospital of the state of Odisha during the Covid-19 pandemic as short term COVID-healthcare workers for more than 3 months, as the entire operation was being carried out under the direct supervision and control of the State Government with the help of the local bodies/local administration.

16. Having heard learned senior counsels and other advocates appearing for the parties, on a careful examination of their contentions as well as the materials on record, this Court found that the petitioners who are eligible for being appointed as Nursing officers, pursuant to advertisement under Annexure-1, satisfy all the requirements/eligibility criteria as provided under clause 3 of the aforesaid advertisement. Further, it is not disputed that they have worked as short-term covid-19 healthcare workers at different hospitals and healthcare centers in the State of Odisha. In recognition of their service during a difficult time for the entire humanity, the State Government formulated the Rule of the year 2022 in exercise of the power conferred by the proviso to Article 309 of Constitution of India.

17. On a careful analysis of the submissions and arguments advanced by learned Additional Government Advocate, this Court observes that the Health and Family Welfare department, Government of Odisha has given the rule a restrictive interpretation, thereby extending the benefit under Rule 3 only to the persons engaged as short-term covid-19 healthcare workers by the Health and Family Welfare department in different capacities as mentioned Rule 2(C). While extending the benefit to the aforesaid category of persons, the petitioners in present batch of writ applications, who have rendered their services during such covid-19 pandemic by putting their life in great danger, have been discriminated against and they have not been extended the benefit of Rule 3 of the 2022 Rules. As a result of which they have not been awarded the 5% weightage mark, as has been done in the case of their counterparts who had worked in Government hospitals during those days. Furthermore, on a careful analysis of the materials on record and instructions received by the learned Additional Government Advocate, taking into consideration the submissions advanced by the learned Additional Government Advocate, this Court finds absolutely no valid ground and justification for creation of such a sub-class amongst the short-term COVID-19 healthcare workers. Moreover, it is not that the healthcare workers employed in private hospitals during COVID-19 were immense to such pandemic and such workers did not die due to COVID-19 during such pandemic.

18. Additionally, on perusal of records of the writ application, and while considering the instructions provided by the OSSSC to the effect that two of the candidates namely Lipsarani Parida and Lori Hati have not claimed such benefit and thereby they have not been provided with such certificate, this Court on a careful examination of the records of those writ applications found that they have annexed the copies of the online application form claiming such benefit along with supporting certificates. In fact, in almost all the cases the petitioners have claimed

such additional weightage mark of 5% and such claims have been supported by medical certificate issued by the authorities, where they have worked.

19. While considering the validity of Rule-2(c) of the Rules, 2022, this Court is required to examine the source of power conferred upon the State to enact such a rule. On a careful reading of Gazette Notification dated 29th November, 2022, it appears that the Rule, 2022 has been formulated in exercise of power conferred by the proviso to Article-309 of the Constitution of India. The preamble of the rule reveals that the Hon'ble Governor of Odisha is pleased to make the rules to provide one time weightage to short-term COVID-19 Healthcare Workers engaged by the Health & Family Welfare Department in the recruitment to the post of Nursing Officer. It is not disputed that service condition of the employees including the process of recruitment can be regulated by the appropriate Government by bringing appropriate legislation in exercise of the power conferred upon the competent legislature by the Constitution to enact the rules and the laws. Moreover, the power conferred under Article-309 of the Constitution of India is subject to other provisions of the Constitution of India, as has been reflected in the opening words used in Article-309. Thus, it is needless to mention here that in the law/rules framed under Article-309 in violation of the provisions contained in the Constitution of India, including the provisions of Part III of the Constitution, i.e. Article 14, 16, 19 and 21, then in such eventuality, the constitutional guarantee in the shape of aforesaid Articles will prevail over every rules/laws enacted by the State.

20. In the present case, the Rule of the year 2022 having been framed in exercise of the power conferred by the proviso to Article-309, such Rules and laws shall have to conform to the underlying principles of Article-14 and 16 of the Constitution of India. Furthermore, the President of India or the Governor of the State, as the case may be, may notify an appropriate rule to regulate the relevant service conditions of Government servants. However, notifications of such rules are transitional in nature. In other words, the rules framed by the executive and notified in the aforesaid manner shall remain in force till the appropriate legislature enacts the law on the subject matter. The aforesaid analysis finds support from the judgment of the Hon'ble Supreme Court in ***A.K. Krishna Vs. State of Karnataka*** reported in **AIR 1998 SC 1050**.

21. It is also a well-settled proposition of law that the rules framed under Article-309 of the Constitution of India may be struck down by a court of law on any of the grounds that may invalidate a legislative measure. Thus, if the rules famed under Article-309 of the Constitution of India are not in conformity with Articles 14 and 16 of the Constitution of India, which are a part of the basic structure of the Constitution of India, then such rules are liable to be struck down by a Court of law in exercise of power contained under Article-226 of the Constitution of India. Therefore, in the event and on the basis of the materials on record, if this Court holds that, in view of the Rules in question, the present Petitioners have been discriminated

against without any reasonable ground and without any legal justification, then such rules would be considered to have been in contravention of the provisions contained in Article-14 and 16 of the Constitution of India and, as such, they are liable to be struck down. Furthermore, taking into consideration the factual background of the present case, this Court observes that the short-term COVID-19 Healthcare Workers, who were engaged in treatment of COVID-19 infected patients during the pandemic, were engaged by various hospitals including the Government Hospitals, as is evident that the entire Health Care Operation during COVID-19 pandemic and the same was being carried out under the active and direct supervision of the State Government.

22. Moreover, such Health Care Operations were being actively supervised by the local administration and they were conferred with power to take remedial measures under the guidelines. Additionally, the guidelines issued by the State Government in this regard provides the procedure to be followed by all hospitals without any discrimination which includes engagement of Healthcare Workers. It is also a fact that such Healthcare Workers, by putting their life in danger, have rendered their service in such hospitals for the betterment of the humanity. As such, this Court found there is no difference between the class of Health Workers engaged in either Government Hospitals or by the Health and Family Welfare Department and the ones who are engaged either in private hospitals or pursuant to the guidelines issued by the Government for management of the COVID-19 pandemic. Therefore, this Court found no justification in creating a sub-class by the executive by putting the Healthcare Workers, who have been engaged by the Health & Family Welfare Department in a different category altogether. Such classification, according to this Court, would be in contravention of the fundamental principles as enshrined in Article 14 and 16 of the Constitution of India.

23. Even assuming for a moment that the rule in question is based on a policy decision of the Government or a scheme prepared by the State Government to provide benefit to a certain class of persons, such policy/scheme must pass the test of Article 14 and 16 of the Constitution of India. In other words, the policy decisions taken by the executives are not immune to the test of Article 14 and 16 of the Constitution of India.

24. Having said that, this Court is aware of the scope and authority of the Government to change any policy decision keeping in view the larger public interest. Such policy decision, even if creates a sub-class within a class, if it is done keeping in view a definite objective which is sought to be achieved by the Government, then it would definitely be protected within the purview of the exceptions to Article 14 and 16 of the Constitution of India. On a careful examination of the factual background of the present case this Court observes that such reasoning/justification for creation of such sub-class within a class is conspicuously absent in the present case. Even in course of the argument, neither could the learned Additional Government Advocate justify the same, nor any reasoning is come forth from the

side of the Government to defend the classification under Rule-2(c) of the Rules, 2022. The State Government and its authorities while taking a policy decision or preparing a scheme, under its authority, are required to adhere to the principles contained in Article 14 and 16 of the Constitution of India and they must act fairly, and provide equal opportunity to all in the matters of public employment. Such an objective is nothing but to transform the goal of social justice, which is enshrined in the preamble of the Constitution of India and casts and obligation on the State to ensure that equal opportunity is provided to all persons coming under the same category without any discrimination on any of the grounds which are not acceptable under the law and the provisions of the Constitution. In the aforesaid context, this Court would like to refer to the judgments of the Hon'ble Supreme Court in the case of ***Distt. Registrar v. M.B. Koyakutty*** reported in **AIR 1979 SC 1060** and ***S.L. Sachdev v. Union of India***, reported in **AIR 1981 SC 411**.

25. In view of the aforesaid analysis, this Court would be well within its jurisdiction to test the rules with the touchstone of Article 14 and 16 of the Constitution of India. In the event the impugned legislation/rules or the policy fails to pass such tests, this Court would be justified in interfering with the rules/policies/schemes and may pass a suitable direction with regard to adoption of the principles of fairness by the State and for providing equal opportunity to the citizens in the matter of public employment. It is also not disputed that the principle enshrined in Article 14 of the Constitution of India applies to cases of appointment by whatever mode to public offices/posts and Government jobs. Therefore, the conduct of the Opposite Parties in restricting the benefit under Rule-3 to a certain class of persons without any valid and justifiable reason is definitely in violation of Article 14 and 16 of the Constitution of India. It is not disputed at bar that the Petitioners along with similarly situated many other persons have rendered services to the COVID-19 patients during the COVID-19 pandemic by putting their life in great danger. Therefore, the State Government was under a constitutional obligation to treat the Petitioners on par with persons who were engaged in Government Hospitals or by order of the Health and Family Welfare Department, Government of Odisha. More so, when both categories of persons were engaged as short-term COVID-19 Healthcare Workers. In such background, this Court is of the considered view that the definition in Rule-2(C) would not pass the test of judicial scrutiny by this Court while weighing he same in the scale of Article 14 and 16 of the Constitution of India.

26. In the present case, this Court would like to refer to the judgment of Hon'ble Supreme Court in ***National Highway Authority of India Vs. Madhukar Kumar*** **(Civil Appeal No.11141 of 2018)** decided on **23.09.2021** wherein by following the ratio laid down by the earlier constitutional Bench judgment of the Hon'ble Supreme Court in ***Ajay Hasia Vs. Khalid Mujib Sehravardi*** reported in **AIR 1981 SC 487**, the constitutional Bench of the Hon'ble Supreme Court has held that every state action must be fair, failing which, it was found to be violative of the mandate of

Article-14 of the Constitution of India. Moreover, Article 14 of the Constitution of India strikes at arbitrariness because, an action that is arbitrary must necessarily involve negation of equality. Whenever, therefore, there is arbitrariness in State action, whether it be of the legislature or of the executive, Article 14 immediately springs into action and strikes down such action.

27. The Hon'ble Supreme Court has also taken similar views in ***E.P. Royappa Vs. State of T.N.*** reported in **AIR 1974 SC 555** and ***Maneka Gandhi Vs. Union of India*** reported in **AIR 1978 SC 597**. The word "arbitrariness" has been defined in a judgment of the Hon'ble Apex Court in ***Sharma Transport Vs. Govt. of A.P.*** reported in **(2002) 2 SCC 188**. The Hon'ble Supreme Court has defined arbitrariness by observing that in order to describe an action as arbitrary, a party has to satisfy that such action was not reasonable and was manifestly arbitrary. The expression "arbitrarily" means an act done in an unreasonable manner, or as fixed or done capriciously or at pleasure without adequately determining the principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone. Such view has also been reiterated in ***Bombay Dyeing & Mfg. Co.Ltd Vs. Bombay Environmental Action Group*** reported in **(2006) 3 SCC 434**.

28. In ***Bidhannagar (Salt Lake) Welfare Assn. Vs. Central Valuation Board*** reported in **AIR 2007 SC 2276** and in ***Grand Kakatiya Sheraton Hotel and Towers Employees and workers union Vs. Srinivasa Resorts Ltd.*** reported in **(2009) 5 SCC 342**, the Hon'ble Supreme Court has observed that a law cannot be declared ultra vires on the ground of hardship. However, the same can be done on the ground of total unreasonableness. The piece of legislation can be challenged and questioned as arbitrary and ultra vires under Article 14. Before declaring the act ultra vires under Article 14, the Court must be satisfied in respect of substantive unreasonableness in the statute itself. Similarly, in ***A.P. Dairy Development Corpn. Federation Vs. B. Narasimha Reddy*** reported in **(2011) 9 SCC 286**, the Hon'ble Supreme Court has held that it is a settled legal proposition that Article 14 of the Constitution of India strikes at arbitrariness because an action that is arbitrary must necessarily involve negation of equality. Furthermore, such doctrine of arbitrariness is not restricted only to executive action, but also applies to the legislature. Thus, an action of the legislature, which is violative of Article 14 of the Constitution, should ordinarily be manifestly arbitrary. There must be case of substantive unreasonableness in the Statute itself for declaring the Act ultra vires to Article 14 of the Constitution of India.

29. In the context of the present case, this Court would like to specifically refer to the finding of the Hon'ble Supreme Court in ***Krishnan Kakkanth Vs. Govt. of Kerala*** reported in **(1997) 9 SCC 495**. In para-36 of the said judgment, which is relevant for the purpose of our case, is quoted herein below:-

> *"36. To ascertain unreasonableness and arbitrariness in the context of Article 14 of the Constitution, it is not necessary to enter upon any exercise for finding out the wisdom in the policy decision of the state government. It is immaterial whether a better or more comprehensive could have been taken. It is equally immaterial if it can be demonstrated that the policy decision is unwise and is likely to defeat the purpose for which such decision has been taken. Unless the policy decision is demonstrably capricious or arbitrary and not informed by any reason whatsoever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision cannot be struck down. It should be borne in mind that except for the limited purpose of testing a public policy in the context of illegality and unconstitutionality, courts should avoid "embarking on uncharted ocean of public policy"."*

In the aforesaid context, it would also be apt to refer to some of the other land mark judgments of the Hon'ble Supreme Court, i.e. in the case of ***S. Nagaraj Vs. State of Karnataka*** reported in **(1993) Supp. 4 SCC 595** and ***Shrilekha Vidyarthi (Kumari) Vs. State of U.P.*** reported in **(1991) 1 SCC 212**.

30. In the ultimate analysis of the factual background of the present case, which is apparent from the materials on record and further keeping in view the analysis of law made hereinabove, this Court is of the considered view that the provision contained in Rule-2(c) of the 2022 Rules is not in compliance with the principles mandated by Article 14 and 16 of the Constitution of India. Therefore, this Court has no hesitation in coming to a conclusion that the discrimination meted out to the Petitioners would be hit by the principles enshrined in the Article 14 and 16 of the Constitution of India. However, before striking down the rule, this Court, by applying the golden rule of interpretation, would make an attempt to bring the said rule in conformity with Article 14 and 16 of the Constitution of India. Furthermore, in the event such interpretation is possible, this Court would first opt for reading down the rule to bring the same in conformity with Article 14 and 16 of the Constitution of India before striking down the same by holding that the same is ultra vires of Article 14 and 16 of the Constitution of India.

31. By applying the aforesaid proposition to the facts of the present case, particularly Rule-2(c) of the Rules, 2022, this Court is of the considered view that by reading down the provisions contained in Rule-2(c) of the Rules, 2022, the same can be brought in conformity with Articles 14 ad 16 of the Constitution of India. Therefore, this Court is of the considered opinion that by removing the words "by health and family welfare department" and reading down such provision in Rule-2(c), the same can be made compliant of Articles 14 and 16 of the Constitution of India. Accordingly, this Court, by reading down the aforesaid words, directs the Opposite Parties to bring an end to the disparity or discrimination between the two classes of Healthcare Workers, who had rendered their services during COVID-19 pandemic. As a result, the aforesaid words in Rule-2(c) are hereby struck down. Further, the Opposite Parties are directed to consider the case of the Petitioners. Further, this Court directs the Opposite Parties to interpret Rule-2(c) in a manner which would include all categories of persons, who have rendered their services as

Short-Term COVID-19 Healthcare Workers for a period of more than three years as has been provided in the Rules. The eligibility criteria with regard to their rendering service as Short-Term COVID-19 Healthcare Workers for three months can very well be verified from the local administration, who were keeping record of such healthcare workers during COVID-19 pandemic and such healthcare workers were working under the active and direct control of the local administration.

32. Lastly, subject to verification of the aforesaid fact, the Opposite Parties are directed to consider the case of the Petitioners by granting them the weightage of mark as has been provided under Rule-3 of Rule-2022 and subject to Petitioners eligibility, the case of the Petitioners shall be considered for appointment as Nursing Officer pursuant to the advertisement under Annexure-1 to the writ petition. The Opposite Parties are further directed to carry out aforesaid exercise within a period of two months from the date of communication of a copy of this judgment by the Petitioners. Furthermore, in view of the aforesaid direction, the rejection list in respect of the Petitioners in the batch of writ application dated 08.08.2023 is hereby quashed. It is also directed that while examining the cases of the Petitioners, the Opposite Parties shall provide opportunity to the Petitioners to furnish their respective certificates in support of their claim and thereafter, it is open to the Opposite Parties to verify such certificates from the local administration. Subject to satisfaction of the aforesaid criteria, the cases of the Petitioners if found eligible for such appointment shall be recommended by the OSSC to the Government by including their name in the merit list for appointment as Nursing Officer against the vacant post of Nursing Officers.

33. Accordingly, the batch of writ petitions stand allowed. However, in the facts and circumstances of the present case, there shall be no order as to costs.

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2024 (I) ILR-CUT-1344

A.K. MOHAPATRA, J.

W.P.(C) NO. 276 OF 2023

BISWANATH DALEI ……Petitioner

-V-

STATE OF ORISSA & ORS. ……Opp.Parties

ODISHA CIVIL SERVICE PENSION RULE, 1992 – Rule 18(3) – Work-charged period for pensionary benefit – Petitioner rendered 6 years, 7 months, 3 days in work-charged establishment – The authorities have not calculated the said period for computing his pensionary benefit – Whether action of Opp. Parties is admissible? – Held, No – Matter is remanded with direction to Opp. Party to include the work-charged period as qualifying period of service for grant of pension and pensionary benefit. (Paras 14-15)

For Petitioner : Mr. D.K. Mohapatra
For Opp.Parties : Mr. P.C. Das, ASC

JUDGMENT Date of hearing : 01.03.2024 : Date of Judgment : 01.03.2024

A.K. MOHAPATRA, J.

1. The petitioner has filed the present writ application challenging the order dated 29.07.2022 under Annexure-5 along with a prayer to quash the said order. Further the petitioner has also sought for a direction to the Opposite Parties to compute the period of service rendered by the petitioner in the Work Charge Establishment, i.e. a period of 6 years 7 months and 3 days, towards qualifying period for calculation of pensionary benefit including gratuity, within a stipulated period of time.

2. The factual background leading to the filling of the present writ application, in a nutshell, is that the petitioner was initially appointed as a Meter Reader under the Work Charge Establishment along with three other persons, one of them being Sri. U.K Mohapatra, by the Superintending Engineer, Upper Kolap Circle, vide order dated 14.04.1981under Annexure 8 to the rejoinder affidavit. While continuing to work under Work Charge Establishment, the petitioner was appointed in the regular establishment as Junior Assistant, vide order dated 06.01.1988 under Annexure-2, in the Directorate of Higher Education Odisha, Bhubaneswar and accordingly the petitioner joined in service on 08.02.1988 along with the other person namely Sri. U.K.Mohapatra as a Junior Assistant. On such appointment the petitioner continued to discharge his duties as a Junior Assistant in the office of the Directorate Higher Education of Odisha until his retirement on attaining age of superannuation w.e.f. 31.10.2012.

3. While the matter stood thus, the petitioner was not getting full pension. Consequently, he approached the Directorate of Secondary Education for grant of full pension. The Assistant Director (Planning), considering the representation of the petitioner, wrote a letter to the Government on 14.08.2019 under Annexure-4 seeking instruction from Government with regard to calculation of entire service period of petitioner for the purpose of calculation and disbursal of the pensionary benefits due and admissible to the petitioner. Furthermore, the letter under Annexure-4 reveals that the petitioner, since the date of his joining on 08.02.1988, had worked continuously for a period of 25 years 8 months and 22 days till his retirement on 31.10.2022. Therefore, the sole grievance of the petitioner in the present writ application is that while calculating the aforesaid period for computing his pensionary benefits, the opposite parties have not included the period of more than 6 years during which the petitioner had worked under the Work Charge Establishment.

4. Heard learned counsel for the petitioner as well as Learned Additional Standing Counsel. Perused the pleadings of the parties and the documents annexed thereto.

5. The learned counsel appearing for the petitioner at the outset submits that, the Govt. of Odisha, School and Mass Education Department vide letter dated 29.07.2022 under Annexure-5 has rejected the claim of the petitioner by passing a non-speaking order. A perusal of the said order under Annexure-5 reveals that the Under Secretary to Government, S & ME Department has passed a singlesentence order wherein, he has stated that the representation of the petitioner for counting of past service for computing pensionary benefits merits no consideration as per Rule 18(3) O.C.S. Pension Rule, 1990. In course of his argument, learned counsel for the petitioner contended that initially the petitioner was engaged in the Work Charge Establishment pursuant to the order under Annexure-1 and accordingly he joined on 08.02.1981. Thereafter, the petitioner continued in the Work Charge Establishment for more than 6 years.

6. Finally, the petitioner was selected for appointment as a Junior Assistant in the office of the Directorate of Higher Education, Odisha vide order under Annexure-2 and consequently joined in said post of Junior Assistant w.e.f. 08.02.1988. In such view of the matter, learned counsel for the petitioner submitted that petitioner had completed more than 6 years of service in the Work Charge Establishment before he was brought over to the regular establishment on 08.02.1988 upon joining as a Junior Assistant. He further contended that although the petitioner continued for more than 25 years in the regular establishment till his retirement from service upon attaining the age of superannuation w.e.f. 31.10.2012, the opposite parties have not taken into consideration the past service rendered by the petitioner in the Work Charge Establishment while calculating the full pension and pensionary benefits as is due and admissible to the petitioner.

7. In the aforesaid context, learned counsel for the petitioner referred to the provisions contained in Rule 18(3) of the Odisha Civil Services (Pension) Rules, 1992. The said Rule has been quoted herein below for better appreciation: -

> *" Notwithstanding anything contained in clauses in Sub-Rule (i) and (ii) of sub-rule (2) a person who is initially appointed by the Government in a workcharged establishment for a period of five years or more and subsequently appointed to the same or another post in a temporary or substantive capacity in a pensionable establishment without interruption of duty, the period of service so rendered in workcharged establishment shall qualify for pension under this rule."*

8. On a careful reading of Sub-Rule 3 of Rule 18 it appears that the same starts with a non-obstante clause. The rule provides that notwithstanding anything containing clause (i) and (ii) of Sub-Rule 2 of Rule 18, a person who is initially appointed by the Government in a Work Charge Establishment for a period of 5 years for more and subsequently appointed in the same or another post in a temporary or substantive capacity in a pensionable establishment without interruption of duty, the period of service so rendered in Work Charge Establishment shall qualify for pension under the said Rule. In other Words, a person who is initially appointed in the Work Charge Establishment and has worked for a period of

5 years or more and, subsequently he was appointed in a regular pensionable post, then in such eventuality, while calculating the pensionary benefits as is due and admissible to such employee, the employer shall take into consideration the period of service rendered in the Work Charge Establishment as a qualifying period for the purpose of computing the pension and pensionary benefits due and admissible to the employee concerned. Thus, there is no ambiguity in the aforesaid Rule 3 of Rule 18. In such view of the matter, leaned counsel for the petitioner submitted that the Opposite Parties have committed a gross illegality by passing the order under Annexure-5 to the writ application thereby rejecting the representation of the petitioner.

9. Per contra, learned Additional Standing Counsel, on the other hand, referring to the counter affidavit filed on behalf of the Opposite Party No.2 submitted that the petitioner joined as a Junior Assistant on 08.02.1988 in the Directorate of Higher Education as a Government Servant on being selected by the Board of Revenue i.e. the recruiting agency. The counter affidavit also does not dispute the fact that the petitioner was engaged by the Government in the Work Charge Establishment under the Project Upper Kolab Circle as a Meter Reader w.e.f. 28.04.1981 and he continued to work there till 24.02.1987. Learned Additional Sanding Counsel in the aforesaid context submitted that the service rendered in the Work Charge Establishment is against a non-sanctioned and non-available post. Therefore, such service rendered by the petitioner in the Work Charge Establishment is purely non-Governmental and nonpensionable service. Consequently, it was contended that the petitioner is not entitled to the benefit of counting of past service as provided under Rule 18(3) of O.C.S. pension Rules, 1990.

10. The Learned Additional Standing Counsel further contended that since the period of service, i.e. 6 years 7 months and 25 days, in the Work Charge Establishment is in a non-pensionable establishment, therefore the same has not been taken in to consideration while calculating the pension and pensionary benefits as is due and admissible to the petitioner. He further contended that the petitioner has been granted pension and pensionary benefits by taking into consideration his service rendered from 08.02.1988 to 31.10.2012, i.e. 24 years 8 months 22 days, under the State Government in a pensionable post of Junior Assistant. Accordingly, it was submitted that the opposite Parties have not committed any illegality in rejecting the claim of the petitioner for including the Work Charge period in the qualifying period for calculation of pension and pensionary benefits.

11. Learned Additional Standing Counsel further relied upon the clause 1 and clause 2 of Sub-Rule (iii) of Rule 18 of the pension rules to deny the claim of the petitioner by saying that the service period rendered in the Work Charge Establishment is to be included in the total period of service for the purpose of pension and pensionary benefits. The Opposite Parties have also referred to the Finance Department OM No. 49296/A dated 12.12.1997. Learned Additional Standing

Counsel also distinguished the case of the present petitioner from the judgment of this Court in ***Basant Kumar Sahoo's*** case reported in **2022 (II) OLR -219** on the ground that the petitioner was working under the Work Charge Establishment as Meter Reader which is not a feeder post to Junior Assistant and hence the ratio laid down in ***Basant Kumar Sahoo's*** Case (supra) shall not be applicable to the facts of the petitioner's case.

12. Having heard the learned counsels appearing for the respective parties, on a careful analysis of the submissions made by respective counsels and, on a careful examination of the materials on record as well as the pleadings of the parties, this Court is of the considered view that the only question that falls for consideration in the present writ application is whether the petitioner is entitled to the counting of past service rendered in the Work Charge Establishment for a period of 6 years 7 month 25 days, as a Meter Reader, while calculating his full pension and pensionary benefits including the period of service which he had rendered in the regular establishment as a Junior Assistant. Learned counsel for the petitioner in reply to the aforesaid issue submitted that the case of the petitioner is squarely covered under Rule 18(3) of the O.C.S. Pension Rule, 1992. On a careful scrutiny of the provisions contained in Rule 18(3) this Court observes that the said rule has been enacted by inculcating a non-obstante clause in respect of Sub-Rule 2(i) and 2(ii). Therefore, irrespective of the provisions contained in Sub-Rule 2(i) and Sub-Rule 2(ii) of Rule 18, if a person is initially appointed by the Government in Work Charge Establishment for a period of 5 years or more and subsequently appointed either to the same post or another post, in a temporary or substantive capacity, in a pensionable establishment, without interruption of duty, then the period of service so rendered in the Work Charge Establishment shall qualify for pension.

13. While considering the applicability of the aforesaid rule to the facts of the petitioner's case, this Court on a careful scrutiny has found that initially the petitioner was engaged in the Work Charge Establishment as a Meter Reader from the date of his joining on 24.04.1981. Thereafter, he continued in such service in the Work Charge Establishment. A service book was also opened in respect of the petitioner and the petitioner was extended a scale of pay while continuing in the said post of Meter Reader in the Upper Kolab Project under the Superintending Engineer, Upper Kolab Circle. Thereafter, the petitioner was duly selected for appointment as a Junior Assistant in the Directorate of Higher Education, Odisha. As such, the petitioner joined as a Junior Assistant on 08.02.1988. On examination of the records it appears that there was no break in service and the petitioner who was a Meter Reader in Work Charge Establishment joined directly as a Junior Assistant in the office of the Directorate of Higher Education on 08.02.1988, continued in such service till the date of his retirement on attaining the age of superannuation on 31.10.2012., i.e. after rendering a continuous service of 25 years 8 months 22 days.

14. In the aforesaid backdrop, by applying the rule 18(3) of the O.C.S. pension Rules 1992 to the facts of the present case, this Court is of the considered view that the case of the petitioner is squarely covered under the Sub-Rule 3 of Rule 18 of 1992 Rules. Furthermore, on perusal of the rejoinder affidavit filed by the petitioner, this Court is also of the view that another person namely Sri U.K.Mohapatra, who was also appointed with the petitioner on 14th April, 1981 under Annexure-8 and subsequently appointed in the regular establishment, has been extended with the full pensionary benefit by taking into consideration the period of service rendered by him in the work charge establishment. The differential treatment of two similarly situated employees, who were both initially engaged in the Work Charge Establishment by virtue of the very same order under Annexure-8 to the writ application, by the Opposite Parties thereby extending the benefit in favour of one while rejecting the case of the petitioner by virtue of the order Annexure-5, is highly arbitrary and discriminatory in nature and as such, the same is violate of Article 14 of the Constitution of India.

15. In view of the aforesaid analysis of the facts of the present case as well as legal position, and keeping in view the provisions contained in Rule 18(3) of O.C.S. pension rules as well as the fact that the benefits prayed for have been extended in favour of a similarly placed person, i.e. one Sri. U.K.Mohapatra, this Court deems it proper to allow the writ application by setting aside the impugned rejection order dated 29.07.2022 under Annexure-5 to the writ application. Further, the matter is remanded back to the Opposite Party No.1 to reconsider the case of the petitioner. Accordingly, the petitioner be extended with the benefits of inclusion of the work charge period in the total qualifying period of service for grant of pension and pensionary benefits. The financial benefits arising out of the aforesaid inclusion of work charge period be also extended in favour of the petitioner within a period of two months from the date of communication of a copy of this judgment by the petitioner.

16. With the aforesaid observation and direction, the writ petition is allowed.

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2024 (I) ILR-CUT-1349

A.K. MOHAPATRA, J.

W.P.(C) NO. 35746 OF 2023

PRASANT KUMAR PATNAIK ……Petitioner

-V-

STATE OF ODISHA & ANR. ……Opp.Parties

(A) ODISHA CIVIL SERVICE (PENSION) RULE, 1992 – Rule 7 – The authority rejected the claim of petitioner for disbursement of retirement dues and pension on the ground that, as per the local fund audit report

a sum of ₹ 7,97,817/- is required to be recovered – Whether the finding in the audit report can be the basis for recovery of any amount from an employee/retired employee? – Held, No – The only way to recover such amount is to first fix the liability by following a due process of law, i.e, by initiating a disciplinary proceeding. (Para 26)

(B) ODISHA LOCAL FUND AUDIT ACT, 1948 r/w circular of Odisha Government dtd. 27.08.1991 – Whether the dues, as has been fixed in the surcharge proceeding on the basis of the audit report can be treated as government dues? – Held, No.

Case Laws Relied on and Referred to :-

1. (2014) 8 SCC 894 : D.D. Tiwari (D) through LRs v. Uttar Haryana Bijli Bitaran Nigam.
2. (1990) 4 SCC 314 : D.V. Kapoor v. UOI and Others.
3. W.P(C) No.2098 of 2013 (dtd. 01.03.2023) : Duryodhan Nayak v. State of Odisha & Ors.
4. 2016(1) OLR-651 : Manoranjan Khadenga v. Chairman, Orissa Forest Development Corporation Ltd., Bhubaneswar, Khurda & Ors.
5. W.P(C) No.14718 of 2015 (dtd.06.05.2022) : State of Odisha & Ors.v. Sushanta Chandra Sahoo & Ors.
6. Gorakhpur University & Ors. V. Dr.Shitla Prasad Nagendra & Ors.AIR 2001 SC 2433;
7. (1994) 6 SCC 589 : R.Kapur v. Director of Inspection (Painting & Pulication) Income Tax.
8. AIR 1985 SC 356 : State of Kerela v. M. Padmanavan Nair.
9. AIR 1981 SC 212 : Som Prakash v. Union of India.
10. (1971) 2 SCC 330 : Deokinandan Prasad v. State of Bihar.
11. (2013) II OLR 513 : State of Orissa & Ors. V. Prabodh Kumar Pal.
12. Civil Appeal No.1677-1678 of 2020 (Supreme Court, dtd.18.02.2020) : Dr. Hira Lal v. State of Bihar & Ors.
13. AIR 1982 SC 33 : Bishamber Dayal Chandra Mohan v. State of UP.
14. AIR 2003 SC 250 : Hindustan Times v. State of UP.
15. (2021) (III) ILR-CUT-60 : Gobardhan Nayak v. State of Orissa & Ors.
16. (2003) 3 SCC 40 : Gangahanume Gowda v. Karnataka Agro Industries Corporation Ltd.
17. (2008) 3 SCC 44 : S.K. Dua v. State of Haryana & Ors.

For Petitioner : Mr. Subir Palit, Sr. Adv.
M/s. Venugopal Mohapatra, S. Sahoo & A. Tripathy.

For Opp.Parties : Mr. Saswat Das, AGA

JUDGMENT Date of Hearing : 19.02.2024 : Date of Judgment : 01.03.2024

A.K. MOHAPATRA, J.

The above named Petitioner, who is a retired Government employee, has filed the present writ petition questioning the validity and propriety of order dated 13.10.2023 passed by the Opposite Party No.1 thereby rejecting the representation of the Petitioner dated 18.05.2023 and 03.08.2023 filed with a prayer for sanction and disbursement of final pension, gratuity and unutilized leave salary along with interest @ 18% from the date of retirement of the Petitioner. The Petitioner while praying for quashing of order dated 13.10.2023 under Annexure-8 to the writ petition has also prayed for issuance of a writ of mandamus thereby directing the

Opposite Party No.1 to sanction and disburse the final pension and gratuity as is due and admissible to the Petitioner along with interest @ 18%.

2. The present writ petition was filed on 31.10.2023. While taking up this matter for admission and while issuing notice vide order dated 07.11.2023, this Court, vide interim order dated 07.11.2023 passed in I.A. No.17282 of 2023, disposed of the said I.A. by directing the Opposite Party to disburse the unutilized leave salary to the Petitioner along with interest @ 18% as claimed by the Petitioner within a period of six weeks from the date of communication of such order. Therefore, the prayer made in the writ petition with regard to payment of unutilized leave salary no more survives.

3. The factual background leading to filing of the present writ petition by the above named Petitioner, in short, is that the Petitioner initially joined as Assistant Town Planner under the department of Housing and Urban Development, Government of Odisha, in the year 1987 on being duly selected. Thereafter, the Petitioner continued to work under the said department and discharged his duties to the satisfaction of the authorities. While the Petitioner was in service, an F.I.R. bearing Cuttack Vigilance P.S. Case No.84 of 2012 was registered on 28.12.2012 for commission of offence under Section 13(2) read with 13(1)(b) of the Prevention of Corruption Act, 1988 and Section 420/120(B) of I.P.C. In the vigilance case, the Petitioner has been implicated as an accused. While the vigilance case was continuing, the Petitioner has retired from service w.e.f. 31.05.2013 on attaining the age of superannuation.

4. The averments made in the writ petition further reveals that on the date of retirement of the Petitioner from service on 31.05.2013, no disciplinary proceeding, as well as any judicial/criminal proceeding were pending against the Petitioner. However, the authorities did not sanction and disburse the financial benefits as well as the pensionary benefits as is due and admissible to the Petitioner on his retirement. Being aggrieved by such conduct of the Opposite Parties, the Petitioner wrote an e-mail on 01.07.2020 to the Opposite Party No.1 with a specific request to sanction his final pension along with gratuity and other retirement benefits.

5. The writ petition further reveals that the F.I.R. in Cuttack Vigilance P.S. Case No.84 of 2012 implicating the present Petitioner as an accused was challenged by the Petitioner before this Court by filing an application under Section 482 of the Cr.P.C. which was registered as CRLMC No.704 of 2019. After hearing the counsels appearing for the parties, a coordinate Bench, vide a detailed judgment dated 13.04.2022 under Annexue-2, to the writ petition allowed the CRLMC application. Accordingly, the F.I.R. in Cuttack Vigilance P.S. Case along with consequential proceeding in VGR P.S. Case No.84 of 2012 pending in the Court of Special Judge, Cuttack, qua the present Petitioner was quashed. Therefore, the judicial/criminal proceeding, which was pending against the present Petitioner, has come to an end by virtue of the judgment dated 13.04.2022 under Annexure-2 to the writ petition.

6. Being aggrieved by the non-consideration of his representation, the Petitioner approached this Court by filing W.P.(C) No.14462 of 2023 with a prayer for a direction to the Opposite Party No.1 to consider his representation dated 01.07.2020. This Court disposed the said writ petition with a direction to the Opposite Party No.1 to dispose of the representation of the Petitioner dated 01.07.2020 by passing a reasoned order and to pay the retirement benefits to the Petitioner along with interest vide order dated 09.05.2023 under Annexure-4 to the writ petition. While disposing of the said writ petition, this Court has categorically directed that in the event the Opposite Parties come to a conclusion that the Petitioner is entitled to the dues as has been claimed by him, the same shall be sanctioned in favour of the Petitioner within a period of four weeks along with interest at such rate as has been directed by the Hon'ble Supreme Court in the case of ***D.D. Tiwari (D) through LRs v. Uttar Haryana Bijli Bitaran Nigam, reported in (2014) 8 SCC 894.***

7. After disposal of the above noted writ petition, the Petitioner had approached the Opposite Party No.1 by filing a fresh representation dated 18.05.2023 under Annexure-5 to the writ petition along with a copy of the order passed by this Court on 09.05.2023. The Opposite Party No.1 pursuant to the order passed in the previous writ petition on 09.05.2023 considered the case of the Petitioner and, accordingly, the representation of the Petitioner dated 18.05.2023 has been disposed of by a detailed and speaking order dated 13.10.2023 under Annexure-8 to the writ petition. While disposing of the representation of the Petitioner as directed by this Court, the Opposite Party No.1 in his order dated 13.10.2023 has stated that on the basis of the local fund audit report, a sum of R.7,97,817/- is required to be recovered from the Petitioner as per the observation made in the audit report. Moreover, since the amount which has been shown recoverable exceeds the amount due towards gratuity, therefore, the Opposite Party No.1 has not sanctioned the final pension and other retiral benefits as is due and admissible to the Petitioner. Furthermore, since the matter involves recovery of public money, the Finance Department, in the meantime, has been requested to expedite final decisions on the Audit paras and suggested audit recoveries to enable the Opposite Party No.1 to sanction the final pension and retirement benefits in favour of the Petitioner. With such observation, the representation of the Petitioner was disposed of.

8. While the matter stood thus, on 18.10.2023, a surcharge order was passed by the Examiner of Local Accounts under Odisha Local Fund Audit Act, 1948 whereunder the Petitioner has been asked to deposit a sum of Rs.6,54,104/- within a period of fourteen days from the date of that order under Annexure-12 to the writ petition.

9. Learned Senior Counsel appearing on behalf of the Petitioner submitted that the aforesaid order dated 18.10.2023 under Annexure-12 has been assailed by the

Petitioner by filing an appeal under Section 11 of the Odisha Local Fund Audit Act, 1948, which is still pending for final consideration.

10. A counter affidavit has been filed on behalf of the Opposite Party No.1 wherein it has been stated that the Petitioner has retired from service on attaining the age of superannuation on 31.05.2013. Thereafter, provisional pension has been sanctioned vide order dated 19.06.2013 in favour of the Petitioner, which was subsequently revised vide order dated 17.09.2019. Further, it has been stated that the representation of the Petitioner which was directed to be considered by this Court vide order dated 09.05.2023 in W.P.(C) No.14462 of 2023 has been duly considered on the basis of the documents available on record and, accordingly, the same has been disposed of by passing a speaking and reasoned order on 13.10.2023 under Annexure-8 to the writ petition. The Opposite Parties have also admitted that the Vigilance F.I.R. lodged against the Petitioner has been quashed by this Court in CRLMC No.740 of 2019 on 13.04.2022.

11. The counter affidavit of Opposite Party No.1 further reveals the Examiner of Local Accounts, Directorate of Local Fund Audit, Odisha has intimated the Opposite Party No.1 for recovery of R.7,97,817/- from the Petitioner in respect of observation made in Audit Report No.42/07/08 and No.61/10-12 pertaining to Puri-Konark Development Authority. Accordingly, the aforesaid issue has been referred to the Finance Department with a request to finalize the Audit Report expeditiously. It has also been stated in the counter affidavit that claim of the Petitioner has not been totally rejected, however, steps have been taken to finalize the retiral benefit of the Petitioner at the earliest. On such ground, it has been stated in the counter affidavit that such order under Annexure-8 does not cause any prejudice to the Petitioner.

12. The counter affidavit further reveals that the delay in sanction and disbursal of the retiral benefits as well as final pension is due to the pendency of the Vigilance Case against the Petitioner, although the same was quashed subsequently by this Court vide order dated 13.04.2022. Moreover, Bhubaneswar Vigilance P.S. Case No.7 dated 08.03.2009 was initiated against the Petitioner for demand of an illegal gratification of Rs.3,000/-. Despite several communications being sent to the G.A. (Vigilance) Department, no reply was received. However, the G.A. (Vigilance) Department, vide letter dated 29.08.2023, intimated the Opposite Party No.1 that Bhubaneswar Vigilance P.S. Case No.7 of 2009 may be treated as closed. A copy of the letter containing the aforesaid intimation dated 29.08.2023 has also been annexed to the counter affidavit.

13. Finally, the Joint Director, Directorate of Local Fund Audit vide his letter dated 02.11.2023 intimated that a sum of Rs.6,54,104/- was surcharged against the Petitioner under Section 9(3) of OLFA Act, 1948 relating to the observation in the Audit Report. Although they have specifically admitted that such order has been appealed against by the Petitioner. Since the aforesaid surcharge amount is public money, therefore, the Opposite Party No.1 has assumed that the money due to the

development authority is Government money as the development authorities are autonomous bodies created by the Government under a special statute. Finally, a stand has been taken in the counter affidavit that the pension amount of the Petitioner has been sanctioned and his pension papers have been forwarded to Accountant General (A&E), Odisha, Bhubaneswar vide letter dated 28.11.2023 and that the unutilized leave salary of the Petitioner has already been sanctioned by the Opposite Party No.1 vide order dated 06.12.2023 with an intimation to withhold the surcharged amount of Rs.6,54,104/- till finalization of Audit Report.

14. Heard Mr. S. Palit, learned Senior Counsel appearing for the Petitioner along with Mr. Venugopal Mahapatra, learned counsel, appearing for the Petitioner; and Mr. Saswat Das, learned Additional Government Advocate appearing for the State-Opposite Parties. Perused the pleadings of the respective parties and the materials on record.

15. Mr. S. Palit, learned Senior Counsel appearing for the Petitioner, at the outset, submitted that the pertinent issue which is required to be decided by this Court in the present writ petition is whether on the ground of surcharge order, the pensionary and retirement benefits as is due to a retired Government servant can be withheld under the provisions of the OCS (Pension) Rules, 1992. In course of his argument, Mr. Palit, referring to the provisions contained in Rule-7(1) of the OCS (Pension) Rules, 1992, submitted that such rule permits the State Government to withhold pension or gratuity and the State Government may order recovery of any pecuniary loss caused to the Government only after it has been ascertained in a disciplinary or judicial proceeding that the Petitioner is guilty of grave misconduct. In the present case, no disciplinary proceeding having been initiated against the Petitioner and the FIR in the Vigilance Case having already been quashed by a coordinate Bench of this Court, the State-Opposite Parties cannot withhold the gratitude as is due and admissible to the Petitioner. In the aforesaid context, learned Senior Counsel appearing for the Petitioner referred to the judgment of the Hon'ble Supreme Court in the case of ***D.V. Kapoor v. UOI and Others***, reported in **(1990) 4 SCC 314.** He specifically placed reliance on para-4, 8, 9 and 10 of the said judgment.

16. In course of his argument, learned Senior Counsel appearing for the Petitioner also specifically referred to the circular of the Government of Odisha dated 27.08.1991, which has been annexed to the writ petition as Annexure-9. For better appreciation of the issue and the decision of the Government under the aforesaid circular, this Court deems it proper to extract the entire circular herein below:-

"No. Pen. 44/91-31740/F.,
Government of Orissa, Finance Department

OFFICE MEMORANDUM

Recovery of dues arising out of non-settlement of audit objections.

> While taking up pension case in the pension Adalat for finalization it has come to the notice that in some cases D.C.R. Gratuity etc. have been held up pending settlement of audit objections. It has to be borne in mind that the findings in an audit report/para do not impose any liability on the Government servant concerned unless the same is established in Departmental proceedings initiated against him under the Orissa Civil Service classification, control and Appeal) Rules, 1962. Such liability does not come under the purview of Government dues. It is mandatory that Government dues are required to be cleared by the retiring Government servant before the date of his retirement. The existing provisions of Rule 157 and 158 of the O.P.R. 1977 do not define the term of Govt. dues. The expression "Government dues" includes only arrears of rent and other charges pertaining to occupation of Govt. accommodation, balance of house building or conveyance advance, over-payment of pay and allowances or leave salary and arrears of Income Tax deductible at source under the Income Tax Act, 1961.
>
> As such the amount arising out of Audit report/para which has not been termed as "Government dues" can not be recovered from D.C.R. Gratuity. Such dues can, however, be realized provided the responsibility is fixed by following the appropriate procedure.
>
> Sd/-S.K. Rath,
> Joint Secy. to Government
>
> Memo No.31741/F., dt. 22.8.91.
>
> Copy forwarded to all Departments of Govt./all Heads of Departments. Xxx xxx for information and necessary action.
>
> Sd/-S.K. Rath,
> Section Officer"

17. Referring to the aforesaid circular, learned Senior Counsel appearing for the Petitioner further emphatically submitted that the Finance Department, Government of Odisha, has stipulated that the findings in an audit report/para do not impose any liability on the concerned Government servant unless, the same is established in a departmental proceedings initiated against the delinquent officer under the Orissa Civil Service (CCA) Rules, 1962 and that such liability does not come under the purview of Government dues. He further contended that the said circular provides that the expression "Government dues" includes only arrears of rent and other charges pertaining to occupation of Govt. accommodation, balance of house building or conveyance advance, over payment of pay and allowances or leave salary and arrears of Income Tax deductible at source under the Income Tax Act, 1961. Therefore, the aforesaid circular clearly provides that the liability arising out of audit report/para cannot be considered as Government dues and, accordingly, the same cannot be recovered from D.C.R., Gratuity as Government dues. Further, such circular specifies that such dues, nevertheless, can be realized provided the responsibility is fixed by following the procedure. In such view of the matter, learned Senior Counsel appearing for the Petitioner submitted that the aforesaid dues by no stretch of imagination can be construed as Government dues. Hence, the gratuity of the Petitioner could not have been withheld by the Opposite Party No.1.

18. Learned Senior Counsel also relied upon the ratio laid down by a coordinate Bench of this Court in ***Duryodhan Nayak v. State of Odisha and Others*** (W.P.(C) No.2098 of 2013 disposed of vide judgment dated 01.03.2023). On a careful reading of the aforesaid judgment in *Duryodhan Nayak's* case (supra), this Court observes that a coordinate Bench of this Court by referring to the judgment passed by this Court in ***Manoranjan Khadenga v. Chairman, Orissa Forest Development Corporation Ltd., Bhubaneswar, Khurda and others***, reported in **2016(1) OLR-651**, has come to a finding that the withholding of retirement benefits along with gratuity as well as leave salary as is due and admissible to the Petitioner, without initiating any disciplinary proceeding to determine the liability, only on the basis of audit report after retirement of the employee is without authority of law. For better appreciation, the relevant portion of the judgment as contained in para-7 is quoted herein below:-

> "7. Law is well settled that the findings of the Audit Report, per se, cannot be the basis for recovery of any amount from an employee much less a retired employee. In the case of Manoranjan Khadenga v. Chairman, Orissa Forest Development Corporation Ltd., (supra), a co-ordinate bench of this Court, while dealing with a similar case held that withholding the retirement benefits admissible to the Petitioner such as gratuity as well as leave salary without initiating any disciplinary proceeding to determine the liability, only on the basis of the audit report after his retirement is without authority of law. This Court is in respectful agreement with the ratio decided as above. Further, a perusal of the Audit Report does not conclusively reveal that the amount in question was 'Government dues'. In the Finance Department Office Memorandum dated 22nd August, 1991 the expression, 'Government dues' has been held to include 'only arrears of rent and other charges pertaining to occupation of Government accommodation, balance of house building or conveyance advance, overpayment of pay and allowances or leave salary and arrears of Income Tax deductible at source under the Income Tax Act, 1961'. The Office memorandum further states as under;
>
> *"As such the amount arising out of Audit report/Para which has not been termed as 'Government dues' cannot be recovered from D.C.R. Gratuity. Such dues can, however, be realized provided the responsibility is fixed by following the appropriate procedure."*

19. Additionally, learned Senior Counsel appearing for the Petitioner, referring to Rule-68 submitted that the said rule empowers the State Government for recovery of only the Government dues from the DCRG of the retired employees. Rule-68(3) defines Government dues, which includes dues pertaining to government accommodation, dues with respect to balance of house building or conveyance or any other advance, overpayment of pay & allowances or leave salary and arrears of Income Tax deductible at the source. In the aforesaid context, it was further submitted before this Court that none of such dues are pending against the Petitioner and in view of the provisions contained in Rule-68, as well as the Government Circular of the Finance Department as referred to hereinabove, the surcharge amount, if any, is not recoverable from the gratuity of the present Petitioner as Government dues. Moreover, the aforesaid surcharge amount can very well be recovered from the defaulting/delinquent Government employee under Section 10(1)

of the Odisha Local Fund Audit Act, 1948. Section 10(1) of OLFA Act, 1948 provides that any surcharge dues can be recovered from the person concerned as "arrears of land revenue". Therefore, the pendency of surcharge appeal will have no bearing in the present writ petition.

20. In the context of pending disciplinary and judicial proceeding on the date of retirement, learned Senior Counsel for the Petitioner submitted that it is an admitted fact that no disciplinary proceeding was initiated against the present Petitioner. So far judicial proceeding arising out of Vigilance P.S. Case No.84 of 2012 is concerned, learned Senior Counsel for the Petitioner submitted that, by the date of Petitioner's retirement from service, no charge sheet have been filed by the Vigilance Department and consequentially, no cognizance was also taken by the Court in seisin over the matter. In the said context, learned Senior Counsel for the Petitioner, referring to the provisions contained in Rule-7(d) of OCS (Pension) Rules, 1992, submitted that the aforesaid provision has been elaborately analysed in a judgment by a Division Bench of this Court in ***State of Odisha and others v. Sushanta Chandra Sahoo and others*** (W.P.(C) No.14718 of 2015 disposed of vide order dated 06.05.2022). In the aforesaid case, the Hon'ble Division Bench has categorically held that a judicial proceeding can be said to be pending against the employee where cognizance has been taken. Since no cognizance was taken in the present case and the F.I.R. having been quashed subsequently by this Court, it cannot be said that a judicial proceeding or any disciplinary proceeding was pending against the Petitioner on the date of retirement of the Petitioner, which would deprived the Petitioner of the benefits which is due and admissible to the Petitioner in the shape of gratuity or final pension on his retirement. He also referred to Rule-82 of the OCS (Pension) Rules, 1992 with regard to the payment of pensionary benefits and since the Petitioner has not been paid the pensionary and retiral benefits, he is entitled to interest w.e.f. 01.06.2013 on such outstanding amount in terms of Notification dated 30.12.1999 issued by the G.A. & P.G. Department, Government of Odisha.

21. Per contra, learned Additional Government Advocate appearing for the State-Opposite Parties, by referring to the counter affidavit submitted that the Opposite Parties have not committed any illegality while disposing of the representation of the Petitioner pursuant to the order passed by this Court in the earlier writ petition. He further contended that it would be wrong to assume that the authority has rejected the representation of the Petitioner. Further, referring to the order under Annexure-8 to the writ petition passed by the Opposite Party No.1 pursuant to the direction of this Court, learned Additional Government Advocate submitted that the Opposite Party No.1 has narrated in detail the entire factual background of the present case. In the aforesaid factual background, the Opposite Party No.1 while disposing of the representation vide order under Annexure-8 has finally stated that expeditious steps have been taken to finalize the retiral benefits of the Petitioner at the earliest.

22. In course of his argument, learned Additional Government Advocate further referring to the order passed in the surcharge proceeding, submitted that on the basis of the audit report a surcharge proceeding was initiated against the Petitioner by the Examiner of Local Accounts, Directorate of Local Fund Audit, Odisha. In his order, the Examiner of Local Accounts, while dropping some of the audit objections/paras to the tune of Rs.1,96,357/-, has categorically held that an amount of Rs.7,97,817/- is still to be recovered from the Petitioner on the basis of the observations made in the Audit Report. He further contended that since the amount which is recoverable exceeds the retiral and pensionary benefits as is due and admissible to the Petitioner, the Opposite Party No.1, awaiting the final decision of the Finance Department, has not taken any final decision in the matter. He further contended that the amount which is recoverable in view of the surcharge proceeding is Government due and, as such, the Opposite Party No.1 has rightly withheld the gratuity and pension of the Petitioner as per the provisions contained in the relevant statute. Therefore, no fault can be found with the Opposite Party No.1 while disposing of the representation of the Petitioner under Annexure-8 to the writ petition vide order dated 13.10.2023. In such view of the matter, learned Additional Government Advocate submitted that the writ petition filed by the Petitioner is devoid of merit and, accordingly, the same should be dismissed.

23. Having due regard to the pleadings of the respective parties and on a careful analysis of the submissions made by the learned counsels appearing for the parties, as well as on a careful examination of the record, this Court is of the view that the relevant question which falls for determination in the present writ petition is with regard to the conduct of the Opposite Party No.1, i.e, whether the Opposite Party No.1 is within his authority to withhold the retirement as well as pensionary benefit and gratuity of the Petitioner under the O.C.S. (Pension) Rules by treating the same to be the Government dues? Now, therefore, this Court is required to consider two questions. (1) Whether any disciplinary proceeding/judicial/criminal proceeding was pending against the Petitioner on the date of retirement? And (2) whether the dues, as have been fixed in the surcharge proceeding on the basis of the audit report, can be treated as Government dues in view of the settled position of law as well as the circular of the Finance Department dated 27th August, 1991 under Annexure-9 to the writ petition?

24. The first question that falls for consideration of this Court is with regard to the pendency of the disciplinary or judicial/criminal proceeding against the Petitioner on the date of Petitioner's retirement on 31.05.2013, admittedly, no disciplinary proceeding whatsoever was initiated against the present Petitioner. So far judicial/criminal proceeding is concerned, the assertion in the writ petition is that no charge sheet was filed and, as such, no cognizance was taken by the Court in seisin over the matter as on 31.05.2013, i.e. the date of retirement of the Petitioner. In such view of the matter, this court is required to decide as to whether the Cuttack Vigilance P.S. Case No. 84 of 2012 lodged on 28.12.2013 can be construed by this

Court as a criminal proceeding pending against the Petitioner on the date of his retirement. This question has been elaborately discussed, analyzed and answered in a judgment by a Division Bench of this Court in *Sushanta Chandra Sahoo's* case (supra). A copy of the judgment delivered by the Division Bench on 06.05.2022 has been annexed as Annexure-13 to the writ petition. On perusal of the Annexure-13, this Court observes that the Division Bench of this Court has categorically held that in view of explanation (b) to Rule-7(2)(1) of Odisha Pension Rules, a criminal proceeding or judicial proceeding can be said to be pending against the Government employee when the Magistrate takes cognizance. In such view of the matter and, keeping in view of such detailed analysis in the judgment under Annexure-13, this Court deems it proper not to discuss the issue any further by wasting valuable judicial time even otherwise also the judgment of the Division Bench under Annexure-13 to the writ petition is binding on this Court. In view of the ratio laid down in the judgment under Annexure-13, i.e. *Sushanta Chandra Sahoo's* case (supra), this Court categorically holds that no disciplinary or judicial proceeding was pending against the Petitioner on the date of his retirement from service w.e.f. 31.05.2013.

25. With regard to the payment of pensionary and retirement benefits including the gratuity, this Court by following a series of judgments of the Hon'ble Supreme Court is of the considered view that grant of pensionary benefit and gratuity are no longer matter of bounty to be distributed by the Government, rather those are in the form of valuable rights acquired by the retired employees and, as such, property in their hands and any delay in settlement and disbursement thereof should viewed seriously and dealt with severely by imposing penalty in form of payment of interest. In the OCS (Pension) Rules, a penalty to the tune of 7% has also been provided. In the aforesaid context, this Court would like to refer to the judgments in ***Gorakhpur University & Ors. V. Dr. Shitla Prasad Nagendra & Ors.***, reported in **AIR 2001 SC 2433**; ***R. Kapur v. Director of Inspection (Painting and Pulication) Income Tax***, reported in **(1994) 6 SCC 589**; ***State of Kerela v. M. Padmanavan Nair***, reported in **AIR 1985 SC 356**; and ***Som Prakash v. Union of India***, reported in **AIR 1981 SC 212**.

26. Additionally, this Court would also like to refer to the judgment by the coordinate Bench in *Duryodhan Nayak's* case (supra) wherein it has been categorically held by the coordinate Bench that the finding in the audit report, per se, cannot be the basis for recovery of any amount from an employee, much less a retired employee and the only way to recover such amount is to first fix the liability by following a due process of law, i.e., by initiating a disciplinary proceeding. This Court would also like to refer to the judgment of Hon'ble Supreme Court in ***Deokinandan Prasad v. State of Bihar***, reported in **(1971) 2 SCC 330** wherein the Hon'ble Supreme Court has held that the right to grant pension to a Government servant flows from the rules and the same cannot be withheld by virtue of an executive order. With regard to the initiation of the disciplinary proceeding, this Court

on a perusal of Rule-7 of the O.C.S. (Pension) Rules, is of the considered view that the same cannot be initiated in support of an incident/occurrence which had taken place more than 4 years prior to the date of institution. A disciplinary proceeding having not been initiated against the Petitioner cannot also be initiated now. The aforesaid finding of this Court gets support from a judgment of this Court in ***State of Orissa and Ors. V. Prabodh Kumar Pal***, reported in **(2013) II OLR 513.**

27. Furthermore, In the context of withholding of pension or gratuity by the Opposite Parties, this Court is of the considered view that the law is no more res integra. Such an issue engaged the attention of the Hon'ble Supreme Court in the case of ***Dr. Hira Lal v. State of Bihar and Ors.***. The Hon'ble Supreme Court vide judgment dated 18.02.2020 in Civil Appeal No.1677-1678 of 2020 has categorically held that in the absence of any statutory rules permitting withholding of pension or gratuity, the State authorities could not do so by way of executive instructions. This Court, at this juncture, is also reminded of the settled proposition of law that an executive instruction which does not have any statutory sanction cannot be termed as law within the meaning of Article 300A of the Constitution of India as has been held by the Hon'ble Supreme Court in ***Bishamber Dayal Chandra Mohan v. State of UP***, reported in **AIR 1982 SC 33** and **Hindustan Times v. State of UP**, reported in **AIR 2003 SC 250**.

28. In reply to the second question formulated by this Court to decide the issue involved in the present writ petition, i.e. as to whether the dues as has been held to be payable by the Examiner of Accounts under the OLFA Act, 1948 could be treated as Government dues? The aforesaid question need not be discussed elaborately and no further analysis is required in view of the Circular dated 27th August, 1991 of the Finance Department, Government of Odisha which has been quoted in the preceding paragraph. Moreover, the aforesaid circular has been elaborately discussed and analyzed by a coordinate Bench of this Court in its judgment in *Duryodhan Nayak's* case (supra). This Court is required to apply the aforesaid well-settled principle to the facts of the present case. In the instant case, the dues that have been claimed by Opposite Party No.1 as recoverable from the Petitioner arise out of a surcharge proceeding. Such surcharge proceeding was initiated on the basis of an audit report by the Local Fund Auditor. The order of Examiner of Accounts has been assailed by filing an appeal before the Appellate Authority as provided under the OLFA Act, 1948. Moreover, taking into consideration the definition of Government dues as has been provided in the Finance Department Circular under Annexure-9, this Court has no hesitation in coming to a conclusion that the surcharge dues under the OLFA Act, 1948 cannot be construed as Government dues.

29. Moreover, in the event such dues are recoverable, then a procedure is available under the OLFA Act, 1948 to recover the same from the retired employee by following the procedure and by treating such dues as arrear land revenue. Furthermore, the words "Government dues" having been defined in the rules as well

as circular under Annexure-9 and the surcharge dues having not been covered under such definition cannot be construed to be Government dues. Moreover, by applying the ratio laid down by a coordinate Bench of this Court in *Duryodhan Nayak's* case (supra), this Court is persuaded to hold that the dues in the present case cannot be construed to be Government dues and, as such, the same cannot stand as a bar in disbursing the final pension and gratuity to the Petitioner. Since the amount as is due and admissible to the Petitioner on account of final pension and gratuity has been withheld by the Opposite Parties without any sanction of law, therefore, the Opposite Parties are liable to pay penal interest to the Petitioner as has been provided under the relevant rules.

30. With regard to payment of penal interest, this Court would like to refer to the judgment of the Hon'ble Supreme Court in *D.D. Tiwari's* case (supra), which has been followed by this Court in ***Gobardhan Nayak v. State of Orissa and others,*** reported in **(2021) (III) ILR-CUT-60** and, accordingly, an employee has been granted interest @ 18%. Moreover, this Court on a reading of the judgment of the Hon'ble Supreme Court in ***Gangahanume Gowda v. Karnataka Agro Industries Corporation Ltd.,*** reported in **(2003) 3 SCC 40** as well as in ***S.K. Dua v. State of Haryana and others,*** reported in **(2008) 3 SCC 44**, wherein it has been held that interest on delayed payment of gratuity as well as pensionary benefits is mandatory, is of the considered view that the employee concerned needs to be compensated for such delayed payment of dues.

31. In view of the aforesaid analysis of factual background of the present case as well as the point of law involved in the present writ petition and, also in view of the various judgments referred to hereinabove laying down the proposition of law, this Court is inclined to hold that the Petitioner in the absence of any judicial/criminal or disciplinary proceeding is entitled to the pensionary and other retiral benefits including the gratuity upon his retirement from service w.e.f. 31.05.2013. Since the same has not been paid to the Petitioner as of now, the reply of Opposite Party No.1 under Annexure-8 is hereby quashed. Accordingly, the Opposite Party No.1 is directed to pay the retirement benefits including gratuity, unutilized leave salary and other financial and pensionary benefits, as is due and admissible to the Petitioner, as per law within a period of two months from the date of communication of this judgment along with interest @ 18%.

32. With the aforesaid observation and direction, the writ petition is allowed. However, there shall be no order as to costs.

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2024 (I) ILR-CUT-1362

V. NARASINGH, J.

W.P(C) NO. 6146 OF 2004

LAXMIPRIYA PATTNAIK ……Petitioner

-V-

THE CENTRAL BANK OF INDIA & ORS. ..…Opp.Parties

CENTRAL BANK OF INDIA EMPLOYEES (PENSION) REGULATION, 1995 – Rule 39 – Family pension – The husband of the petitioner has rendered service about 18 years in the bank – The authority denied family pension to the petitioner on the plea that, her husband had not rendered 20 years of qualifying service – Whether such denial is sustainable? – Held, No – The petitioner is entitled to family pension taking into account of Rule 39 of the Regulation which stipulate that, even after completion of one year of service, family of the deceased employee shall be entitled to family pension – Denying such entitlement is malafide due to non-application of mind, not sustainable and accordingly quashed.

Case Laws Relied on and Referred to :-

1. (2020) 8 SCC 106 : V. Sukumaran vs. and Anr
2. (1983) 1 SCC 305 : D.S. Nakara and Others V. Union of India
3. 1985 (1) SCC 429 : State of Kerala & Ors vs. M. Padmanabhan Nair
4. 1999 (3) SCC 438 : Dr. Uma Agarwal v. State of U.P. and Anr
5. 2023 SCC online SC 287 : R. Sundaran vs. The Tamil Nadu State Level Scrutiny Committee & Ors
6. (2013) 12 SCC 210 : State of Jharkhand and Ors. Vs. Jitendra Kumar Srivastava & Anr.

For Petitioner : Mr. S.K. Dash

For Opp.Parties : Mr. P.C. Rath, M.K. Routray

JUDGMENT Date of Hearing : 19.12.2023 : Date of Judgment : 20.12.2023

V. NARASINGH, J.

1. Petitioner a widow, who lost her husband 26 years ago has filed the writ Petition seeking intervention of this Court under Article-226 and 227 of the Constitution of India, for quashing Annexure-6 and 9 to the writ Petition denying her family pension and other terminal dues.

2. Heard Mr. Susant K. Dash, learned counsel for the petitioner.

3. None appeared for the opposite parties though the names of the counsel is on record.

4. This Court perused the counter affidavit filed on behalf of the Central Bank of India and its functionary opposite parties controverting the allegation in the writ Petition and seeking dismissal thereof, sworn to by the Assistant Regional Manager.

5. It is contended by the petitioner that Late Tushar Kanti Patnaik, husband of the petitioner as ex-servicemen was selected as Assistant Cashier-cum-Go down Keeper on 10th February, 1973 to serve opposite party Bank, after he was discharged from Indian Air Force. Thereafter he got promotion to the rank of Assistant Manager scale-I during the year 1994. While continuing as such the husband of the petitioner applied for voluntary retirement due to personal reasons on 17th February, 1998 in terms of regulation 29 of the Central Bank of India Employees (pension) Regulation 1995 (Hereinafter referred to as "Regulation 1995") which provided for an employee to opt for voluntary retirement on completion of 20 years of service by giving notice of not less than 3 months.

6. Such request of the Petitioner's husband was accepted by the Opposite Party number-3 as per order dated 16.3.1998, and vide Annexure-4 the petitioner's husband was advised to be relieved from the Bank at the close of office hours on 17.5.1998. The same is extracted hereunder for convenience of ready reference:

> "xxx xxx xxx
>
> We advise that the competent authority has accepted the Notice of Voluntary Retirement given by Shri Tushar Kanti Patnaik. Emp. No.39333, Asstt. Manager, w.e.f. 17.05.1998, under Pension Regulations.
>
> Please, therefore, relieve the member from the Bank at the close of office hours on 17.05.1998 under advice to all concerned and arrange for settlement of his terminal dues at an early date.
>
> xxx xxx xxx"

7. As per such decision the petitioner's husband was allowed to voluntary retire on **17.05.1998** in terms of Regulations 1995. However before pecuniary benefits could be disbursed after acceptance of voluntary retirement, as ill luck would have it, the petitioner's husband unfortunately expired on **26.06.1998**.

8. Despite repeated approaches, the family pension which had accrued in her favour on account of death of her husband was not paid. She was only paid a part of Provident fund on 29th January, 1999.

9. Opposite Party number-3 issued a letter to the petitioner on 30th March, 1999 to be present before him with 2 recent passport size photographs for quick disposal of her claim relating to family pension. Thereafter the petitioner was further instructed to provide original death certificate as per letter dated 23rd March, 2000. Since no follow up action was taken despite complying the requirements as per instructions the petitioner submitted a representation on 04.04.2000 with a request for early release of her pension and other terminal benefits.

10. To her surprise and dismay she was communicated with a letter dated 11.7.2000 under Annexure 6, impugned herein, by which she was intimated by the Opposite Party No. 3 that she is not entitled to family pension as her husband had not rendered 20 years of qualifying service. The same is extracted hereunder:

xxx xxx xxx

"As per instruction of our Regional Office, Bhubaneswar, we inform you that, as Mr. Late T.K. Pattanaik has not completed the minimum qualifying 20 (Twenty) years of service **his family is not eligible for Family Pension.**"

xxx xxx xxx

11. Being aggrieved with the same the petitioner preferred appeal to the General Manager i.e. opposite party No.1 on 11.07.2000 (Annexure-7).

12. Even though the claim of the Petitioner was recommended vide recommendation letter dated 27.09.2000 (Annexure-8) but no follow up actions was taken for redressal.

13. On the other hand the opposite party No.2 (Zonal Manager) at Annexure-9, dated 23.11.2000 instructed the opposite party No.3 (Regional Manager) to submit the required information along with his views relating to the entitlement of the petitioner. Annexure-9 which is assailed is quoted hereunder:

"xxx xxx xxx

May we invite your careful attention to the referred letter on captioned subject. The reply to which is till awaited by us.

We request you to realize the crux of the seriousness and importance of the issue. Your inordinate delay to expedite the submission of required information along with your view and comments has put us in an awkward position.

A copy of our letter dated 11.07.2000 is enclosed for your ready reference.
Your earliest reply will be appreciated.

xxx xxx xxx"

14. The opposite parties have submitted a counter affidavit controverting the averments in the writ petition. It is contended by the Opp. Party that as per the Regulation-29 of Regulation-1995 voluntary retirement by an employee is permissible only when one has rendered 20 years of qualifying service excluding the period of leave availed by the concerned employee during his service career.

14A. Since the husband of the petitioner is a habitual absentee in the office and he had not completed 20 years of qualifying service therefore, he is not entitled for pensionary benefits and consequentially the petitioner is also not entitled for family pension. The husband of the petitioner being an officer of the Bank it was incumbent upon him to go through the rules and regulations and the service condition of the Bank before submitting his application for voluntary retirement and since he had not completed 20 years of qualifying service deducting the period of leave he had taken during his service career, his family members are not eligible for family pension.

14B. For convenience of ready reference para-11 of the counter filed on behalf of the opposite parties is extracted hereunder:

"xxx xxx xxx

That the averment made in Sub-Para-1 & 2 of Para-11 of the Writ Application has no comment by the Opp. Parties and annexure-6 has been correctly replied to the representation made by the petitioner and as per sub-para-3,4 & 5, the husband of petitioner being an officer of the bank should go through the rules and regulations of the service condition and before submission of voluntary retirement application. As the husband of petitioner has not been completed 20 years of qualifying service, hence his family members were not eligible for family pension.

xxx xxx xxx"

15. Chapter-7 of the "Regulations 1995" deal with family pension. Regulation-39(1), which is germane for just adjudication is culled out hereunder:

"xxx xxx xxx

39. Family Pension:

1. Without prejudice to the provisions contained in these regulations where an employee dies-

a) after completion of one year of continuous service; or

b) before completion of one year of continuous service provided the deceased employee concerned immediately prior to his appointment to the service or post was examined by a medical officer approved by the Bank and declared fit for employment in the Bank; or

c) after retirement from service and was on the date of death in receipt of a pension, or compassionate allowance;

the family of the deceased shall be entitled to family pension, the amount of which shall be determined in accordance with Appendix III. Provided that in respect of employees who were in the service of the bank on or after the 1st day January, 1986 and had died while in service on or before the 31st day of October, 1987 or had retired on or before 31st day of October 1987 but died later, the family of the deceased shall be entitled to family pension, the amount of which shall be determined in accordance with Appendix V.

xxx xxx xxx"

16. It is not disputed by the Opposite Parties that petitioner's husband joined the Bank as Assistant Cashier-cum-Go down Keeper on 10th February 1973 thereafter he was promoted to the officer cadre on 19.12.1994 and was allowed to retire voluntarily from service as Assistant Manager and relieved on 17.05.1998. And, admittedly was governed by the Central Bank of India Pension (Employees') Pension Regulations 1995. Regulation-29 which is relevant is quoted below:

xxx xxx xxx

29. **Pension on Voluntary Retirement** -

1. On or after the 1st day of November, 1993, at any time after an employee has completed twenty years of qualifying service he may, by giving notice of not less than three months in writing to the appointing authority retire from service;

Provided that this sub-regulation shall not apply to an employee who is on deputation or on study leave abroad unless after having been transferred or having returned to India he has resumed charge of the post in India and has served for a period of not less than one year:

Provided further that this sub-regulation shall not apply to an employee who seeks retirement from service for being absorbed permanently in an autonomous body or a public sector undertaking or company or institution or body, whether incorporated or not to which he is on deputation at the time of seeking voluntary retirement;

Provided that this sub-regulation shall not apply to an employee who is deemed to have retired in accordance with clause (I) of regulation 2.

2. The notice of voluntary retirement given under sub-regulation (1) shall require acceptance by the appointing authority:
Provided that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.

3(a) An employee referred to in sub-regulation (1) may make a request in writing to the appointing authority to accept notice of voluntary retirement of less than three months giving reasons therefore;

(b) On receipt of a request under clause (a) the appointing authority may, subject to the provisions of sub-regulation (2), consider such request for the curtailment of the period of notice of three months on merits and if it is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience, the appointing authority may relax the requirement of notice of three months on the condition that the employee shall not apply for commutation of a part of his pension before the expiry of the notice of three months.
4. An employee, who has elected to retire under this regulation and has given necessary notice to that effect to the appointing authority, **shall be precluded from withdrawing his notice except with the specific approval of such authority;**

xxx xxx xxx"

17. Regulation-52 of "Regulation-1995" deals with the date from which pension become payable. Regulation-52(2) & (3), which is relevant is extracted hereunder.

"xxx xxx xxx

(2) Family Pension shall become payable from the date following the date of death of the employee or the pensioner.
(3) Pension including family pension shall be payable for the day on which its receipient dies.
Pension should be paid on due date as per schedule. However, in case of delay in payment, interest may be paid for overdue period at Bank rate.

xxx xxx xxx"

18. In this context it is also apt to note regulation-14 and 15 which deals with qualifying service. The same is extracted hereunder:

"xxx xxx xxx

Qualifying Service – Subject to the other conditions contained in these regulations, an employee who has rendered a minimum of ten years of service in the Bank on the date of his retirement or the date on which he is deemed to have retired shall qualify for pension
Commencement of qualifying service – Subject to the provisions contained in these regulations, qualifying service of an employee shall commence from the date he takes charge of the post to which he is first appointed on a permanent basis.

xxx xxx xxx"

19. Relying on the aforementioned regulations dealing with family pension it is submitted by the learned counsel for the Petitioner, Mr. Das that since the Petitioner's

husband has admittedly worked for almost 18 years even otherwise she is entitled to family pension even assuming that her husband was not entitled to opt for voluntary retirement.

20. It is apt to note the Petitioner's contentions in this regard in paragraph-15.2 of the writ petition as well as the reply of the opposite party in paragraph-14 of the counter. The same is extracted hereunder.

"xxx xxx xxx

15.2 Alternatively in case the petitioner's late husband offered for voluntary retirement through Annexure-2 stands unaccepted, because of the mistaken order (Annexure-4) of the by Opp. Party No.2, the deceased employee shall be deemed to be continuing in service date of his death and he having rendered much more than the qualifying period, service as of prescribed in Regulations 14 of "Regulation 1995" his family is entitled to family pension, the break period between 17.5.98 to 26.6.98 ought to have been treated as extra-ordinary leave and the employee having died in harness, for computing the family pension, the length of military service should have been accounted.

xxx xxx xxx"

Counter

"xxx xxx xxx

14. That the averment made in Para-15 of the writ Application is totally false and baseless and has no leg to stand and the petitioner has to put strict proof of the same.

xxx xxx xxx"

21. The Prime issue which is required to be considered in this lis is whether the petitioner is entitled for the family pension and the terminal benefits accrued in her favour on account of service rendered by deceased husband, once her husband was allowed to avail voluntary retirement and even otherwise since her husband had served for more than the minimum period of qualifying service, as per the contention of the learned counsel for the Petitioner.

22. It is the stand of the opposite party that since the Petitioner had availed 928 days of leave on loss of pay which is more than two(2) years and in the absence of any order to treat the same as qualifying service in terms of regulation-17 as quoted hereinabove, the authorities did not count such period of leave as qualifying service. Thereby the total qualifying period of service of the petitioner comes down to less than 19 years of service for the purpose of pension. Since there is a statutory restriction for payment of pension on voluntary retirement which is payable only when an employee has completed 20 years of qualifying service in terms of Regulation-29, the employee concerned (Petitioner's husband) is neither entitled for pension on account of voluntary retirement nor his family members including the present petitioner are entitled for the family pension.

23. To answer this issue it is relevant to note here that the Regulation 29 of "Regulation-1995" permits an employee to apply for voluntary retirement by giving 3 months notice in case he has served for a period of more than 20 years of qualifying

service to his credit. Since the mere application for voluntary retirement is not to be treated as deemed acceptance unless and until the competent authority accepts the same, Hence, it is incumbent upon competent authority to accept or reject the proposal for voluntary retirement. Once the competent authority has decided the matter accepting the voluntary retirement request of an employee (the Petitioner's husband) it is deemed that the employee had satisfied the pre-conditions laid down in Regulation-29.

24. It is apposite to take note of regulation-29.4 of Regulations, 1995, at this juncture. The same reads thus:

> "xxx xxx xxx
>
> 29.4. An employee, who has elected to retire under this regulation and has given necessary notice to that effect to the appointing authority, shall be precluded from withdrawing his notice except with the specific approval of such authority;
>
> xxx xxx xxx"

And, it is submitted by the learned counsel for Petitioner Mr. Dash that in terms of the said regulation the Petitioner's husband is deemed to have been voluntarily retired in terms of the order dated 16.03.1998(Annexure-4) extracted in paragraph-5 above and the stand of the opposite party bank to the contrary is without any substance.

25. This Court is of the considered view that the Bank authorities have deliberately misinterpreted Regulation-29 of Regulation,1995 and over jealously tried to justify the unjustifiable. Regulation 29 deals with the option available to the employee to ask for voluntary retirement and the competent authority to verify the same to accept or reject such request for voluntary retirement. Rather once the competent authority has applied his mind and accepted the proposal of volunteer retirement submitted by an employee and after verifying the service records arrived at a conclusion that it is a fit case for acceptance of volunteer retirement, then unless and until the order of voluntary retirement is withdrawn treating it to be illegal or unsustainable or contrary to any statue, the employee concern is entitled for the benefit to be derived by treating him as a retired employee. And admittedly in the case at hand no such action has been taken and in the considered opinion of this Court could not have been taken once the order of voluntary retirement has been passed in terms of Regulation-29.4 quoted above.

26. As already noted the opposite party bank has admitted in their counter that the husband of the Petitioner, was relieved on acceptance of his request for voluntary retirement.

26A. As such, the order of voluntary retirement of the Petitioner's husband attained finality. By virtue of which the status of the husband of the Petitioner was that of a retired employee.

27. Even otherwise since undisputedly the husband of the Petitioner has rendered service of about 18 years, the Petitioner is entitled to family pension taking

into account Rule-39 of the Regulation which stipulates that even after completion of one year of service, family of the deceased employee shall be entitled to family pension. Such Rule-39 of the regulation is once again extracted hereunder at the cost of repetition for convenience of ready reference.

> **"39. Family Pension:**
> 1.Without prejudice to the provisions contained in these regulations where an employee dies-
> a) after completion of one year of continuous service; or
> b) before completion of one year of continuous service provided the deceased employee concerned immediately prior to his appointment to the service or post was examined by a medical officer approved by the Bank and declared fit for employment in the Bank; or
> c) after retirement from service and was on the date of death in receipt of a pension, or compassionate allowance;
> the family of the deceased shall be entitled to family pension, the amount of which shall be determined in accordance with Appendix III. Provided that in respect of employees who were in the service of the bank on or after the 1st day January, 1986 and had died while in service on or before the 31st day of October, 1987 or had retired on or before 31st day of October 1987 but died later, the family of the deceased shall be entitled to family pension, the amount of which shall be determined in accordance with Appendix V."

28. In the case of **V.Sukumaran vs. State of Kerala and Anr**, reported in **(2020)8 SCC 106** the Apex Court while dealing with the claim for pension held thus:

> "Pension is succor for post-retirement period. It is not a bounty payable at will, but a social welfare measure as a post-retirement entitlement to maintain the dignity of the employee."

28A. Entitlement of an employee to pension engaged the attention of the Apex Court on several occasion starting from the celebrated judgment of **D.S. Nakara and Others V. Union of India** reported in **(1983) 1 SCC 305** wherein the constitution Bench of the Apex Court held:

> "Pension is neither a bounty, nor a matter of grace depending upon the sweet will of the employer, nor an ex-gratia payment."

28B. Such view has been reiterated in the case of **State of Kerala & Others vs. M.Padmanabhan Nair [1985 (1) SCC 429]** and in the case of **Dr. Uma Agrawal v. State of U.P. and Anr., 1999(3) SCC 438.**

28C. Recently the Apex Court in **R. Sundaram Vs. The Tamil Nadu State Level Scrutiny Committee & Ors** reported in **2023 SCC online SC 287** restated such principles relating to pensionary benefits and quoted its earlier judgment in the case of **State of Jharkhand and Ors. Vs. Jitendra Kumar Srivastava & Another: (2013)12SCC 210**. Paragraph-11 of the judgment of R. Sundaram (Supra) is extracted hereunder:

> xxx xxx xxx
> 11. Keeping in mind the submissions of both the parties, at the very outset we would like to state that the right to pensionary benefit is a constitutional right and as such cannot be

taken away without proper justification as has been held in the case of **State Of Jharkhand & Ors. vs Jitendra Kumar Srivastava & Anr**.[1]. The relevant paragraph of the judgment is being extracted herein:

"15. In State of W.B. v. Haresh C. Banerjee [(2006)7SCC 651 : 2006 SCC (L&S) 1719] this Court recognised that even when,after the repeal of Article 19(1)(f) and Article 31(1) of theConstitution vide Constitution (Forty-fourth Amendment) Act,1978 w.e.f. 20-6-1979, the right to property no longer remained a fundamental right, it was still a constitutional right, as provided in Article 300-A of the Constitution. Right to receive pension was treated as right to property. Otherwise, challenge in that case was to the vires of Rule 10(1) of the West Bengal Services (Death-cum-Retirement Benefit) Rules, 1971 which conferred the right upon the Governor to withhold or withdraw a pension or any part thereof under certain circumstances and the said challenge was repelled by this Court.

16. The fact remains that there is an imprimatur to the legal principle that the right to receive pension is recognised as a right in "property"...Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law, which is the constitutional mandate enshrined in Article 300-A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced.

xxx xxx xxx"

29. On consideration of materials on record, in the light of the dictum of the Apex Court as noted, this Court is of the considered view that annexures-6 and 9 denying the entitlement of the Petitioner to family pension and terminal benefit of her deceased husband is malafide due to non-application of mind, not sustainable and accordingly quashed.

30. In the case at hand not only the authorities arbitrarily denied family pension to the Petitioner-widow but have been uncharitable in their approach towards her legitimate claim. In as much as, in paragraph-G of the counter, it has been stated thus:

"xxx xxx xxx

g) That the bank was magnanimous in allowing to Mr. Patnaik to continue in the bank even after his continued irregularity and he has not attend the office since 1st March 1998 and the case of Mr. Patnaik was a fit case for dismissal the bank was magnanimous enough to pay gratuity of Rs.96,000/-

xxx xxx xxx"

31. Regulation- 52(2) & (3) of the bank which has already been noted is extracted hereunder for convenience of ready reference:

"(2) <u>Family Pension shall become payable from the date following the date of death of the employee or the pensioner.</u>

(3) Pension including family pension shall be payable for the day on which its receipient dies.

Pension should be paid on due date as per schedule. However, in case of delay in payment, interest may be paid for overdue period at Bank rate."

32. In terms of regulation-52(3), this Court directs that the opposite party bank shall release all pecuniary benefits such as family pension and other terminal benefits in favour of the Petitioner treating her to eligible to get the same from 26.06.1998, the date on which her husband passed away with the prevailing rate of interest in the year 1998 in terms of regulation-52(3) quoted above.

33. In the event such family pension along with accrued interest and other terminal benefits are not paid by the opposite party Bank within a period of three months from the date of receipt/ production of the copy of this order, the same shall carry interest at the rate of 12% from 26.06.1998 (date of death of Petitioner's husband) till its actual payment.

34. Accordingly, the writ Petition stands disposed of. No costs.

—— o ——

2024 (I) ILR-CUT-1371

V. NARASINGH, J.

CRLREV NO. 901 OF 2008

KULAMANI SAHU & ORS. ……Petitioners

-V-

STATE OF ORISSA .....…Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 319 – Necessary requirements to invoke the power U/s. 319 of the code – Discussed with reference to case laws. (Paras 11-15)

Case Laws Relied on and Referred to :-

1. (2014) 3 SCC 92 : Hardeep Singh vrs. State of Punjab & Others
2. 2021 SCC Online SC 741 : Ramesh Chandra Srivastava vrs. State of U.P.
3. 2023 6 SCC 702 : Vikas Rathi vrs. State of U.P.
4. 2011 (74) ACC 951 (SC) : Sarojben Ashwin Kumar Shah Vrs. State of Gujurat and Another
5. AIR 2019 SC 734 : Mani Pushpak Joshi vrs. State of Uttarakhand

For Petitioner : Mr. R. Achary

For Opp. Party : Mr. K.K. Gaya, ASC, Mr. P.K. Sahoo (Informant)

JUDGMENT Date of Hearing : 14.12.2023 : Date of Judgment : 19.01.2024

V. NARASINGH, J.

1. Heard learned counsel for the Petitioners, learned counsel for the State and learned counsel for the informant.

2. This Revision has been filed under Section 397 read with 401 of the Cr.P.C., 1973 assailing the order dated 16.07.2008 passed by the learned Additional Sessions Judge, Kamakhya Nagar in C.T. (S) Case No.129 of 2007 directing the Petitioners to be arrayed as accused to face trial for commission of offence under Sections 302/34

of IPC along with the co-accused Pankaj Kumar Biswal who is already facing trial in Parjang P.S. Case No.86 of 2007.

3. It is apt to note here that the present Revision is confined to the Petitioner Nos. 2, 3 & 5 (Manoj Biswal, Ratnakara Sahu and Bhupesh Pradhan), since the learned counsel for the Petitioners has submitted that Petitioner No.1 (kulamani Sahu) has passed away and Petitioner No.4 (Dillip Sahu) was arrested and released on bail by this Court. Hence, he does not want to press the application in respect of Petitioner No.4 (Ref:- order dated 14.11.2023).

4. The case of the Prosecution as per the FIR is that on 03.05.2007 night the informant was sleeping in his grocery shop which is situated near the kothaghara. Hearing some noise the informant woke up and found accused persons Bhupesh Pradhan (Petitioner No.-5), Pankaj Biswal (co-accused facing trial), Manoj Biswal (Petitioner No.-2), Dillip Sahu (Petitioner No.-4), Kulamani Sahu(Petitioner No.-1 since dead), Ratnakar Sahu (Petitioner No.-3) were conjointly assaulting the deceased Pradeep Kumar Sahu by deadly weapons like Axe, Bhujali, Farsha on the head of Pradeep Kumar Sahu. After commission of the murder of the said Pradeep Kumar Sahu, the Petitioners further threatened to kill other persons and fled away from the roof of the kothaghara. Thereafter the deceased was taken to the hospital by the co-villagers namely Durga Prasad Sahu, Prahallad Biswal, Pravakar Sahu, Rabinarayan Sahu and others and relating to the incident, Parjang P.S. Case No.86 of 2007 was lodged and a case u/s 147, 148, 302, 506/149 of IPC was registered.

5. It is apposite to note here that the Petitioner Nos.2, 3 & 5 were the named accused in the FIR, while filing the chargesheet, the same was filed only against one Pankaj Kumar Biswal.

6. During the course of trial, four prosecutions were examined. For convenience of ready reference, the relevant extract of the evidence of the said witnesses are culled out hereunder:-

P.W.-1-Minaketan Biswal

"……. P.W.1 stated in his evidence that in that night he was sleeping in the varandah of his Masala shop. At about 1 A.M. inthat night he heard hullah "PANKAJA HANIDELA HANI DELA" emanating from Palla Mandap side and hearing the hullah he woke up and found **Manoj Biswal (Petitioner No.2), Kulamani Sahu (Petitioner No.1 since dead), Ratnakar Sahu (Petitioner No.3), Dillip Sahu (Petitioner No.4), Pankaja Biswal (coaccused facing trial)** each one of them armed with tangia and Bhupesh Pradhan armed with bhujali coming down to the staircase of the roof uttering "GOTE KU SAFA KARIDE AU THI TINITA KU SAFA KARIBU". P.W.1 further stated that out of them, four persons ran towards the western side of the, Kothaghara and Bhupesh Pradhan ran towards the eastern side of the Kothaghara and accused Pankaja Kumar Biswal ran towards his house. ……"

P.W.-2- Sushanta Kumar Biswal

"……. P.W.2-Susanta Kumar Biswal, the scribe of the written report, stated in his evidence that on the date of incident at about 10 A.M. Pradeep Sahu (deceased) was

proceeding to Pabitranagar College from his village Barihapur in one motor cycle driven by Litu Sahu and while they were proceeding and were infront of the house of Advocate Pradeep Sahu and Pradeep(deceased) was talking with Lokanath Sahu, at that time one white Ambassador Car came from Parjang side and stopped infront of the house of Advocate Pradeep Sahu. **Bhupesh Pradhan (Petitioner No. 5), Pankaja Biswal (coaccused facing trial), Manoj Biswal (Petitioner No.2), Dillip Sahu (Petitioner No.4), Ratnakar Sahu (Petitioner No.3) and Kulamani Sahu (Petitioner No.1-since dead)** alighted from the car and abused Pradeep (Deceased) saying " SALA BAHUTA PETITION PAKAI AMARA BAHUTA LOSS KALUNI, DHENKANALARU FERILE AJIRATIRE TOA KATHA BUJHIBU". ……."

P.W.-3-Rabinarayan Sahu

"P.W.3 -Babinarayan Sahu, one of the eye witness to the incident stated that in the night of incident, he went to the roof of Palamandap of his village for the purpose of sleeping and by the time he reached the roof, he found Deepa (Deceased), Susanta, Rama, Durga, Prahallad Biswal, Sudhakar Sahu and Surya Sahu were sleeping on the roof and accused Pankaja Biswal was sitting on the roof. When he asked Pankaja as to why he is awake, he told him that as he has not yet smoked 'bidi' he is not feeling sleepy. Thereafter, he slept on the roof. P.W.3 further stated that while he was sleeping approximately at about 1 A.M., he woke up hearing sound of some persons jumping from the roof to the earth and when he woke up he found one person wearing a black pant and a white shirt jumped down from the roof armed with bhujali and three to four persons jumping P.W.3 further stated that he saw accused Pankaja giving a tangia blow to Pradeep Sahu (deceased) and thereafter ran away. ……"

P.W.-4- Jamini Pradhan

"…….. P.W.4-Jamini Pradhan stated that while she was urinating in her bari with her mother by that time she heard hullah, coming from Pallamandap side "PRADEEPA KU HANI DELE DHAIN ASA DHAIN ASA". Hearing hullah she alongwith her mother came to the Dehurysahi Rasta and at that time found Bhupesh Pradhan (Petitioner No.5) wearing one black pant and white shirt being armed with bhujali on the Dehury Sahi road and Bhupesh was uttering "GOTE SALA SAFA HEIGALA AUU DI TINITA RAHILE"..……."

7. The statement of the P.Ws. is on record having been filed by the learned counsel for the Petitioner.

8. After examination of the said P.Ws., a Petition was filed under Section 319 of the Cr.P.C. by the Prosecutions to issue process against the Petitioners who have not been charge sheeted to implead them as accused persons to face trial along with co-accused Pankaj Kumar Biswal.

9. Counter affidavit was filed to such Petition and on consideration of materials, the learned Court in seisin passed impugned order by which the Petitioners have been arrayed as accused.

10. It is submitted by the learned counsel for the Petitioners with vehemence that even if the entire prosecution case is accepted at its face value no prima facie case is made out against the Petitioners and to fortify his submission he relied on the following judgments and submitted that exercise of discretion under Section 319 of

Cr.P.C. being ex-facie illegal in the case at hand, the same is liable to be interfered with and the impugned order is to be setaside.

(i) **Hardeep Singh vrs. State of Punjab & others** reported in **(2014) 3 SCC 92**

(ii) **Ramesh Chandra Srivastava vrs. State of U.P.** reported in **2021 SCC Online SC 741**

(iii) V**ikas Rathi vrs. State of U.P.** reported in **2023 6 SCC 702**

(iv) **Sarojben Ashwin Kumar Shah Vrs. State of Gujurat and another** reported in **2011 (74) ACC 951 (SC)**

(v) **Mani Pushpak Joshi vrs. State of Uttarakhand** reported in **AIR 2019 SC 734**

11. For convenience of reference Section 319 of Cr.P.C. is extracted hereunder:-

"**319. Power to proceed against other persons appearing to be guilty of offence.** -(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.
(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.
(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.
(4) Where the Court proceeds against any person under sub-section (1) then-
(a) the proceedings in respect of such person shall be commenced afresh and the witnesses re-heard;
(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

12. It is apt to state here that the power to be exercised under Section 319 of Cr.P.C. came up for consideration of the Constitution Bench of the Hon'ble Supreme Court of India in the case of **Hardeep Singh vs. State of Punjab** reported in **(2014) 3 SCC 92**.

13. The Apex Court formulated the following questions to be answered:

"5. On the consideration of the submissions raised and in view of what has been noted above, the following questions are to be answered by this Bench:
(i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?
(ii) Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by cross- examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?
(iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?
(iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) Cr.P.C. can be exercised only if the Court is satisfied that the accused summoned will in all likelihood convicted?

(v) Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?

14. And answered the questions as culled out hereunder:-

xxx xxx xxx

"117. We accordingly sum up our conclusions as follows:

Questions (i) and (iii)

What is the stage at which power under Section 319 Cr.P.C. can be exercised?

AND

Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

Answer

117.1. In Dharam Pal case, the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of the investigation. Such cognizance can be taken under
Section 193 CrPC and the Sessions Judge need not wait till "evidence" under Section 319 CrPC becomes available for summoning an additional accused.

117.2. Section 319 CrPC, significantly, uses two expressions that have to be taken note of i.e. (1) inquiry
(2) trial.As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 CrPC, and under Section 398 CrPC are species of the inquiry contemplated by Section 319 CrPC. Materials coming before the court in course of such inquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 CrPC, and also to add an accused whose name has been shown in Column 2 of the charge-sheet.

117.3. In view of the above position the word "evidence" in Section 319 CrPC has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question (ii)—Whether the word "evidence" used in Section 319(1) CrPC could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination in-chief of the witness concerned?

Answer

117.4. Considering the fact that under Section 319 CrPC a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) CrPC the proceeding against such person is to commence from the stage of taking of cognizance, the court need not wait for the evidence against the accused proposed to be summoned to be tested by cross- examination.

Question (iv)—What is the nature of the satisfaction required to invoke the power under Section 319 CrPC to arraign an accused? Whether the power under Section 319(1) CrPC can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

Answer

117.5. Though under Section 319(4)(b) CrPC the accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the

offence, the degree of satisfaction that will be required for summoning a person under Section 319 CrPC would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Question (v)—Does the power under Section 319 CrPC extend to persons not named in the FIR or named in the FIR but not charge-sheeted or who have been discharged?

Answer

117.6. A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 CrPC provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, insofar as an accused who has been discharged is concerned the requirement of Sections 300 and 398 CrPC has to be complied with before he can be summoned afresh.

(emphasized in the factual matrix of the case at hand)

118. The matters be placed before the appropriate Bench for final disposal in accordance with law explained hereinabove."

15. The impugned order has to be assessed on the touchstone of the law laid down by the Constitution Bench in the case of **Hardeep Singh (Supra)**.

16. Learned counsel for the State as well as informant submit that on cogent analysis of the materials on record qua the accusation vis-à-vis the Petitioners taking into account the law governing the field the learned Court has exercised discretion in a judicious manner which does not warrant any interference by this Court in exercise of its revisional jurisdiction.

17. It is submitted by the learned counsel for the State and Informant that the filing of the Criminal Revision is an abuse of process of law and hence seek dismissal.

18. The evidence of the P.Ws.1 to 4 has been extracted hereinabove. On a close scrutiny of the evidence of P.Ws.1 to 4, this Court is of the considered opinion that the same stands the test in terms of the answer to question No.IV (supra) by the Constitution Bench. And, keeping in view the power under Section 319 Cr.P.C. dealt with under question No.V dealing with accused like the Petitioners, this Court does not find any merit in the contention of the learned counsel for the Petitioners.

18-A. The submission of the learned counsel for the Petitioners that since most of the witnesses are related to the deceased hence no credence can be attached to them is to be negated.

18-B. The judgments relied upon by the learned counsel for the Petitioners have no application in the facts of the present case.

19. On the strength of materials on record, this Court does not find any infirmity in the impugned order, since the case at hand comes within the parameters as set out in **Hardeep Singh (Supra)** and is not persuaded to accept the submission of the learned counsel for the Petitioners that the learned Court in seisin has exercised its jurisdiction in a mechanical manner.

20. This Court does not find any merit in the CRLREV. Accordingly, CRLREV stands dismissed.

21. It is needless to state here that the observations of this Court relating to the evidence of P.Ws.1 to 4 is only for the purpose of deciding the Criminal Revision and same ought not to be treated as this Court expressing any opinion regarding the complicity of the Petitioners (Manoj Biswal, Ratnakara Sahu and Bhupesh Pradhan) which has to be decided on the basis of materials on record by the learned Court in seisin independently in the impending trial.

22. The interim order stands vacated.

23. Taking into account that the case relates to the year 2007, learned Court in seisin is requested to expedite the trial.

24. Registry is requested to intimate the learned Court in seisin forthwith.

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2024 (I) ILR-CUT-1377

BIRAJA PRASANNA SATAPATHY, J.

W.P(C) NO. 6991 OF 2022

RASANANDA BASTI ……Petitioner

-V-

STATE OF ODISHA & ORS. ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – Articles 226, 227 r/w chapter 28 of the Rules of High Court of Orissa, 1948 – Whether second writ application is maintainable for implementation of the order passed by the High Court in earlier writ application? – Held, No – Petitioner has got efficacious alternate remedy for execution of the said order by filing appropriate application as provided under chapter 28 of Rules of the High Court of Orissa – Petitioner is also eligible and entitled to file appropriate application under the provision of Contempt of Court's Act.

Case Laws Relied on and Referred to :-

1. (1977) 1 SCC 340 : State of Haryana & Anr. Vrs. Chanan Mal & Ors.
2. (1987) 1 SCC Page-5 : Sarguja Transport Service Vrs. State Transport Appellate Tribunal M.P., Gwalior & Ors.
3. (1993) 2 SCC Page-495 : State of UP. & Anr. vrs. Labh Chand.
4. (2006) 4 SCC 683 : State of Karnataka & Anr. Vrs. All India Manufacturers Organisation & Ors.

For Petitioner : Mr. S. Mallik
For Opp.Parties : Mr. S.K. Samal, AGA & Dr. J.K. Lenka.

ORDER Date of Hearing : 12.09.2023 : Date of Order : 19.12.2023

BIRAJA PRASANNA SATAPATHY, J.

1. Heard Mr. S. Mallik, learned counsel for the petitioner, Mr. S.K. Samal, learned Addl. Govt. Advocate for the State and Dr. J.K. Lenka, learned counsel appearing for private Opp. Party Nos.5 & 6.

2. Present Writ Petition has been filed *inter alia* with the following prayer:-

> *"On the aforesaid facts and circumstances, the Hon'ble Court may graciously be pleased to:-*
>
> *(i) Quash the impugned selection and approval of the name of the Opp. Party No.6 as an attendant dt.20.02.2020 as at Annexure-3.*
>
> *(ii) Direct/order that appointment of the petitioner shall be approved from the date of his initial appointment and he shall be paid the consequential salary with other benefits.*
>
> *(iii) Pass such other orders/direction as the Hon'ble Court may be deemed fit and proper in the interest of justice."*

3. Learned counsel for the petitioner contended that the petitioner was engaged as an Attendant in Maa Bauti School for deaf, which was an Un-Aided Educational Institution at the relevant point of time. Petitioner was appointed as an Attendant on 30.12.2013 along with one Rashmita Ojha and Mahendra Kumar Sahoo. Private Opp. Party No.6 was appointed as an Attendant (Female) on 30.01.2014, even though Rashmita Ojha was already appointed as a female Attendant on 30.12.2013.

3.1. It is contended that when the School became eligible to get the benefit of Grant-in-Aid vide order dated 03.10.2018 so issued under Annexure-1, the services of the present petitioner when was not approved on the face of such approval extended in favour of Opp. Party No.6 vide order dated 20.02.2020 under Annexure-3, petitioner challenging such action of the Opp. Parties moved the Collector on 18.02.2021 under Annexure-8 to approve his name as per the approved sanction pattern, so sanctioned by the Government. It is contended that when no action on the claim made by the petitioner was taken in his representation dated 18.02.2021 under Annexure-8, Petitioner approached this Court in W.P.(C) No.13964 of 2021. This Court vide order dated 09.06.2021 under Annexure-9, disposed of the Writ Petition inter alia directing the Opp. Party No.3 to take a decision on the representation made by the petitioner on 18.02.2021 under Annexure-8. It is contended that the petitioner basing on the order passed by this Court on 09.06.2021, once again moved Opp. Party No.3 to consider his claim as made in his representation on dated 27.10.2021. It is contended that when no action was taken by the Opp. Party No.3, petitioner moved a representation before Opp. Party No.1 on 06.12.2021 under Annexure-10.

3.2. It is contended that when no action was also taken by the Opp. Party No.1 on the claim made by the petitioner in his representation under Annexure-10, the

present Writ Petition has been filed inter alia with the prayer as indicated hereinabove.

3.3. Learned counsel for the petitioner contended that since in terms of the order passed by this Court on 09.06.2021, Opp. Party No.3 did not take any action on the claim made by the petitioner in his representation dated 18.02.2021 under Annexure-8, petitioner approached Opp. Party No.1 on 06.12.2021 under Annexure-10. However, when no action was also taken by the Opp. Party No.1 in considering the grievance of the petitioner, the present writ petition has been filed.

3.4. It is accordingly contended that in view of such inaction on the part of the Opp. Parties, the order of approval issued in favour of Opp. Party No.6 vide order dated 20.02.2020 under Annexure-3 requires interference of this Court.

4. In course of hearing, learned counsel appearing for Opp. Party No.5 raised the question of maintainability of the present Writ Petition and contended that on self same issue and on the face of the order passed by this Court on 09.06.2021 in W.P.(C) No.13964 of 2021, the present Writ Petition is not maintainable. Accordingly, this Court directed learned counsel appearing for the petitioner to satisfy this Court on the question of maintainability of the Writ Petition.

5. Learned counsel appearing for the petitioner in support of the maintainability of the Writ Petition relied on the decisions of the Hon'ble Apex Court reported in the case of ***State of Haryana and Another Vrs. Chanan Mal and Others, (1977) 1 SCC 340***, Hon'ble Apex Court in Para-49 of the said judgment has held as follows:-

> *"49. (3) Any petitioner who applies for a writ or order in the nature of a mandamus should, in compliance with a well known rule of practice, ordinarily, first call upon the authority concerned to discharge its legal obligation and show that it has refused or neglected to carry it out within a reasonable time before applying to a Court for such an order even where the alleged obligation is established."*

5.1. Learned counsel for the petitioner also relied on an order passed by a Co-ordinate Bench of this Court on 06.01.2023 in W.P.(C) No.34606 of 2021. This Court relying the decision rendered in ***2003 (3) Calcutta High Court Notes (CHN) 148*** held that a Writ Petition is maintainable to enforce an order made in previous writ petition. View of this Court reflected in para-5 of the said order is quoted hereunder:-

> *"5. A writ petition is maintainable to enforce order made in a previous writ petition was view taken in Indrapuri Studio V. State of West Bengal, reported in 2003(3) Calcutta High Court Notes (CHN) 148. Paragraphs 35 to 37 of the judgment available at 2003 SCC Online Cal 236 are reproduced below:-*
> *"35. This writ petition is virtually a petition before this Court for enforcement of the order passed by this Court in the earlier writ petition. A second writ petition for enforcement of the earlier order is very much maintainable.*
> *36. In the case of Bibekananda Mondal v. State of West Bengal, reported in (2003) 1 WBLR(Cal) 213, this Hon'ble court specifically held that without initiating a proceeding*

for contempt, the Court can quash any order or proceeding done in disregard of such order which may also tantamount to contempt. The relevant portion from paragraph 6 of the said judgment is quoted hereunder:

"6. It is therefore, settled law that the second writ application is maintainable for implementation of an earlier order of the writ Court. This Court must issue proper directions for proper implementation of previous directions. Where there has been an order, the order must be complied with. An act done is wilful disobedience of a Court Order is not only contempt, but also, an illegal and invalid act. The language used in Article 226 of the Constitution of India is couched in comprehensive phraseology and the said Article recognizes a very wide power on the High Courts to remedy injustice wherever it is found."

37. The Supreme Court in the case of Devaki Nandan Prasad v. State of Bihar, reported in AIR 1983 SC 1134, entertained a second writ application under Article-32 of the Constitution of India and passed specific order directing the authority to do what was earlier directed by the Supreme Court on the first writ application."

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

6. Learned counsel for the State as well as learned counsel appearing for O.P. No.5 and 6 on the other hand contended that challenging the order of approval so issued in favour of Opp. Party No.6 under Annexure-3, petitioner moved an application before the Opp. Party No.3 on 18.02.2021. As no action was taken on the representation filed by the petitioner under Annexure-8, petitioner approached this Court in W.P.(C) No.13964 of 2021. This Court vide order dated 09.06.2021 under Annexure-9, disposed of the Writ Petition with a direction on the Opp. Party No.3 to take a decision on the representation, so filed by the petitioner under Annexure-8 in accordance with law, within a period of 3 (three) months from the date of receipt of the order. It is contended that on the face of such order passed by this Court on 09.06.2021, petitioner should have taken further step by filing appropriate application for compliance of order dated 09.06.2021. The present writ petition filed on self-same issue is not maintainable.

6.1. In support of such submission, learned counsel appearing for the State as well as Opp. Party Nos.5 & 6 relied on the following decisions:

"1. (1987) 1 SCC Page-5 (Sarguja Transport Service Vrs. State Transport Appellate Tribunal M.P., Gwalior and Others),

2. (1993) 2 SCC Page-495 (State of UP. And Another vrs. Labh Chand).

3. (2006) 4 SCC 683 (State of Karnataka and Another Vrs. All India Manufacturers Organisation and Others. "

Hon'ble Apex Court in the case of ***Sarguja Transport Service*** in para-9 has held as follows:-

> *"9. The point for consideration is whether a petitioner after with-drawing a writ petition filed by him in the High Court under Article 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that Article. On this point the decision in Daryao"s case (supra) is of no assistance. But we are of the view that the principle underlying Rule 1 of Order XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission. In the instant case the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn without permission to file a fresh petition. We, however, make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under Article 21 of the Constitution since such a case stands on a different footing altogether. We, however leave this question open.*

Similarly, in the case of ***Labh Chand***, Hon'ble Apex Court in para-20 has held as follows:-

> *"20. When a Judge of single Judge Bench of a High Court is required to entertain a second Writ Petition of a person on a matter, he cannot, as a matter of course, entertain such petition, if an earlier Writ Petition of the same person on the same matter had been dismissed already by another single Judge Bench or a Division Bench of the same High Court, even if such dismissal was on the ground of laches or on the ground of non-availing of alternate remedy. Second Writ Petition cannot be, so entertained not because the learned single Judge has no jurisdiction to entertain the same, but because entertaining of such a second Writ Petition would render the order of the same Court dismissing the earlier Writ Petition redundant and nugatory, although not reviewed by it in exercise of the recognised power. Besides, if a learned single Judge could entertain a second Writ Petition of a person respecting a matter on which his first Writ Petition was dismissed in limine by another learned single Judge or a Division Bench of the same Court, it would encourage an unsuccessful Writ Petitioner to go on filing Writ Petition after Writ Petition in the same matter in the same High Court, and have it brought up for consideration before one Judge after another. Such a thing, if is allowed to happen, it could result in giving full scope and encouragement to an unscrupulous litigant to abuse the process of the High Court exercising its writ jurisdiction under Article 226 of the Constitution in that any order of any Bench of such Court refusing to entertain a Writ Petition could be ignored by him with impunity and relief sought in the same matter by filing a fresh Writ Petition. This would only lead to introduction of disorder, rconfusion*

and chaos relating to exercise of writ jurisdiction by Judges of the High Court for there could be no finality for an order of the Court refusing to entertain a Writ Petition. It is why, the Rule of judicial practice and procedure that a second Writ Petition shall not be entertained by the High Court on the subject-matter respecting which the first Writ Petition of the same person was dismissed by the same Court even if the Order of such dismissal was in limine, be it on the ground of laches or on the ground of non-exhaustion of alternate remedy, has come to be accepted and followed as salutary Rule in exercise of writ jurisdiction of Courts."

Similarly, in the case of ***All India Manufacturers Organisation and Others***., Hon'ble Apex Court in para-32 & 33 has held as follows:-

"32. Res Judicata is a doctrine based on the larger public interest and is founded on two grounds: one being the maxim nemo debet bis vexari pro una et eadem causa ("No one ought to be twice vexed for one and the same cause") and second, public policy that there ought to be an end to the same litigation . It is well settled that Section 11 of the Civil Procedure Code, 1908 (hereinafter "the CPC") is not the foundation of the principle of res judicata, but merely statutory recognition thereof and hence, the Section is not to be considered exhaustive of the general principle of law. The main purpose of the doctrine is that once a matter has been determined in a former proceeding, it should not be open to parties to re- agitate the matter again and again. Section 11 of the CPC recognises this principle and forbids a court from trying any suit or issue, which is res judicata, recognising both 'cause of action estoppel' and 'issue estoppel'. There are two issues that we need to consider, one, whether the doctrine of res judicata, as a matter of principle, can be applied to Public Interest Litigations and second, whether the issues and findings in Somashekar Reddy (supra) constitute res judicata for the present litigation.

33. Explanation VI to Section 11 states:

"Explanation VI.- Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

6.2. It is also contended that under Chapter 28 of the Rules of High Court of Orissa, 1948, Execution of an order passed in a Writ Petition under Article 226 and 227 of the Constitution of India has been provided.

It is contended that in view of the clear provision contained under Chapter 28 of the Rules of High Court of Orissa, 1948, petitioner instead of taking appropriate steps for execution of the order dated 09.06.2021, has approached this Court once again with similar nature of prayer. It is accordingly contended that in view of such clear provision contained under Chapter 28, the present writ petition is not maintainable.

7. Having heard learned counsel for the parties and after going through the materials available on record, this Court finds that the services of Opp. Party No.6 was approved as against the post of Attendant (Female) vide order dated 03.03.2020 in terms of the proceeding of the meeting held on 20.02.2020 under Annexure-3. Even though clarification was sought for by the Opp.Party No.3 vide letter dated

28.05.2020 under Annexure-5, but inspite of that when the services of the petitioner was not approved as against the post of Attendant (Male), petitioner challenging the illegal approval of services of Opp. Party No.6, filed a representation before the Opp. Party No.3 on 18.02.2021 under Annexure-8.

7.1. As the claim made in the representation dated 18.02.2021 was not considered, petitioner approached this Court in W.P.(C) No.13964 of 2021. This Court vide order dated 09.06.2021 under Annexure-9, while disposing the Writ Petition directed Opp. Party No.3 to take a decision on the claim made by the petitioner under Annexure-8 in accordance with law, within a period of 3 (three) months from the date of receipt of this order. As found from the record, on receipt of the order from this Court so passed under Annexure-9, Collector, Cuttack directed District Social Welfare Officer, Cuttack to conduct an enquiry and submit a report before him vide order dated 27.10.2021. Thereafter, when no further action was taken by the Collector, the petitioner challenging the inaction of the Collector-O.P. No.3, in carrying out the order of this Court, filed a representation before O.P. No.1 on 06.12.2021 under Annexure-10.

7.2. As no action was taken by Opp. Party No.1 on the representation made on 06.12.2021, the present Writ Petition has been filed but with the same prayer challenging the approval of service of Opp. Party No.6. Since the issue with regard to approval of the services of Opp. Party No.6 is under consideration before the Collector-Opp. Party No.3 as made by the petitioner under Annexure-8, on the face of the order passed by this Court on 09.06.2021 under Annexure-9, placing reliance on the decisions of the Hon'ble Apex Court in the case of "***Sarguja Transport Service, State of U.P. and Another*** and ***State of Karnataka and Another*** as cited (supra), the present Writ Petition inter alia with the prayer as made is not entertainable. The decision relied on by the learned counsel for the petitioner as per the considered view of this Court is not applicable to the facts of the present case. If the Opp. Party No.3 is not implementing the order passed by this Court on 09.06.2021, petitioner has got efficacious alternate remedy for execution of the said order by filing appropriate application as provided under Chapter 28 of the Rules of High Court of Orissa, 1948. Petitioner seeking compliance of the order dated 09.06.2021 is also eligible and entitled to file appropriate application under the provisions of Contempt of Court's Act. In view of such speedy efficacious remedy available to the petitioner to execute/implement the order dated 09.06.2021 so passed in W.P.(C) No.13964 of 2021, this Court is not inclined to entertain the present Writ Petition and dismiss the same.

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2024 (I) ILR-CUT-1384

BIRAJA PRASANNA SATAPATHY, J.

FAO NOS. 302 & 264 OF 2018

SAROJINI DASH ……Appellant

-V-

STATE OF ORISSA & ORS. ……Respondents

SERVICE LAW – The appellant was appointed against a non-exist post – The managing committee approved & regularized the appointment of appellant – The appellant approached the Education Tribunal to extend the benefit of Grant in aid in the shape of Block Grant – The Tribunal rejected the claim of appellant – Whether the order of Tribunal should be interfered? – Held, No – The appointment, approval and regularization of appellant are not legal and justified.

Case Laws Relied on and Referred to :-

1. 2011 (14) SCC 770 : State of Punjab Vs, Debender Pal Singh.
2. (2011) 3 SCC 456 : State of Orissa & Ors. Vs. Mamata Mohanty.

For Appellant : M/s.K.K.Swain, Sr. Adv.with Mr. S.Jena & P.K.Panda

For Respondents : M/s. S.K. Samal, AGA,
Mr. J.K. Rath, Sr. Adv. with Mr. P. Prusty.

JUDGMENT Date of Hearing : 10.11.2023 : Date of Judgment : 03.01.2024

B.P. SATAPATHY, J.

Since both the appeals have been filed challenging the judgment dt.24.02.2018 so passed by the State Education Tribunal (in short, called "The Tribunal") in G.I.A. Case No.180 of 2016, both the appeals are heard analogously and disposed of by the present common order.

2. While FAO No.302 of 2018 has been filed by the appellant, who was the applicant before the Tribunal in G.I.A. Case No.180 of 2016, F.A.O No.264 of 2018 has been filed by the Managing Committee of the School also challenging the judgment passed by the Tribunal on 24.02.2018.

3. It is the case of the appellant in F.A.O No.302 of 2018 that the School in question Maa Durga Girls High School, Bangalo, in the district of Cuttack was established in the year 1991. Respondent No.5 was appointed as against the post of Trained Graduate Teacher (PCM) vide order dt.24.11.2001 of the Managing Committee and in terms of the said order, Respondent No.5 joined in the school on 24.11.2001.

3.1. It is contended that since Respondent No.5 remained on unauthorized leave for a period of more than three (3) months w.e.f 29.11.2005 and subsequently, she made an application on 01.10.2006 to remain on Maternity Leave, taking into account such unauthorized absence of Respondent No. 5, the Managing Committee

provided appointment to the appellant vide order dt.22.01.2007 under Annexure-3 to the G.I.A application. The appellant in terms of the order dt. 22.01.2007 joined in the school as against the post of T.G.T (PCM).

3.2. It is contended that on being so appointed as against the post of T.G.T (PCM), name of the appellant was reflected in the renewal recognition form so submitted by the Managing Committee before the Board of Secondary Education, Orissa. It is also contended that subsequently Respondent No.5 was terminated from her services w.e.f 16.04.2007 vide order under Annexure-2 series to the G.I.A application. On being so terminated from her services w.e.f 16.04.2007, the Managing Committee in its proceeding dt. 09.06.2007 approved the appointment of the appellant so made on 22.01.2007 w.e.f 17.04.2007 and regularized the appointment of the appellant.

3.3. It is contended that private Respondent No.5 at no point of time challenged the appointment of the appellant as against the post of T.G.T(PCM) w.e.f 22.01.2007 nor her termination so issued by the Managing Committee of the School on 16.04.2007. In the meantime, the School also became eligible to get the benefit of Grant-in-Aid as per Grant-in-Aid Order, 2004 read with Grant-in-Aid (Amendment) order,2008 w.e.f 01.04.2008. Even though services of the teaching and non-teaching staff of the School was approved and benefit of Block Grant w.e.f 01.04.2008 was extended vide order dt.15.03.2011, but because of the dispute with regard to the post of T.G.T.(P.C.M), the services of the appellant was not approved.

3.4. It is contended that even though Respondent No.5 was terminated from her services vide order dt.16.04.2007, but Respondent No.5 only in the year 2014 made a grievance petition before Respondent No.3 inter alia with a prayer to direct the School authority to allow her to resume duty as against the post of T.G.T(P.C.M) and to approve her services with release of Block Grant on 10.10.2014 vide Annexure-6 series. On receipt of the representation dt.10.10.2014 under Annexure-6 series, Respondent No.3 vide letter dt.03.11.2014 requested the school to submit a detailed report with regard to appointment as against the Post of T.G.T (PCM). The school on receipt of letter dt.03.11.2014 submitted a detailed report vide letter dt.17.11.2014 under Annexure-7 series. But, in the meantime, basing on the letter issued by the Director, Secondary Education on 29.08.2015, Respondent No.3 vide his letter dt.26.09.2015 directed the Headmaster-cum-Secretary of the School to allow Respondent No.5 to join as against her former post of T.G.T(PCM) under Annexure-8.

3.5. It is contended that challenging the direction issued by Respondent No.3 vide his letter dt.26.09.2015 under Annexure-8, the appellant moved Respondent No.2 on 07.10.2015 inter alia with a request to set aside the direction of Respondent No.3 so issued on 26.09.2015.

As the request made by the appellant before Respondent No.2 on 07.10.2015 was not considered and kept pending, appellant approached this Court in

W.P.(C) No. 18949 of 2015. This Court vide order dt.16.10.2015 while disposing the matter directed Respondent No.2 to take a decision on the representation made by the appellant on 07.10.2015.

3.6. It is contended that Respondent No.2 without proper appreciation of the appellant's claim vis-a-vis the claim of Respondent No.5, rejected the claim of the appellant so made in his representation dt.07.10.2015 while upholding the direction issued by the Respondent No.3 in his letter dt.26.09.2015 vide order dt.18.04.2016.

3.7. It is contended that challenging the direction issued by Respondent No.3 in his letter dt. 26.09.2015 and the order passed by Respondent No.2 in his order dt.18.04.2016, the appellant moved the Tribunal in G.I.A Case No.180/2016 inter alia with the following prayer.

> *" It is, therefore, prayed that this Hon'ble Tribunal may graciously be pleased :-*
>
> *(i) Admit the G.I.A case*
> *(ii) Call for the records;*
> *(iii) The impugned letter of opposite party no.3 dated 26.09.2015 under Annexure-10 and the consequential office order issued by opposite party no.2 dated 18.04.2016 under Annexure-13 be quashed*
> *(iv) Further the opposite party nos.1 to 3 be directed to approve the appointment of the applicant as against the post of Trained Graduate Teacher (PCM) and necessary grant-in-aid in shape of block grant be released in her favour as has been done in the case of other employees of the institution and the applicant may be also entitled to receive all financial and consequential benefit as due and admissible to the said post within a reasonable time to be stipulated by this Hon'ble Tribunal*
> *(v) And may pass such other appropriate order as this Hon'ble Tribunal deems fit and proper in the eye of law."*

3.8. It is contended that in the G.I.A application so filed before the Tribunal, the appellant contended that even though Respondent No.5 was appointed as against the post of T.G.T (PCM) on 24.11.2001 where she joined on 03.12.2001, but since Respondent No.5 remained on unauthorized absent, the Managing Committee of the School appointed present appellant as against the post of T.G.T(PCM) vide order dt.22.01.2007 under Annexure-3 to the G.I.A Application. Subsequently, the services of Respondent No.5 was terminated by the Managing Committee vide order dt.16.04.2007 and after such termination of Respondent No.5, the Managing Committee in its resolution dt.09.06.2007 resolved to regularize the services of the appellant as against the post of T.G.T (P.C.M) in which she was appointed on 22.01.2007 w.e.f 17.04.2007

3.9. It is the case of the appellant before the Tribunal that Respondent No.5 in terms of the resolution issued by the Government on 27.03.1983 under Annexure-7, never challenged her termination so made on 16.04.2007. Not only that, subsequent to the appointment of appellant, her name was reflected in the renewal recognition form so submitted by the Managing Committee before the Board of Secondary Education, Orissa, every year. But respondent No. 5 after remaining silent for more

than 7 years, moved an application before Respondent No.3 on 10.10.2014 inter alia with a prayer to direct the school authority to allow her to join as against the Post of T.G.T (P.C.M).

3.10. It is contended that since in terms of the resolution issued by the Government on 27.03.1983, against such nature of termination, Director, Secondary Education is the appellate authority, but Respondent No.3 in consideration of the application submitted by Respondent No.5 on 10.10.2014, directed the school authority to allow Respondent No.5 to join in her former post of T.G.T (P.C.M) vide letter dt.26.09.2015. It is contended that Respondent No.3 is not competent to issue such a direction, as it is the Director, who is the appellate authority and to consider such nature of grievance.

3.11. It is further contended that appellant challenging the communication issued by Respondent No.3 though moved an application before Respondent No.2 on 07.10.2015, but the same was never considered. Accordingly, the appellant was constrained to move this Court in W.P.(C) No.18949 of 2015. This Court vide order dt.16.10.2015 when directed Respondent No.2 to consider the appellant's grievance, the same was rejected vide order dt.18.04.2016 and by confirming the direction issued by Respondent No.3 in his letter dt.26.09.2015.

3.12. It is contended that since Respondent No.5 was duly terminated from her services as she remained on unauthorized absent and the appellant was appointed as against the said post with due approval of her appointment in the proceeding of the meeting dt.09.06.2007, the Tribunal on the face of such materials being produced, should not have rejected the appellant's claim vide the impugned judgment dt.24.02.2018.

4. Mr. S.D. Routray, learned counsel appearing for the appellant in FAO No.264 of 2018 while supporting the submission of Mr. K.K. Swain, learned counsel for the appellant in the other appeal, contended that Respondent No.5 while continuing as against the post of T.G.T (PCM), she was issued with a show-cause on 23.03.2005 with regard to missing of valuation paper. Thereafter, Respondent No.5 remained on unauthorized absent w.e.f 29.11.2005.

4.1. It is contended that while continuing on such leave, Respondent No.5 submitted an application on 01.10.2016 in order to allow her to take maternity leave. After availing the maternity leave, Respondent No.5 joined in her duty on 17.01.2007. But w.e.f 01.02.2007, she remained on unauthorized leave once again. Taking into account the conduct of Respondent No.5 in remaining unauthorized absent from her duty, the Managing Committee initially resolved to appoint the appellant as against the Post of T.G.T (P.C.M) and accordingly, order of appointment was issued in favour of the appellant on 22.01.2007. Subsequently, Respondent No.5 was terminated from her services w.e.f 16.04.2007 and on such termination of Respondent No. 5, the appointment of the appellant so made on

22.01.2007 was approved and her appointment was regularized by the Managing Committee in its Proceeding dt.09.06.2007.

4.2. It is accordingly contended that the Tribunal without proper appreciation of the stand taken by the appellant/ applicant in the G.I.A case as well as the Managing Committee, illegally rejected the claim of the appellant applicant in G.I.A Case No.180 of 2016 vide the impugned judgment dt.24.02.2018.

5. Learned Additional Government Advocate appearing for the State on the other hand contended that since by the time appellant in F.A.O 302/2018 was appointed on 22.1.2007, there was no vacancy available as per the prescribed yardstick as against the Post of T.G.T(P.C.M), the very appointment of the appellant is a nullity in the eye of law.

5.1. It is also contended that even though Respondent No.5 was terminated from her services w.e.f 16.04.2007 and the services of the appellant was regularized in the proceeding dt.09.06.2007, but the said proceeding is a manipulated one, as in the proceeding dt.09.06.2007, the decision taken by the Managing Committee on 23.07.2007 was also taken note of.

5.2. Learned Additional Government Advocate contended that the happening of 23.07.2007 cannot be taken note of in the proceeding dt.09.06.2007. It is contended that in view of such thing which is apparent on the face of the resolution dt.09.06.2007, it is to be held that such a resolution is a manipulated one and the services of the appellant-Sarojini Dash was never regularized in terms of the resolution dt.09.06.2007.

5.3. Learned Additional Government Advocate accordingly contended that since the very appointment of the appellant-Sarojini Dash was against a non-existent post and by that time Respondent No.5 was very much in service, the appellant has no right to claim against the post in question.

5.4. It is further contended that taking into account the fact that the appellant was appointed during continuance of Respondent No.5, Respondent No.3 basing on the direction issued by the Respondent No.2, directed the School authority to allow Respondent No.5 to join in her former post vide letter dt.26.09.2015. The said action of Respondent No.3 has also been upheld by the Director in terms of the order passed by this Court in W.P.(C) No.18949 of 2015 vide order dt.18.04.2016. It is accordingly contended that the Tribunal after due consideration of the matter since has passed the judgment in question, it requires no interference.

6. Mr. D.N. Rath, learned counsel appearing for Respondent No.5 on the other hand made his submission basing on the stand taken before the Tribunal.

6.1. It is contended that Respondent No.5 was duly appointed by the Managing Committee of the School as against the post of T.G.T (P.C.M) vide order of appointment issued on 24.11.2001. In terms of the said order, Respondent No. 5 joined in the school on 03.12.2001.

6.2. It is contended that during continuance of Respondent No.5, appellant was appointed vide order dt.22.01.2007. Since the very appointment of the appellant was against a non-existing post and prior to termination of Respondent No.5, such nature of appointment is void, ab initio.

6.3. In support of his submission, learned counsel appearing for Respondent No.5 relied on a decision of the Hon'ble Apex Court in the case of ***State of Punjab Vs, Debender Pal Singh 2011 (14) S.C.C 770***. Hon'ble Apex Court in Paragraphs-72 &73 of the said judgment has held as follows.

> *"72. It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact-situation, the legal maxim "sublato fundamento cadit opus" meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores in the present case.*
>
> *73. In Badrinath v. State of Tamil Nadu & Ors., AIR 2000 SC 3243; and State of Kerala v. Puthenkavu N.S.S. Karayogam & Anr., (2001) 10 SCC 191, this Court observed that once the basis of a proceeding is gone, all consequential acts, actions, orders would fall to the ground automatically and this principle is applicable to judicial, quasi-judicial and administrative proceedings equally."*

6.4. Learned counsel for Respondent No.5 also relied on another decision of the Hon'ble Apex Court in the case of *State of Orissa & Others Vs. Mamata Mohanty, (2011) 3 SCC 456*. Hon'ble Apex Court in paragraph-20 has held as follows.

> *"20. It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. (vide: Upen Chandra Gogoi v. State of Assam & Ors., AIR 1998 SC 1289;Mangal Prasad Tamoli (Dead) by L.Rs. v. Narvadeshwar Mishra (Dead) by L.Rs. & Ors. , AIR 2005 SC1964; and Ritesh Tiwari & Anr. v. State of U.P. & Ors., AIR 2010 SC 3823).*
>
> *The concept of adverse possession of lien on post or holding over are not applicable in service jurisprudence. Therefore, continuation of a person wrongly appointed on post does not create any right in his favour. (Vide Dr. M.S. Patil v. Gulbarga University & Ors., AIR 2010 SC 3783)."*

6.5. It is also contended that even though a stand has been taken by the Managing Committee that Respondent No.5 was terminated from her services w.e.f 16.04.2007, but at no point of time, such order of termination was communicated to Respondent No.5 and thereby enabling her to take appropriate steps as provided under law.

6.6. It is also contended that while on the one hand, it is the stand of the Managing Committee that Respondent No.5 was terminated w.e.f 16.04.2007, but in

the letter issued by the Chairman of the School on 28.04.2007, it was indicated that the resignation submitted by Respondent No.5 has been accepted by the Managing Committee in its resolution dt.28.04.2007. But in the Resolution dt.28.04.2007, there is no such decision taken by the Managing Committee with regard to acceptance of the resignation of Respondent No.5.

6.7. It is contended that Respondent No.5 at no point of time has either resigned nor she was terminated, as alleged w.e.f 16.04.2007. It is accordingly contended that the Tribunal after going through the materials placed before it, has rightly come to the conclusion by upholding the direction issued by Respondent No.3 in his letter dt.26.09.2015 and the order passed by the Director on 18.04.2016.

6.8. Learned counsel appearing for Respondent No.5 also produced a copy of the proceeding of the Managing Committee dt.09.06.2007 before this Court for perusal. On bare perusal of the said resolution, it is found that even though the proceeding was held on dt.09.06.2007, but in the said proceeding vide Resolution No.6, decision taken by the Managing Committee on 23.07.2007 has been approved. Since an happening of 23.07.2007 cannot be taken note of in the proceeding held on 09.06.2007, it is quite obvious that such a proceeding is a manipulated one and any decision taken in the proceeding dt.09.06.2007 is a nullity in the eye of law.

7. Having heard learned counsel for the parties and after going through the materials available on record, this Court finds that as against the post of T.G.T (PCM) in Maa Durga Girls High Schoo, Bandalu, Respondent No.5 was appointed on 24.11.2001 where she joined on 03.12.2001. It is also found that during subsistence of the appointment of Respondent No.5, appellant-Sarojini Dash was appointed as against the post held by Respondent No.5 on 22.01.2007. Since by the time appellant was appointed as against the post of T.G.T(PCM), the post was held by Respondent No.5, no such order of appointment could have been issued in favour of the appellant-Sarojini Dash and it is a void order in view of the decision of the Hon'ble Apex Court in the case of Debender Singh and Mamata Mohanty as cited supra.

7.1. Even though a stand has been taken that Respondent No.5 was terminated from her services w.e.f 16.04.2007 and such termination was approved by the Managing Committee in its proceeding dt.09.06.2007, but as discussed hereinabove, the proceeding dt.09.06.2007 is a manipulated one.

In view of such position, the approval of appointment of appellant-Sarojini Dash so made w.e.f 22.01.2007 in the proceeding dt.09.06.2007 is also not legal and justified.

7.2. Since by the time the appellant-Sarojini Dash was appointed on 22.01.2007, Respondent No.5 was very much in service in the school as against the post of T.G.T (PCM), this Court finds no illegality or irregularity with the judgment passed by the Tribunal on 24.02.2018 in G.I.A Case No.180 of 2016. Accordingly, this Court is not inclined to interfere with the said judgment and dismiss both the appeals.

2024 (I) ILR-CUT-1391

MURAHARI SRI RAMAN, J.

WPC (OAC) NO. 2603 OF 2015

SRI UDHAB CHARAN PRADHAN ……Petitioner

-V-

D.G & I.G OF POLICE, CUTTACK & ORS. ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – Articles 226/227 – Disciplinary authority imposed punishment of "suspension period should be treated as such" upon the petitioner which was confirmed by the Appellate as well as Revisional Authorities – Whether the concurrent findings recorded by the authorities can be interfered with the exercise of power under Articles 226/227 of the Constitution of India? – Held, No.

Case Laws Relied on and Referred to :-

1. AIR 2011 SC 2731 = (2011) 7 SCC 397 : Union of India Vrs. Arulmozhi Iniarasu.
2. AIR 2015 SC 545 : Union of India Vrs. P. Gunasekaran.
3. AIR 1963 SC 1723 : State of Andhra Pradesh Vrs. S. Sree Rama Rao.
4. (2011) 12 SCR 1036 : Ram Lal Bhaskar Vrs. State Bank of India.
5. (2020) 1 SCR 616 : State of Karnataka Vrs. N. Gangaraj.
6. (1977) 2 SCC 491 : State of Haryana Vrs. Rattan Singh.
7. (2006) 5 SCC 88 : M.V. Bijlani Vrs. Union of India.
8. (2015) 3 SCC 101 : General Manager (Operations), SBI Vrs. R. Periyasamy.
9. (2022) 1 SCC 373 : Union of India Vrs. Ex. Constable Ram Karan.
10. (2022) 18 SCR 605 : Union of India Vrs. Subrata Nath.
11. (1997) 9 SCC 552 : Rajkot Municipal Corporation Vrs. Manjulben Jayantilal Nakum.
12. AIR 1963 AP 452 : V.V. Narayana Chetty Vrs. Narrappareddigari Venkata Reddi.
13. (1955) 4 SCC 683 : State of Maharashtra Vrs. Digambar.
14. (2014) 1 SCR 987 : Chennai Metropotan Water Supply and Sewerage Board Vrs. T.T. Murali Babu.

For Petitioner : M/s. A.K. Apat, G.R. Sethi, J.K. Digal, Ms. Babita Kumari Pattnaik & S. Nanda.

For Opp.Parties : Mr. Rabi Narayan Mishra, AGA

JUDGMENT Date of Hearing : 15.03.2024 : Date of Judgment : 19.03.2024

M.S.RAMAN, J.

THE CHALLENGE:

Assailing the Order dated 14.03.2012 of the Superintendent of Police, Rourkela in District Prog. No.25 of 2010 against C/1142 (petitioner) awarding "one black mark" coupled with treating the period of suspension during 07.07.2010 to 26.11.2010 (141 days) "as such" (Annexure-5), as affirmed in appeal *vide* Order dated 10.12.2013 passed by the Inspector General of Police, Western Range, Rourkela (Annexure-7), being unsuccessfully challenged the said orders in revision before the Director General and Inspector General of Police, Odisha, Cuttack, which came to be disposed of vide Order dated 23.01.2015 (Annexure-9), the petitioner

approached the Odisha Administrative Tribunal, Cuttack Bench, Cuttack by way of filing Original Application registered as O.A. No.2603 (C) of 2015 under Section 19 of the Administrative Tribunals Act, 1985, and sought for the following relief(s):

> *"In view of the facts stated in paragraph 6, the applicant prays for the following relief(s):*
> *(i) To quash the memorandum of charged under Annexure-1;*
> *(ii) To quash the punishment Order dated 14.03.2012 under Annexure-5;*
> *(iii) To quash the Appellate Authority's Order dated 10.12.2013 under Annexure-7;*
> *(iv) To quash the Revision Authority's Order dated 23.01.2015 under Annexure-9;*
> *(v) And pass such other order/orders, as may be deemed fit and proper for the interest of justice."*

1.1. After abolition of the Odisha Administrative Tribunal by virtue of Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) Notification F. No. A-11014/10/2015-AT [G.S.R.552(E).], dated 2nd August, 2019), the said case having been transferred to this Court, O.A. No. 2603 (C) of 2015 has been re-registered as WPC (OAC) No. 2603 of 2015.

THE FACTS:

2. Being duly selected the petitioner, appointed as Constable on 04.03.1991, was posted in the district of Sundargarh and he has been discharging his duty assigned to the satisfaction of the authorities concerned. He has unblemished career althrough.

2.1. A departmental proceeding being Rourkela District Proceeding No.25 of 2010 was initiated against the petitioner on the charge of gross misconduct and dereliction of duty on the allegation that "on 07.07.2010 at 11.00 to 11.30 PM while joint checking by SDPO, Bonai and IIC, Bonai PS he was found absent without any leave or permission, though he was well informed to remain alert in view of *bundh* call by CPI (Maoists)" and he was directed to file his show cause within a period of 15 days from the date of the service of the notice.

2.2. In response thereto, the petitioner in his reply *inter alia* apprised that as he suddenly fell sick with malaria fever, he went to see physician and after getting medicines he went back to resume duty. He returned to police station by 11.00 PM. Nonetheless, it is alleged that without considering the show cause reply in its right earnest, the enquiry officer was appointed to conduct enquiry into the charges.

2.3. Upon submission of the enquiry report dated 06.09.2011, the petitioner was directed to submit his written statement of defence, which he furnished by stating *inter alia* that due to sudden illness, he had to go for half-an-hour for taking physician's advice with knowledge and permission of Striking Force Havildar (S.F. Havildar).

2.4. The Superintendent of Police agreed with the substance of the Enquiry Report and found the petitioner guilty of charges and directed for issue of show cause notice calling for explanation as to why proposed punishment, *viz*., "one black

mark and to treat the suspension period with effect from 07.07.2010 PM to 26.11.2010 AM, i.e., 141 days is treated as such" would not be imposed. Accordingly, the petitioner prayed to exonerate him from the charges.

2.5. *Vide* D.O. No.736, dated 14.03.2012, the Superintendent of Police, Rourkela affirming the observations contained in the Enquiry Report, found the reply to second show cause notice "not satisfactory" and awarded the petitioner with "one black mark" and treated the suspension period with effect from 07.07.2010 PM to 26.11.2010 AM, i.e., 141 days "as such".

2.6. Aggrieved thereby, the petitioner preferred an Appeal before the Deputy Inspector General-opposite party No.2 on 16.05.2012 contending *inter alia* that due opportunity has not been afforded during the course of enquiry, yet he was imposed with punishment(s). It is alleged that the punishment(s) has been imposed without taking into account the evidence adduced by the petitioner during the course of enquiry.

2.7. By Order dated 10.12.2013, the opposite party No.2 rejected the Appeal. The Appellate Authority ascribed that no permission was sought for nor was leave asked for which led to consider that there was gross misconduct and dereliction of duty as the petitioner was informed to remain alert due to bundh call by CPI (Maoists). The Appellate Authority concluded that "no procedural flaw in conduct of the enquiry" was perceived and reasonable opportunity was afforded to the petitioner-Constable to defend his case.

2.8. Still aggrieved, the petitioner preferred a Revision before the Director General and Inspector General of Police on 16.01.2014, which came to be rejected *vide* Order dated 23.05.2015.

2.9. Being unsuccessful, the Original Application was filed before the Odisha Administrative Tribunal invoking provisions of Section 19 of the Administrative Tribunals Act, 1985, which was subsequently converted to writ petition before this Court after abolition of the said Tribunal.

THE REPLIES OF THE OPPOSITE PARTIES:

3. Responding notice issued by the learned Odisha Administrative Tribunal, the opposite parties filed reply justifying punishment as awarded to the petitioner.

3.1. Rourkela District Prog. No.25 of 2010 was initiated against the petitioner based on enquiry report containing gross misconduct and dereliction of duty as the petitioner was found absent from duty during joint checking by SDPO, Bonai and IIC, Bonai P.S. on 07.07.2010. The petitioner was appointed as Armed Police Reserve Constable (APR Constable), who along with others was to remain at Reserve Office, Rourkela (R.O.). As per command certificate issued by the Reserve Inspector, the petitioner was directed to report before Bonai P.S. as part of S.F. (Striking Force). The APR Constable is commanded to proceed to the P.S., whenever Law and Order situation arise.

3.2. The petitioner, an APR Constable, was commanded to proceed to Bonai S.F. on 04.03.2010 in view of bundh call given by CPI (Maoist). He was well informed to remain alert at Bonai S.F. (Striking Force), but found absent without any intimation. As his preliminary explanation was found not satisfactory, a departmental proceeding was initiated against him. The Enquiring Officer submitted his finding after affording opportunity to defend himself (petitioner). The Superintendent of Police, Rourkela found him guilty of the charge and awarded with one black mark and directed to treat period of suspension as such vide Order No.736, dated 14.03.2012.

3.3. It is revealed from statement of Havildar, namely Dusmanta Behera (Annexure-C/3), who was In-charge of Bonai S.F. (Striking Force) recorded during the course of Rourkela District Proceeding No. 25 of 2010, the present petitioner was absent on 07.07.2010. Similarly, the statements of Sudarsan Sethi (Annexure-C/4) and Hadibandhu Swain (Annexure-C/5) were recorded in the said District Proceeding No. 25 of 2010.

3.4. The petitioner had remained absent from his duty at Bonai S.F. during checking by SDPO, Bonai and IIC, Bonai P.S. on 07.07.2010 between 11.00 PM to 11.30 PM though he was well informed to remain alert at Bonai S.F. as *bundh* call was given by CPI (Maoists).

3.5. It is asserted by the opposite parties that the plea of the petitioner that he had been to see the physician for advice which was duly intimated to Havildar Dusmanta Behera, In-charge of Striking Force (S.F.) Guard, Bonai, was denied by said In-charge Havildar in his statement recorded during the course of disciplinary proceeding vide Annexures-C/3, C/4 and C/5 to the counter.

3.6. Thus, the defence submitted by the petitioner, being found unsatisfactory, the Enquiry Officer submitted his findings holding the petitioner guilty of the charge. Hence he was asked to submit his explanation to the second show cause against the proposed punishment of one black mark and the suspension period to be treated as such.

3.7. It is pleaded by the opposite parties that there is justification in awarding such punishment by the Superintendent of Police, which was affirmed not only by the Appellate Authority but also the Revisional Authority.

3.8. It is contended by the opposite parties that having afforded due opportunity to the petitioner at each stage of the proceeding including the appellate forum and the revisional forum, the petitioner is not entitled for grant of any leniency and, therefore, the orders impugned do not warrant interference.

HEARING OF THE WRIT PETITION:

4. This matter was on board on 15.03.2024 under the heading "Admission". Though *vide* Orders dated 04.07.2022, 27.01.2023, 23.03.2023, 19.04.2023, 12.07.2023, 21.09.2023 and 07.02.2024, this Court granted liberty to the counsel for

the petitioner to file rejoinder affidavit, as yet same remained non-compliant. Since pleadings are completed and have been exchanged amongst the parties, and the learned counsel for the petitioner declined to file any rejoinder affidavit, on consent for disposal, the matter has been finally heard. Heard Ms. Babita Kumar Pattnaik, learned Advocate for the petitioner and Sri Rabi Narayan Mishra, learned Additional Government Advocate for the opposite parties.

SUBMISSIONS AND ARGUMENTS OF RESPECTIVE PARTIES:

5. Ms. Babita Kumari Pattnaik, learned Advocate for the petitioner submitted that the writ petition is liable to be allowed on the ground that no adequate opportunity has been afforded before imposing punishment of "one black mark" and treating the period of suspension "as such". She strenuously went on to urge that the Odisha Police Manual does not contemplate "suspension" period to be treated "as such". Therefore, the award clubbing imposition of punishment of "one black mark" and treatment of suspension period "as such" is without authority of law.

5.1. Ms. Babita Kumari Pattnaik, learned Advocate with all humility submitted that the explanation of the petitioner that he had to see the physician for his advice on account of sudden sickness for which he was absent for half-an-hour or so has not been given proper consideration. The opposite parties-Authorities should not have relied heavily on the Enquiry Report which was submitted with bias. They ought to have placed weight on the statement of the petitioner to the effect that he had intimated the fact of absence for medical exigency to the S.F. Havildar. Having not settled the factual aspect in proper perspective by the Disciplinary Authority, it was not warranted for the Appellate Authority or the Revisional Authority to sustain the findings recorded in the Enquiry Report.

5.2. In such view of the matter, she prayed for setting aside the Order dated 14.03.2012 passed by the Superintendent of Police, Rourkela, which was confirmed in the Order dated 10.12.2013 of the Inspector General of Police, Western Range, Rourkela (Appellate Authority) and the Order dated 23.01.2015 passed by the Director General and Inspector General of Police, Odisha (Revisional Authority).

5.3. Amplifying her argument, Ms. Babita Kumari Pattnaik, learned Advocate placed reliance on the decision rendered by this Court in *Bani Bhusan Dash Vrs. State of Odisha & Others, 2021 (II) OLR 1022*, and submitted that the punishment of treatment of suspension "as such" besides "one black mark" is unwholesome and is, thus, liable to be deleted.

6. Sri Rabi Narayan Mishra, learned Additional Government Advocate for the opposite parties would submit that on the facts and in the circumstances upon enquiry being conducted, it was found that the petitioner having not intimated the Striking Force Havildar remained absent from duty which is nothing but misconduct and dereliction of duty. The petitioner being in disciplinary force has been awarded appropriate punishment by the Disciplinary Authority which got confirmed by the

Appellate Authority. Such concurrent finding of fact further got affirmed in revision filed at the behest of the petitioner before the Director General and Inspector General of Police, Odisha, Cuttack. Therefore, interfering with quantum of punishment based on concurrent finding is not warranted in exercise of power under Article 226/227 of the Constitution of India.

6.1. The statements of witnesses transpire that the plea of the petitioner that he went to attend medical exigency after intimating the S.F. Havildar is not true and no evidence is laid in this regard to disbelieve their versions. Referring to Annexure-C/3, i.e., Statement of Havildar Sri Dushmant Behera, who denied in cross-examination that the assertion of the petitioner is false to the effect that he had intimated him about his sickness at around 10.15 PM.

6.2. Under such premise, Sri Rabi Narayan Mishra, learned Additional Government Advocate vehemently contended that the punishments awarded by the Disciplinary Authority by accepting the contents of the Enquiry Report being in consonance with categories of penalties envisaged under Rule 13 of the Odisha Civil Services (Classification, Control and Appeal) Rules, 1962 ("OCS (CCA) Rules" for brevity) read with Rule 824 of the Odisha Police Manual Rules, it is improper for this Court to exercise jurisdiction under Article 226/227 of the Constitution of India.

CONSIDERATION OF RIVAL CONTENTIONS:

7. Before delving into the merit of the matter, it is appropriate to reproduce the nature of penalties envisaged under Part-V: "Discipline" of the OCS (CCA) Rules:

> *"13. Nature of penalties.—*
>
> *The following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed on a Government servant, namely:*
>
> *(i) fine;*
> *(ii) censure;*
> *(iii) withholding of increments (without cumulative effect)*
> *(iii-A) withholding of promotion;*
> *(iv) recovery from pay of the whole, or part of any pecuniary loss caused to Government, or to a company, association or body of individuals, whether incorporated or not, which is wholly or substantially owned or controlled by Government, or to a local authority set up by an Act of Parliament or of the Legislature of a State, by negligence or breach of orders.*
> *(v) suspension;*
> *(vi) reduction to a lower service, grade or post or to a lower time-scale or to a lower stage in a time scale;*
> *(vi-A) withholding of increments (without cumulative effect)*
> *(vii) compulsory retirement;*
> *(viii) removal from service which shall not be a disqualification for future employment;*
> *(ix) dismissal from service which shall ordinarily be a disqualification for future employment :*
>
> *Provided that the penalty of (sic. or) fine shall (be) imposed only on Group-D Government servants.*

Explanation.—

The following shall not amount to a penalty within the meaning of this rule.—

(a) Withholding of increments of a Government servant for failure to pass a departmental examination in accordance with the rules or orders governing the service or post or the terms of his appointment.

(b) Stoppage of a Government servant at the efficiency bar in the time scale on the ground of his unfitness to cross the bar.

(c) Non-promotion, whether in a substantive or officiating capacity, of a Government servant, after consideration of his case, to a service, grade or post for promotion to which he is eligible.

(d) Reversion to a lower service, grade or post of a Government servant officiating in a higher service grade or post on the ground that he is considered, after trial, to be unsuitable for such higher service, grade or post, or on administrative grounds unconnected with his conduct.

(e) Reversion to his permanent service, grade or post of a Government servant appointed on probation to another service, grade or post during or at the end of the period of probation in accordance with the terms of his appointment or the rules and orders governing probation.

(f) Replacement of the services of a Government servant whose services have been borrowed from the Central or State Government or an authority under the control or a State Government at the disposal of the authority which had lent his services.

(g) Compulsory retirement of a Government servant in a accordance with the provision relating to his superannuation or retirement.

(h) Termination of the services:

(i) of a Government servant appointed on probation during or at the end of the period of probation in accordance with the terms of his appointment or the rules and orders governing probation; or
(ii) of a temporary Government servant in accordance with the terms of his appointment; or
(iii) of a Government servant employed under an agreement in accordance with the terms of such agreement."

7.1. Rule 3 of said OCS (CCA) Rules prescribes as follows:

"3. Application.—
(1) These Rules apply to all Government servants except—

(a) persons in casual employment;
(b) persons subject to discharge from service on less than one month's notice;
(c) persons for whose appointment and other matters covered by these rules special provision is made by or under any law for the time being in force, in regard to the matters covered by such law; and
(d) members of the All-India Services.

(2) Notwithstanding anything contained in Sub-rule (1) these rules shall apply to every Government servant temporarily transferred to a service or post coming within exception (c) in sub-rule (1) to whom, but for such transfer, these rules would apply.

(3) Notwithstanding anything contained in sub-rule (1) the Governor may, by order exclude from the operation of all or any of these rules in case of any Government servant or class of Government servants.

(4) If any doubt arises—

(a) whether these rules or any of them apply to any person; or
(b) whether any person to whom these rules apply belongs to a particular service,
the matter shall be referred to Governor whose decision thereon shall be final."

7.2. Chapter-XXV of the Odisha Police Manual Rules deals with "PUNISHMENTS", which lays down the following categories of punishments:

"DEPARTMENTAL PUNISHMENTS
[Rules marked with an asterisk (*)
have been sanctioned under Section 7, Act V of 1861)

**824.Description of departmental punishments.—*

The following punishments may be inflicted departmentally on a police officer below the rank of Deputy Superintendent—

(a) Dismissal,
(b) Removal,
(b-1) Compulsory retirement, and
(c) Reduction in rank,
(d) Reduction in time-scale.
(e) Withholding of the next increment for a specific offence, with or without corresponding postponement of subsequent increments,
(f) Black mark or marks.
(g) Removal from any office of distinction or specific emolument,
(h) Censure.
(i) Warning.
(j) Confinements to quarters for a period not exceeding 15 days,
(k) punishment drill, and
(l) Extra guard or other duty;

Provided that the punishments mentioned in Clauses (i) to (m) shall not be imposed on any officer of or above the rank of Sub-Inspector nor the punishment mentioned in (l) on any Assistant Sub-Inspector, Constable of Ordinary Reserve and Havildar of Armed Reserve.

Punishments mentioned in Clauses (a) to (h) are classed as major and the rest are minor. All major punishments and censure shall be entered in the service book other minor punishments may be so entered if the officer awarding the punishment so directs.

Note 1.—

Superintendents may use the orderly Room Register in P.M. Form No. 114 when dealing with cases of misconduct and breaches of discipline in which the punishments mentioned in Clauses (k) to (l) are imposed.

Note 2.—

Forfeiture of pay for overstaying have (Service Code Rule 144) and deductions from pay on account of loss or damage to Government property shall not be treated as punishment."

7.3. Rule 834 of the Odisha Police Manual Rules with regard to "BLACK MARKS" prescribes as follows:

"834. Imposition of black marks.—

(a) Black marks may be awarded alone or in addition to other punishments enumerated in Rule 824 except dismissal or removal, to all officers of and below the rank of Inspector.

No more than one black mark shall be awarded or any one offence except when moral turpitude can reasonably be inferred.

(b) Three black marks shall ordinarily entail reduction or forfeiture or withholding of an increment, the period of which shall be specified in the order and, after the period is over the officer will be restored to his former position. Such reduction or forfeiture or withholding of increment shall not carry any black mark value.

(c) It shall be left to the discretion of the officer awarding the third black mark to waive the penalty noted in Clause (b). In exercising this option, he shall consider:

(i) the officers for which the previous black marks were awarded;
(ii) the length of time that has elapsed since they were awarded,
(iii) any good service the defaulter may have to his credit."

7.4. Having regard to Rules 840, 841, 842 and 843 of the Odisha Police Manual Rules are relevant for the present purpose:

"840. Suspension.—

(a) The Director General and Inspector General, Special Inspector General, Deputy Inspector General, Superintendent of Police or any Officer in the rank of Superintendent of Police may place under suspension any police officer sub-ordinate to him and working under him, of or below the rank of Inspector where a disciplinary proceeding against him is contemplated or is pending or where a case against him in response to any criminal offence is under investigation or trial. If an officer in the rank of Superintendent of Police suspends a police officer of the rank of Inspector, he shall report it to the Deputy Inspector General. Suspension is authorised only in cases in which the continuance on duty of an Officer pending enquiry into his conduct is prejudicial to public interest. When however, an officer is believed to have been guilty of giving false evidence in Court he should not be suspended on the account until the Court has pronounced judgment finding him guilty since his suspension might have the appearance of an attempt to prejudice the case.

(b) An officer who is committed to prison for debt or on a criminal charge shall be considered as under suspension from the date of arrest, (Service Code, Rules 93 & 93-A).

841. Payments in cases of Dismissal, Removal, or Suspension.—

(a) The rules regulating the pay and allowances of a Government servant dismissed or removed from office or suspended pending enquiry into alleged misconduct, will be found in Rules 89 to 93-A of the Service Code.

(b) The payments to be received by a Government servant while under suspension shall be fixed by the suspending authority in accordance with the Rule 90 (b) of the Orissa Service Code, Vol. I.

(c) (1) When a Government servant who has been dismissed, removed or suspended is reinstated, the authority competent to order the reinstatement shall consider and make a specific order:

(i) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty, and

(ii) whether or not the said period shall be treated as a period, on duty.

(2) Where such competent authority holds that the Government servant has been fully exonerated or in the case of suspension, that it was wholly unjustified, the Government servant shall be given the full pay to which he would have been entitled had he not been dismissed, removed or suspended as the case may be together with any allowances of which he was in receipt prior to his dismissal, removal or suspension.

(3) In other cases, the Government servant shall be given such proportion of such pay and allowances as such competent authority may prescribe.

Provided that the payment of allowances under Clause (2) or Clause (3) shall be subject to all other conditions under which such allowances are admissible.

(4) In a case falling under Clause (2) the period of absence from duty shall be treated as a period spent on duty for all purposes.

(5) In case falling under Clause (3) the period of absence from duty shall not be treated as a period spent on duty unless such competent authority specifically directs that it shall be so treated for any specified purpose (Service Code Rule 91).

(d) No extra cost may ordinarily be imposed on the State by any of the payments mentioned above without the permission of the State Government provided that such permission shall not be necessary in cases where extra cost does not exceed Rs. 500 and the period during which the Government servant has been absent from duty through dismissal or suspension does not exceed six months (Service Code Rule 92).

842. Suspended police officer subject to discipline.—

Under Section 8 of Act V of 1861, as amended by Section 3, Act VIII of 1895, a police officer does not by reason of being suspended from office, cease to be a police officer. During the term of such suspension the powers, functions and privileges vested in him as a police officer are in abeyance, but he continues subject to the same responsibilities, discipline and penalties, and to the same authorities as if he had not been suspended.

843. Absence without leave.—

Wilful overstayal of leave, absence from duty without leave or absence from the Station, except on duty or permission, shall be treated misconduct and proceedings shall invariably be drawn up and departmental punishment inflicted in addition to the forfeiture of pay provided for by Rule 803. Police officers who absent themselves without leave are liable also to prosecution under Section 29 of the Act V of 1861, as amended by Section 9 of Act VIII of 1895. Prosecutions, however, should only be instituted in exceptional circumstances. As a rule when an officer does not return within one week of the expiry of his leave, enquiries shall be made from the Superintendent of his native district and should there be good ground for his absence, he shall be punished department. (G.O. No.26544-P, dated the 30th July, 1973)"

7.5. It is noteworthy to have regard to Rule 91 of the Odisha Service Code, which reads as follows:

"91. Authority competent to order the reinstatement shall consider and make a specific order:

(1) When a Government servant who has been dismissed, removed, compulsorily retired or suspended is reinstated or would have been reinstated but for his retirement on superannuation while under suspension the authority competent to order the reinstatement shall consider and make a specific order:

(a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duly or for the period of suspension ending with the date of his retirement on superannuation, as the case may be, and

(b) whether or not the said period shall be treated as a period spend on duty.

(2) Where such competent authority holds that the Government servant has been fully exonerated or in the case of suspension, that it was wholly unjustified, the Government servant shall be given the full pay to which he would have been entitled had he not been dismissed, removed, compulsorily retired or suspended, as the case may be, together with any allowances of which he was in receipt to his dismissal, removal or suspension.

(3) (a) In the case of dismissal, removal and compulsory retirement when a Government servant who is not completely exonerated of the charges, is reinstated in service, it shall be open to the competent authority to decide not to allow any pay or allowances to him.

(b) In the case of suspension when a Government servant, not having been exonerated of the charges fully, is reinstated in service, he may be allowed subsistence allowance only for the period of suspension as admissible under Rule 90.

(4) In a case falling under Clause (2) the period of absence from duty shall be treated as a period spent on duty for all purposes.

(5) In a case falling under Clause (3) the period of absence from duty shall not be treated as a period spent on duty, unless such competent authority specifically directs that it shall be so treated for any specified purpose:

Provided that if the Government servant so desires, such authority may direct that the period of absence from duty shall be converted into leave of any kind due and admissible to the Government servant."

8. Having the aforesaid categories of punishments, the facts as emanated from the pleadings lead to demonstrate that the petitioner having not taken permission of nor availed leave from the competent authority remained absent on 07.07.2010, i.e., the date on which the CPI (Maoists) have called *bundh* for which purpose the petitioner was instructed to be alert. Such fact of non-availability of the petitioner at the deputed place has been enquired into by the Enquiry Authority and the fact submitted by way of Report was accepted by the Disciplinary Authority, who after having afforded opportunity to explain by way of second show cause notice awarded punishments, *viz*., "one black mark" and directed to treat the period of suspension between 07.07.2010 to 26.11.2010 "as such".

8.1. Noteworthy here to notice that the Statement of Havildar Sri Dushmant Behera, In-charge of Striking Force, recorded on 28.08.2011 in connection with Rourkela Police District Proceeding No.25 of 2010, copy of which has been acknowledged by the petitioner to have been received, clearly indicates that six APR Constables including the petitioner were found absent on 07.07.2010 at the time of joint checking by SDPO, Bonai and IIC, Bonai Police Station. It is also revealed from the said Statement that in cross-examination, Sri Dushmant Behera has denied the fact of the petitioner having taken permission for leave or intimated about remaining absent on 07.07.2010. To prove his stand and counter such assertion of S.F. Havildar, the petitioner has also not adduced any evidence to show that he had been to see the physician.

8.2. Such being the factual matrix, when the Rules contained in the Odisha Police Manual are read harmoniously with those of the categories of penalties enlisted in Rule 13 of the OCS (CCA) Rules, it is unequivocal that apart from "black mark", "suspension" is also enumerated as one of the penalties/punishments.

8.3. On careful reading of Rule 12 in Part-IV of the OCS (CCA) Rules, which deals with "SUSPENSION", it transpires from sub-rule (6) thereof as under:

> *"The Disciplinary Authority, while passing the* ***final over (sic. order) of punishment*** *or of release in the Disciplinary Proceedings* ***against the Government servant, shall give directions about the treatment of the period of suspension****, which is passed not as a measure of substantive punishment but as suspension pending inquiry, and indicate whether the suspension would be a punishment or not."*

8.4. Rule 2(c) of the OCA (CCS) Rules defines the term "Disciplinary Authority" which spells out that "in relation to the imposition of a penalty on a Government servant means the Authority competent under these rules to impose on him that penalty". While Rule 2(d) *ibid*. defines the term "Government" to mean "the Government or Odisha", clause (f) thereof defines "Government servant" to mean "a person who is a member of a service or who holds a civil post under the State and includes any such person on foreign service or whose service are temporarily placed at the disposal of Union Government or any other State Government or a local or other local authority and also any person in the service of the Union Government or any other State Government or a local or other authority whose services are temporarily placed at the disposal of the State Government".

8.5. Rule 841 of the Odisha Police Manual Rules read juxtaposed with the provisions of the OCS (CCA) Rules and the Odisha Service Code, it can be construed that the Disciplinary Authority, while considering reinstatement of Government servant, who was suspended, shall consider and make specific order with respect to the treatment of period of suspension. Therefore, it is explicit that the Disciplinary Authority is required to "give directions about the treatment of the period of suspension". The Disciplinary Authority-Superintendent of Police, Rourkela, while passing final order in Rourkela District Prog. No.25 of 2010 vide D.O. No.736, dated 14.03.2012 (Annexure-5), has directed as follows:

> *"Perused the findings of the EO and relevant documents on record.*
>
> *The delinquent C/1142 U.Pradhan of APR was charged with* ***gross misconduct and dereliction of duty*** *in that while he was at Bonai S.F. On 07.07.2010 from 11 PM to 11.30 PM while joint checking conducted by SDPO, Bonai and IIC, Bonai P.S.* ***he was found absent at Bonai S.F. without any leave or permission though he was well informed to remain alert in view of Bandh called by CPI (Maoist)****. He was asked to show cause within 15 days for submitting his explanation as to why disciplinary action shall not be taken against him. He had submitted his explanation which was not satisfactory. Hence this proceeding was initiated against him. The proceeding was entrusted to Sri B.K. Pradhan, OPS, DSP (P), Rourkela to conduct the enquiry expeditiously and submit findings early.*

> *During course of enquiry the E.O. was examined as many as V PW's and exhibited III documents in support of the charges.* ***The delinquent was offered all reasonable opportunities to cross examine PW's.*** *After prosecution was over the charged Constable was asked to submit list of DW's and written defence, if any.* ***He declined to produce the list of DW's and submitted his written defence pleading him not guilty of the charges leveled against him****. The E.O. has submitted findings holding the charge C/1142 U.Pradhan, guilty of the charges made out against him* ***for his gross misconduct and dereliction of duty as he was absent from duty without any leave or permission****.*
>
> *After perusing the Proceeding file and analyzing the evidence on record and due application of judicious mind, I found that the Proceeding had been conducted in free and fair manner following the principles of natural justice. I agreed with the findings of the E.O. and hold him guilty of the charges and* ***proposed to award him with One Black Mark and to treat the suspension period with effect from 07.07 10 Pm to 26.11 10 AM, i.e., 141 days as such****.*
>
> *The Charged C/1142 U.Pradhan was directed to submit his 2nd show cause explanation by 28.01.2012 as to why the proposed punishment shall not be awarded to him. He submitted his 2nd show cause explanation, perused the 2nd show cause explanation and found not satisfactory.* ***Hence he is awarded with One Black Mark and the suspension period with effect from 07.07 10 PM to 26.11 10 AM, i.e., 141 days is treated as such****. Including this black mark he has earned total One Black Mark in his service career."*

8.6. In appeal at the behest of the petitioner, the Inspector General of Police, Western Range, Rourkela, finding no procedural irregularity in the conduct of Rourkela District Proceeding No.25 of 2010, and compliance of principles of natural justice by affording the charged Constable reasonable opportunity to defend his case, confirmed the findings of the Disciplinary Authority *vide* Order dated 10.12.2013.

8.7. The petitioner having carried the matter further in revision before the Director General and Inspector General of Police, Odisha, Cuttack, the same came to be rejected on 23.01.2015 with the following observation:

> *"****
>
> *Record reveals that the charged C/1142 U. Pradhan was found absent during joint checking conducted by SDPO, Bonai and IIC, Bonai P.S. on 07.07.2010 between 11 PM to 11.30 PM. The charge has been well proved by the PWs. The quantum of punishment imposed by the Disciplinary Authority is also proportionate to the level of delinquency of the charged Constable. There is no ground to interfere with the Order of punishment passed by S.P., Rourkela, which has been upheld by the Inspector General of Police, Western Range, Rourkela.*
>
> *The revision petition, being devoid of merit, is rejected."*

9. With the concurrent findings on record, when the decision of this Court rendered in *Bani Bhusan Dash (supra)*, cited by the learned counsel for the petitioner is taken into consideration, it is perceived that ratio of said Judgment being applied to different set of facts and not related to police personnel, the same has no application to the present fact-situation.

9.1. It has been succinctly stated in *Union of India Vrs. Arulmozhi Iniarasu, AIR 2011 SC 2731 = (2011) 7 SCC 397* as follows:

> *"Before examining the first limb of the question, formulated above, it would be instructive to note, as a preface, the well-settled principle of law in the matter of applying precedents that the Court should not place reliance on decisions without discussing as to how the fact situation of the case before it fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of Statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Disposal of cases by blindly placing reliance on a decision is not proper because one additional or different fact may make a world of difference between conclusions in two cases. (Ref.: Bharat Petroleum Corpn. Ltd. Vrs. NR Vairamani, (2004) 8 SCC 579; Sarva Shramik Sanghatana (KV), Mumbai Vrs. State of Maharashtra, (2008) 1 SCC 494; and Bhuwalka Steel Industries Limited Vrs. Bombay Iron & Steel Labour Board, (2010) 2 SCC 273.)"*

9.2. With the aforesaid dicta, if the facts of the present case are analysed it is not in dispute that there was no permission for leave nor was there any evidence adduced by the petitioner available on record to indicate intimation to the superior authority. The uncontroverted fact available on record shows that the APR Constables were instructed to remain alert on account of *bundh* call given by the CPI (Maoists). The petitioner without bringing on record iota of evidence to suggest that the petitioner had to attend to medical exigency at the relevant point to time unsuccessfully defended his case. This Court is of the firm opinion that the concurrent findings recorded by the authorities cannot be interfered with in exercise of power under Article 226/227 of the Constitution of India.

9.3. In the said reported case, this Court at paragraph 10 observed that "*The Authority cannot initiate a proposal from its side in assumption of leave application from the delinquent or employee concerned to treat the period as leave due and admissible affecting the delinquent by way of consuming accrued leave in favour of the employee concerned without any fault on his part". Observing thus, this Court following Samir Kumar Mitra Vrs. State of Odisha, W.P.(C) No.20827 of 2016, disposed of on 25.08.2016, held that "in absence of any provision under OCS (CCA) Rules, 1962, the decision of the authorities to treat the period of suspension as leave due is not permissible*".

9.4. Nonetheless, in the present set of facts and having glance at Rule 12(6) of the OCS (CCA) Rules, which is framed in exercise of power conferred by proviso to Article 309 of the Constitution of India, it is unequivocal that the Disciplinary Authority, while passing final order of punishment "shall give directions about the treatment of the period of suspension".

9.5. This Court is conscious of interpretation of the word "shall" used in statute. It may be apt to refer to few cases on the point. In *C. Bright Vrs. District Collector, (2020) 7 SCR 997*, it has been reiterated that, a well-settled rule of interpretation of

the statutes is that the use of the word "shall" in a statute, does not necessarily mean that in every case it is mandatory that unless the words of the statute are literally followed, the proceeding or the outcome of the proceeding, would be invalid. It is not always correct to say that if the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid and 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. The principle of literal construction of the statute alone in all circumstances without examining the context and scheme of the statute may not serve the purpose of the statute. In *S. Siba Rao Vrs. Nabin Mahakur, 2011 (I) ILR-CUT 946 (Ori) = 2011 (Supp.-II) OLR 910 (Ori)* this Court has observed referring to State of U.P. Vrs. Babu Ram, AIR 1961 SC 751 that the use of word "shall" raises presumption that particular provision is imperative. The word "shall" is ordinarily mandatory but it is sometimes not so interpreted if the context or intention otherwise demands. See, *Sainik Motor Vrs. State of Rajasthan, AIR 1961 SC 1480*. When the statute uses 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. Refer, *Govindlal Chagganlal Patel Vrs. Agriculture Produce Market Committee, AIR 1976 SC 263*.

9.6. It is trite that when a discretion is vested in an Authority to exercise a particular power, the same is required to be exercised with due diligence, and in reasonable, prudent and rational manner. The Disciplinary Authority, before passing final order on quantum of penalty/punishment issued second show cause notice, and upon consideration of evidence on record and explanation proffered by the petitioner, passed the final order. Therefore, it is perceived by this Court that on rational application mind and adhering to the procedure, by a speaking order the punishment has been inflicted which got confirmed not only in the Appeal but also in the Revision preferred at the behest of the petitioner.

9.7. The Disciplinary Authority has taken into consideration the evidence led and material forming part of the Enquiry Report to return a finding that the charges levelled against the petitioner stand proved. It is not in dispute that the Superintendent of Police, Rourkela is the Disciplinary Authority and he is competent to impose penalty. When the nature of penalties enumerated in the OCS (CCA) Rules contained one of the penalties as "suspension", and Rule 12(6) of the OCS (CCA) Rules read with Rule 841 of the Odisha Police Manual Rules confers power on the Disciplinary Authority to give directions about the treatment of the period of suspension, the competent authority having decided to direct for treating the period of suspension from 07.07.2010 to 26.11.2010 "as such", this Court finds no infirmity or illegality in imposing such penalty bearing in mind the nature of delinquency, *viz*. "misconduct" and "dereliction of duty".

Scope of judicial review in exercise of power under Article 226/227 of the Constitution of India:

10. This Court, in the aforesaid emerging factual matrix, need not go into the details of evidence to upset the settled factual position as that is not required while sitting in this jurisdiction under Article 226/227 of the Constitution of India.

10.1. Thus, in exercise of power under Articles 226 and 227 of the Constitution of India, this Court is not required to re-examine the evidence to find out as to whether the conclusion arrived at by the Disciplinary Authority or by the Appellate Authority is right or wrong. It is only required to examine as to whether the correct procedure has been followed and the principles of natural justice have been applied.

10.2. The guidelines as propounded in *Union of India Vrs. P. Gunasekaran*, *AIR 2015 SC 545*, are culled out hereunder:

> *"The High Court, in exercise of its powers under Article 226/227 of the Constitution of India, shall not venture into re-appreciation of the evidence. The High Court can only see whether:*
> *a. the enquiry is held by a competent authority;*
> *b. the enquiry is held according to the procedure prescribed in that behalf;*
> *c. there is violation of the principles of natural justice in conducting the proceedings;*
> *d. the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;*
> *e. the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;*
> *f. the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;*
> *g. the disciplinary authority had erroneously failed to admit the admissible and material evidence;*
> *h. the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;*
> *i. the finding of fact is based on no evidence.*
>
> *Under Article 226/227 of the Constitution of India, the High Court shall not:*
>
> *(i). re-appreciate the evidence;*
> *(ii). interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;*
> *(iii). go into the adequacy of the evidence;*
> *(iv). go into the reliability of the evidence;*
> *(v). interfere, if there be some legal evidence on which findings can be based.*
> *(vi). correct the error of fact however grave it may appear to be;*
> *(vii). go into the proportionality of punishment unless it shocks its conscience."*

10.3. In the case of *State of Andhra Pradesh Vrs. S. Sree Rama Rao, AIR 1963 SC 1723*, the Hon'ble Supreme Court made the following observations:

> *"The High Court is not constituted in a proceeding under Article 226 of the Constitution a Court of appeal over the decision of the authorities holding a departmental enquiry against a public servant: it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted*

and which evidence may reasonably support the conclusion that the delinquent Officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence. The High Court may undoubtedly interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or; where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, or on similar grounds. But the departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226 of the Constitution."

10.4. Having noticed aforesaid observation in *S. Sree Rama Rao (supra), in Ram Lal Bhaskar Vrs. State Bank of India, (2011) 12 SCR 1036*, it has been enunciated as follows:

*"**Thus, in a proceeding under Article 226 of the Constitution, the High Court does not sit as an Appellate Authority over the findings of the disciplinary authority and so long as the findings of the disciplinary authority are supported by some evidence the High Court does not re-appreciate the evidence and come to a different and independent finding on the evidence**. This position of law has been reiterated in several decisions by this Court which we need not refer to, and yet by the impugned judgment the High Court has re-appreciated the evidence and arrived at the conclusion that the findings recorded by the enquiry officer are not substantiated by any material on record and the allegations levelled against the respondent No.1 do not constitute any misconduct and that the respondent No.1 was not guilty of any misconduct."*

10.5. Pertinent here to have regard to the following observations made in *State of Karnataka Vrs. N. Gangaraj, (2020) 1 SCR 616*:

"8. In State of Andhra Pradesh Vrs. S. Sree Rama Rao, AIR 1963 SC 1723, a three Judge Bench of this Court has held that the High Court is not a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant. It is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. The Court held as under:

*'7. *** The High Court is not constituted in a proceeding under Article 226 of the Constitution a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant: it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence….'*

9. In B.C. Chaturvedi Vrs. Union of India, (1995) 6 SCC 749, again, a three Judge Bench of this Court has held that power of judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eyes of the court. ***The Court/Tribunal in its power of judicial review does not act as an appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence****. It was held as under:*

'12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. ***When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence****. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.*

13. The disciplinary authority is the sole judge of facts. Where appeal is presented, the Appellate Authority has co-extensive power to re-appreciate the evidence or the nature of punishment. In a disciplinary inquiry the strict proof of legal evidence and findings on that evidence are not relevant. ***Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal****. In Union of India Vrs. H.C. Goel, (1964) 4 SCR 781, this Court held at page 728 that if the conclusion, upon consideration of the evidence, reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could be issued.'*

10. In High Court of Judicature at Bombay through its Registrar Vrs. Shashikant S. Patil, (2000) 1 SCC 416, this Court held that ***interference with the decision of departmental authorities is permitted if such authority had held proceedings in violation of the principles of natural justice or in violation of statutory regulations prescribing the mode of such enquiry while exercising jurisdiction under Article 226 of the Constitution****. It was held as under:*

'16. The Division Bench of the High Court seems to have approached the case as though it was an appeal against the order of the administrative/disciplinary authority of the High Court. Interference with the decision of departmental authorities can be permitted,

while exercising jurisdiction under Article 226 of the Constitution if such authority had held proceedings in violation of the principles of natural justice or in violation of statutory regulations prescribing the mode of such enquiry or if the decision of the authority is vitiated by considerations extraneous to the evidence and merits of the case, or if the conclusion made by the authority, on the very face of it, is wholly arbitrary or capricious that no reasonable person could have arrived at such a conclusion, or grounds very similar to the above. But we cannot overlook that the departmental authority (in this case the Disciplinary Committee of the High Court) is the sole judge of the facts, if the enquiry has been properly conducted. ***The settled legal position is that if there is some legal evidence on which the findings can be based, then adequacy or even reliability of that evidence is not a matter for canvassing before the High Court in a writ petition filed under Article 226 of the Constitution.****'*

11. In State Bank of Bikaner and Jaipur Vrs. Nemi Chand Nalwaya, (2011) 4 SCC 584, this Court held that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be ground for interfering with the findings in departmental enquiries. The Court held as under:

'7. ***It is now well settled that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries****. Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether a tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record. Courts will however interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala fide or based on extraneous considerations. (vide B.C. Chaturvedi Vrs. Union of India, (1995) 6 SCC 749, Union of India Vrs. G. Gunayuthan, (1997) 7 SCC 463, and Bank of India Vrs. Degala Suryanarayana, (1999) 5 SCC 762, High Court of Judicature at Bombay Vrs. Shashi Kant S Patil, (2001) 1 SCC 416).'*

***

12. The fact that the criminal court subsequently acquitted the respondent by giving him the benefit of doubt, will not in any way render a completed disciplinary proceedings invalid nor affect the validity of the finding of guilt or consequential punishment. The standard of proof required in criminal proceedings being different from the standard of proof required in departmental enquiries, the same charges and evidence may lead to different results in the two proceedings, that is, finding of guilt in departmental proceedings and an acquittal by giving benefit of doubt in the criminal proceedings. This is more so when the departmental proceedings are more proximate to the incident, in point of time, when compared to the criminal proceedings. The findings by the criminal court will have no effect on previously concluded domestic enquiry. An employee who allows the findings in the enquiry and the punishment by the disciplinary authority to attain finality by non-challenge, cannot after several years, challenge the decision on the ground that subsequently, the criminal court has acquitted him.

***

14. On the other hand learned counsel for the respondent relies upon the judgment reported as Allahabad Bank Vrs. Krishna Narayan Tewari, 2017 2 SCC 308, wherein this Court held that if the disciplinary authority records a finding that is not supported by any evidence whatsoever or a finding which is unreasonably arrived at, the Writ Court could interfere with the finding of the disciplinary proceedings. We do not find that even on touchstone of that test, the Tribunal or the High Court could interfere with the findings recorded by the disciplinary authority. It is not the case of no evidence or that the findings are perverse. The finding that the respondent is guilty of misconduct has been interfered with only on the ground that there are discrepancies in the evidence of the Department. The discrepancies in the evidence will not make it a case of no evidence. The Inquiry Officer has appreciated the evidence and returned a finding that the respondent is guilty of misconduct.

15. The disciplinary authority agreed with the findings of the enquiry officer and had passed an order of punishment. An appeal before the State Government was also dismissed. ***Once the evidence has been accepted by the departmental authority, in exercise of power of judicial review, the Tribunal or the High Court could not interfere with the findings of facts recorded by reappreciating evidence as if the Courts are the Appellate Authority****. We may notice that the said judgment has not noticed larger bench judgments in S. Sree Rama Rao and B.C. Chaturvedi as mentioned above. Therefore, the orders passed by the Tribunal and the High Court suffer from patent illegality and thus cannot be sustained in law. Accordingly, appeal is allowed and orders passed by the Tribunal and the High Court are set aside and the order of punishment imposed is restored."*

10.6. The Hon'ble Supreme Court in the case of State of Haryana Vrs. Rattan Singh, (1977) 2 SCC 491 while dealing with standard of proof and evidence applicable in the domestic inquiry, held as under:

*"4. It is well settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. 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. It is true that departmental authorities and administrative tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act. For this proposition it is not necessary to cite decisions nor text books, although we have been taken through case law and other authorities by counsel on both sides. The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fair play is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiate the conclusions reached, such finding, even though of a domestic tribunal, cannot be held good. *** The simple point is, was there some evidence or was there no evidence not in the sense of the technical rules governing regular court proceedings but in a fair common-sense way as men of understanding and wordly wisdom will accept.* ***Viewed in this way, sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny. Absence of any evidence in support of a ending is certainty available for the court to look into because it amounts to an error of law apparent on the record****.*

****"*

10.7. The Supreme Court in the case of *M.V. Bijlani Vrs. Union of India, (2006) 5 SCC 88* laid down as under:

> *"25.* ***It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidences to prove the charge. Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e., beyond all reasonable doubts, we cannot lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record****. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."*

10.8. Following observation in *General Manager (Operations), State Bank of India Vrs. R. Periyasamy, (2015) 3 SCC 101* may be relevant:

> *"11. It is interesting to note that the learned Single Judge went to the extent of observing that the concept of preponderance of probabilities is alien to domestic enquiries. On the contrary, it is well known that the standard of proof that must be employed in domestic enquiries is in fact that of the preponderance of probabilities. In Union of India Vs. Sardar Bahadur, (1972) 4 SCC 618 this Court held that a disciplinary proceeding is not a criminal trial and thus, the standard of proof required is that of preponderance of probabilities and not proof beyond reasonable doubt. This view was upheld by this Court in State Bank of India Vrs. Ramesh Dinkar Punde, (2006) 7 SCC 212****. More recently, in State Bank of India Vs. Narendra Kumar Pandey, (2013) 2 SCC 740, this Court observed that a disciplinary authority is expected to prove the charges levelled against a bank-officer on the preponderance of probabilities and not on proof beyond reasonable doubt.****"*

10.9. In *Union of India Vrs. Ex. Constable Ram Karan, (2022) 1 SCC 373*, the Hon'ble Supreme Court made the following pertinent observations :

> *"23. The well-ingrained principle of law is that it is the disciplinary authority, or the appellate authority in appeal, which is to decide the nature of punishment to be given to the delinquent employee. Keeping in view the seriousness of the misconduct committed by such an employee, it is not open for the courts to assume and usurp the function of the disciplinary authority.*
>
> *24. Even in cases where the punishment imposed by the disciplinary authority is found to be shocking to the conscience of the court, normally the disciplinary authority or the appellate authority should be directed to reconsider the question of imposition of penalty. The scope of judicial review on the quantum of punishment is available but with a limited scope.* ***It is only when the penalty imposed appears to be shockingly disproportionate to the nature of misconduct that the courts would frown upon. Even in such a case, after setting aside the penalty order, it is to be left to the disciplinary/appellate authority to take a call and it is not for the court to substitute its decision by prescribing the quantum of punishment****. However, it is only in rare and exceptional cases where the court might to shorten the litigation may think of substituting its own view as to the quantum of punishment in place of punishment awarded by the competent authority that too after assigning cogent reasons."*

10.10. In the case of *Union of India Vrs. Subrata Nath, (2022) 18 SCR 605* the Hon'ble Supreme Court of India laid down the circumstance under which there is scope for exercise of power under Article 226/227 of the Constitution of India:

> *"22. To sum up the legal position, being fact finding authorities, both the Disciplinary Authority and the Appellate Authority are vested with the exclusive power to examine the evidence forming part of the inquiry report. On finding the evidence to be adequate and reliable during the departmental inquiry, the Disciplinary Authority has the discretion to impose appropriate punishment on the delinquent employee keeping in mind the gravity of the misconduct. However, in exercise of powers of judicial review, the High Court or for that matter, the Tribunal cannot ordinarily reappreciate the evidence to arrive at its own conclusion in respect of the penalty imposed unless and until the punishment imposed is so disproportionate to the offence that it would shock the conscience of the High Court/Tribunal or is found to be flawed for other reasons, as enumerated in P. Gunasekaran (supra). If the punishment imposed on the delinquent employee is such that shocks the conscience of the High Court or the Tribunal, then the Disciplinary/ Appellate Authority may be called upon to re-consider the penalty imposed. Only in exceptional circumstances, which need to be mentioned, should the High Court/Tribunal decide to impose appropriate punishment by itself, on offering cogent reasons therefor."*

10.11. As the authorities have settled the facts by analysing the evidence on record with due adherence to the principles of natural justice *qua* the petitioner, this Court desists to interfere with the Order dated 14.03.2012 of the Disciplinary Authority (Annexure-5) as affirmed in Order in Appeal dated 10.12.2013 (Annexure-7), and revision against such appellate order got confirmed vide Order dated 23.01.2015 (Annexure-9). Consequently, it is needless to say that this Court has no scope to show indulgence in charge *vide* Annexure-1 as sought to be quashed by the petitioner.

CONCLUSION:

11. Whereas the Disciplinary Authority has accepted the findings recorded in the Enquiry Report and imposed penalty/punishment based on testimony of the witnesses more particularly the S.F. Havildar having denied that the petitioner had intimated him before leaving, there is little scope to interfere with finding of fact. In furtherance thereto, the appeal and the revision carried against such imposition of penalty, after consideration of the second show cause reply of the petitioner by the Disciplinary Authority, stood dismissed. Thus, this Court is not inclined to interfere with the concurrent finding of fact.

11.1. Though the petitioner was instructed to be alert on 07.07.2010 on account of bundh call by CPI (Maoists), he left the station without any intimation. The plea of the petitioner that he intimated S.F. Havildar has been stoutly denied by said Havildar in his statement recorded vide Annexure-C/3 to the counter filed by the opposite parties. Such fact remained uncontroverted by the petitioner. Therefore, the finding of fact of the Disciplinary Authority being affirmed by the Appellate Authority as also the Revisional Authority, the penalty/punishment cannot be said

to be without evidence on record. The petitioner having not demonstrated perversity of factual adjudication by the authorities concerned, the writ petition is liable to be dismissed.

11.2. The legal issue that the Disciplinary Authority was not competent to award punishment of treating period of suspension "as such" in addition to "black mark", as sought to be agitated by Ms. Babita Kumari Pattnaik, learned Advocate for the petitioner, is liable to be repelled for the reason that:

> (a) Neither such plea was raised before the Disciplinary Authority nor before the Appellate Authority or the Revisional Authority.
>
> (b) Be that as it may, the provisions of the OCS (CCA) Rules read in harmony with the Odisha Police Manual Rules it is manifest that the Disciplinary Authority was required to pass orders with regard to effect of suspension while passing final orders.
>
> (c) In the case at hand, the Disciplinary Authority having taken into consideration the Statements of witnesses recorded, especially the Statement of Striking Force Havildar (Annexure-C/3 enclosed to the counter filed by the opposite parties), it could not be stated that the finding of fact is based on no evidence. Given the legal position as enunciated, this Court does feel it inept to show indulgence in the concurrent finding of fact, as the petitioner has failed to show any perversity in coming to such conclusion by the authorities concerned on the basis of material available on record.
>
> (d) Bereft of the above, it may be stated that the relevant rules as referred to herein above clearly envisaged order to be passed with respect to treatment of period of suspension. Therefore, the argument of the counsel for the petitioner that in addition to "black mark", the period of suspension could not be treated "as such" cannot hold water.

12. The suspension period, i.e., from 07.07.2010 to 26.11.2010 being directed to be treated "as such", the petitioner was considered as not on duty during that period.

12.1. In *Rajkot Municipal Corporation Vrs. Manjulben Jayantilal Nakum, (1997) 9 SCC 552*, it has been observed that 'duty' is "an obligation recognized by law to avoid conduct fraught with unreasonable risk of damage to others".

12.2. In *V.V. Narayana Chetty Vrs. Narrappareddigari Venkata Reddi, AIR 1963 AP 452*, the Court ascribed the meaning of the "duty" based on dictionary as "Action or an act, that is due in the way of moral or legal obligation; that which one ought or is bound to do; an obligation". Thus, as expression "duty" denotes, one cannot refuse to perform the act, but is bound to do it. Therefore, 'duty' is an act that is due to be performed by virtue of moral or legal obligation; that which one ought or is bound to do the official function.

12.3. The Armed Police Reserve Constables in Striking Force are expected to adhere to strict code of conduct and follow orders promptly, especially in situations where public safety and security are at risk. Failure to comply with instructions during critical times can jeopardize operations, compromise the safety of the public, and undermine the credibility of the police force. Therefore, such behaviour is likely to be viewed seriously within a disciplined organization like the police, where adherence

to protocols and discipline are paramount. It is essential for law enforcement agencies to maintain high standards of discipline and professionalism to effectively carry out their duties and responsibilities. Any act of insubordination or negligence that hinders the operational effectiveness of the police force can have serious repercussions, both in terms of public trust and organizational integrity. As such, instances of misconduct, such as being absent during a critical alert period, may warrant disciplinary action to uphold the standards of the organization and ensure accountability among its members.

12.4. In a disciplined organization like the police, remaining absent when asked to remain alert due to *bundh* call given by CPI (Maoists) has seemly been considered misconduct and dereliction of duty by the Disciplinary Authority. The petitioner, in the instant case, cannot be treated leniently due to the serious implications it can have on operational efficiency and public safety. Upholding discipline and adherence to protocols are essential aspects of maintaining the credibility and effectiveness of law enforcement agencies.

12.5. It is fairly well settled [see, *State of Rajasthan Vrs. B.K. Meena, (1996) 6 SCC 417*] that the approach and objective in criminal proceedings and the disciplinary proceedings are altogether distinct and different. In the disciplinary proceedings the preliminary question is whether the employee is guilty of such conduct as would merit action against him; whereas in criminal proceedings the question is whether the offences registered against him are established and if established what sentence should be imposed upon him. The standard of proof, the mode of enquiry and the rules governing the enquiry and trial are conceptually different.

12.6. In case of disciplinary enquiry the technical rules of evidence have no application. The doctrine of "proof beyond doubt" has no application. Preponderance of probabilities and some material on record are necessary to arrive at the conclusion whether or not the delinquent has committed misconduct.

12.7. While exercising jurisdiction under Article 226 of the Constitution this Court does not act as an appellate authority. Its jurisdiction is circumscribed by limits of judicial review to correct errors of law or procedural errors leading to manifest injustice or violation of principles of natural justice. Judicial review is not akin to adjudication of the case on merits as an Appellate Authority. As observed in *R.S. Saini Vrs. State of Punjab, (1999) 8 SCC 90*, the scope of interference is rather limited and has to be exercised within the circumscribed limits. It was noted as follows:

> *"16. Before adverting to the first contention of the appellant regarding want of material to establish the charge, and of non-application of mind, we will have to bear in mind the rule that the court while exercising writ jurisdiction will not reverse a finding of the inquiring authority on the ground that the evidence adduced before it is insufficient. If there is some evidence to reasonably support the conclusion of the inquiring authority, it*

is not the function of the Court to review the evidence and to arrive at its own independent finding. The inquiring authority is the sole judge of the fact so long as there is some legal evidence to substantiate the finding and the adequacy or reliability of the evidence is not a matter which can be permitted to be canvassed before the Court in writ proceedings.

17. A narration of the charges and the reasons of the inquiring authority for accepting the charges, as seen from the records, shows that the inquiring has based its conclusions on materials available on record after considering the defence put forth by the appellant and these decisions, in our opinion, have been taken in a reasonable manner and objectively. The conclusion arrived at by the inquiring authority cannot be termed as either being perverse or not based on any material nor is it a case where there has been any non-application of mind on the part of the inquiring authority. Likewise the High Court has looked into the material based on which the enquiry officer has come to the conclusion, within the limited scope available to it under Article 226 of the Constitution and we do not find any fault with the findings of the High Court in this regard."

12.8. As noted above, the plea of the petitioner that he had intimated Striking Force Havildar to proceed to attend medical exigency was denied in the cross-objection of the Havildar and no further material has been placed on record to contradict such statement of said Havildar. The authorities-opposite parties have found that there was lapse on the part of the petitioner. The petitioner, a Constable, was instructed to remain alert on 07.07.2010, but he had shown dereliction in discharging his duty entrusted to him. The nature of his work demands vigilance with the inbuilt requirement to act carefully. Any carelessness invites action.

12.9. In the wake of aforesaid, this Court considers it apposite to restrict itself from exercising extraordinary jurisdiction under Article 226/227 of the Constitution of India by showing indulgence in the matter where not only the Orders of the Disciplinary Authority got confirmed in the Appellate Authority, but also the revision preferred by the petitioner suffered rejection.

13. In the instant case, it is the concurrent finding of the opposite parties-authorities that there was failure to fulfil assigned responsibilities, leading to breach of trust having impact on service delivery and violation of rules to hold that the petitioner was found guilty of "misconduct" and "dereliction of duty". Thus, understood, these key elements being essential for ensuring accountability and upholding ethical standards in public service, there appears no flaw in imposing appropriate penalty/punishment.

13.1. In *State of Maharashtra Vrs. Digambar, (1955) 4 SCC 683*, while dealing with exercise of power of the High Court under Article 226 of the Constitution, the Court observed that power of the High Court to be exercised under Article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy. It is for that reason, a person's entitlement for relief from a High Court under Article 226 of the Constitution, be it against the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to necessarily depend upon unblameworthy conduct of the person seeking relief, and

the court refuses to grant the discretionary relief to such person in exercise of such power, when he approaches it with unclean hands or blameworthy conduct.

13.2. Where the employee who is unauthorisedly absent from duty and fails to offer any satisfactory explanation, the employer is competent to take recourse to disciplinary action in regard to the unauthorized absence. Such disciplinary proceedings may lead to imposition of punishment ranging from a major penalty like dismissal or removal from service to a minor penalty like withholding of increments without cumulative effect. The extent of penalty will depend upon the nature of service, the position held by the employee, the period of absence and the cause/explanation for the absence. See, *State of Punjab Vrs. Dr. P.L. Singla, (2008) 8 SCC 469*.

13.3. In *Chennai Metropotan Water Supply and Sewerage Board Vrs. T.T. Murali Babu, (2014) 1 SCR 987*, the Hon'ble Supreme Court discussed the "doctrine of proportionality" with the following observations:

> *"27. Presently, we shall proceed to scrutinize whether the High Court is justified in applying the doctrine of proportionality. Doctrine of proportionality in the context of imposition of punishment in service law gets attracted when the court on the analysis of material brought on record comes to the conclusion that the punishment imposed by the Disciplinary Authority or the appellate authority shocks the conscience of the court. In this regard a passage from Indian Oil Corporation Ltd. and another Vrs. Ashok Kumar Arora, (1997) 3 SCC 72 is worth reproducing:*
>
> *'At the outset, it needs to be mentioned that the High Court in such cases of departmental enquiries and the findings recorded therein does not exercise the powers of appellate court/authority. The jurisdiction of the High Court in such cases is very limited for instance where it is found that the domestic enquiry is vitiated because of non-observance of principles of natural justice, denial of reasonable opportunity; findings are based on no evidence, and/or the punishment is totally disproportionate to the proved misconduct of an employee.'*
>
> *28. In Union of India and another Vrs. G. Ganayutham, (1997) 7 SCC 463, the Court analysed the conception of proportionality in administrative law in England and India and thereafter addressed itself with regard to the punishment in disciplinary matters and opined that unless the court/tribunal opines in its secondary role that the administrator was, on the material before him, irrational according to Associated Provincial Picture Houses Ltd. Vrs. Wednesbury Corpn., (1948) 1 KB 233 = (1947) 2 All ER 680 and Council of Civil Service Unions Vrs. Minister for Civil Service, 1985 AC 374 = (1984) 3 All ER 935 norms, the punishment cannot be quashed.*
>
> *29. In Chairman-cum-Managing Director, Coal India Limited and another Vrs. Mukul Kumar Chaudhuri and others, (2009) 15 SCC 620, the Court, after analyzing that the doctrine of proportionality at length, ruled thus:*
>
> *'19. The doctrine of proportionality is, thus, well-recognised concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain and sole power of the decision-maker to quantify punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a manner which is out of proportion to the fault. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review.*

*20. One of the tests to be applied while dealing with the question of quantum of punishment would be: would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment.' ***"*

13.4. Judged on the anvil of the aforesaid premises, it would not be correct approach for this Court to interfere with the penalty/punishment imposed on the petitioner for proved charge of "misconduct" and "dereliction of duty".

14. For the reasons ascribed supra and in the light of discussions made in the foregoing paragraphs and bearing in mind the limited scope of judicial review, it would be right in upholding the orders of punishment/ penalties as inflicted by the Disciplinary Authority, which has been affirmed in the Appeal as also the revision. This Court finds no reason to differ from the conclusions of the opposite parties.

15. The writ petition, sans merit, is liable to be dismissed.

16. In the result, this writ petition stands dismissed, but in the circumstances, there shall be no order as to costs.

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2024 (I) ILR-CUT-1417

SANJAY KUMAR MISHRA, J.

W.P.(C) NO. 3827 OF 2016

T. NAGIN KUMAR SENAPATI ……Petitioner

-V-

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

ODISHA PUBLIC DISTRIBUTION SYSTEM (CONTROL) ORDER, 2008 – Clause 14(1), 14(3) – Whether it is obligatory on the part of licensing authority to supply the notice/report basing upon which the authority decided to issue the order of suspension? – Held, No – The clause 14(3) provides no prior notice is necessary before passing any order.

(Para 11)

Case Law Relied on and Referred to :-

1. 2010 (I) OLR 446 : Saroj Kumar Tripathy vs. Collector, Sambalpur & Ors.

For Petitioner : Mr. Mr. A.K. Patra

For Opp.Parties : Mr. J. Katikia, AGA

JUDGMENT Date of Hearing and Judgment : 26.02.2024

S.K.MISHRA, J.

1. This writ petition has been preferred with a prayer to quash the order of suspension dated 06.08.2015 as at Annexure-3, vide which the Opposite Party No.2

(Collector, Ganjam) ordered to suspend the wholesale kerosene license of the Petitioner. A further prayer has been made to pass an order directing the authority concern to allow the Petitioner to continue as kerosene wholesale dealer in his place of business at Rambha.

2. Opposing to the said prayer made in the writ petition, the State has filed the Counter Affidavit, in response to which the Petitioner has also filed the Rejoinder Affidavit.

3. Mr. Patra, learned Counsel for the Petitioner drawing attention of this Court to the impugned order dated 06.08.2015 as at Annexure-3 submits, in terms of Clause-14 (3) of the Odisha Public Distribution System (Control) Order, 2008, shortly, "Control Order, 2008", even though a proceeding is initiated against the dealer in terms of Clause 14 (1) of the said Control Order, 2008, it is obligatory on the part of the licensing authority to be satisfied that during pendency of the said proceeding, it may not be in the interest of the smooth operation of the Public Distribution System to allow the dealer to handle the PDS stocks. But, while issuing the impugned order dated 06.08.2015, no reason has been assigned in the said order.

4. Mr. Patra further submits, though on the very same day a show cause notice was issued to the Petitioner for cancelation of his license for alleged contravention of various clauses under the Control Order, 2008, till date no communication has been made to the Petitioner regarding the outcome of the said proceeding initiated against the Petitioner, for which he was debarred from preferring an appeal in terms of Clause-17 of the Control Order, 2008, which is akin to the Clause-19 of the OPDS (Control) Order, 2016.

5. Mr. Patra submits, no reason was assigned before issuing the order of suspension in terms of Clause-14 (3) of the Control Order, 2008. Unless the licensing authority is satisfied that the conduct of the dealer is such that the smooth operation of the Public Distribution System may hamper, no order can be passed in terms of Clause-14 (3) of the Control Order, 2008. Since, the impugned order is lacking with such observation, the same being contrary to the provision/pre-condition enshrined under Clause- 14 (3) of the Control Order, 2008, deserves interference, despite there being provision of appeal prescribed under clause-17 of the Control Order, 2008.

6. Mr. Patra submits, even though there is a mention regarding the satisfaction of the authority concern, as indicated in the office order dated 06.08.2015, but the so called report was never supplied to the Petitioner. Further, the said report has not been enclosed to the Counter Affidavit filed by the State, based on which the licensing authority allegedly being satisfied, ordered for suspension of the license of the Petitioner. Relying on the order of this Court in ***Saroj Kumar Tripathy vs. Collector, Sambalpur & Ors.*** reported in 2010 (I) OLR 446, Mr. Patra further submits, the writ court has jurisdiction to deal with the grievance of the Petitioner.

7. In response to such submission made by the learned Counsel for the Petitioner, Mr. Katikia, learned AGA for the State-Opposite Parties, drawing attention of this Court to the Office Order dated 06.08.2015 submits, the Collector & Licensing Authority, Ganjam, Chhatrapur, while passing such order has categorically mentioned that on being satisfied by the Report, ordered for suspension of the license in terms of Clause-14 (3) of the Control Order, 2008 with immediate effect and it is incorrect to say that there is no such observation made in the impugned suspension order date 06.08.2015.

8. Mr. Katikia further submits, the suspension of license can be in vogue till the validity period of license, which ended on 31.03.2016. Hence, by efflux of time, the writ petition has become infructuous. He further submits, though no specific stand has been taken in the Counter Affidavit, in view of the provisions enshrined under Clause-17 (2) of the Control Order, 2008, instead of preferring an appeal against the suspension order dated 06.08.2015, the Petitioner has approached the writ court. Hence, the writ petition is not maintainable.

9. Mr. Katikia submits, for the first time such a point is being agitated by the learned Counsel for the Petitioner regarding nonsupply of Report, based on which the Collector, being satisfied, passed the order of suspension. No ground has been taken in the writ petition that because of non-supply of report so also non fulfillment of the pre-condition enshrined under Clause-14 (3) as to the order of suspension is bad. Hence, there was no occasion on the part of the State to disclose the said report in the counter based on which the licensing Authority issued office order dated 06.08.2015 ordering to suspend the wholesale SK Oil License issued in favour of M/s Senapati Traders, Rambha. The stand of non disclosing the said report in the Counter Affidavit is also misconceived.

10. In view of such submission made by the learned Counsel for the parties, it would be apt to reproduce below the Clause-14 (1), 14 (3) and 17 of the OPDS (Control) Order, 2008.

> 14. **Contravention of conditions of licence or Control orders**. - (1) No holder of a licence issued under this order, or his agent or servant or any other person acting on his behalf or placed by him in physical charge of stock shall contravene any of the terms or conditions of the licence or of any Control Order issued under the Essential Commodities Act. If any such person contravenes any of the said terms or conditions, without prejudice to any other action that may be taken against him/her, the license shall be cancelled and the security deposit may be forfeited in full or in part:
>
> Provided that no order shall be made under this clause unless the licensee has been given a reasonable opportunity of stating his case and if he desires of personal hearing against the proposed cancellation and forfeiture.
>
> XXX XXX XXX
>
> (3) The licensing authority may by a written order, **suspend the license of a dealer, if a proceeding under subclause (1) of this clause has been initiated against the dealer, and the said licensing authority is satisfied that it is not in the interest of the smooth**

operation of the Public Distribution System to allow the dealer to handle the PDS stocks. No prior notice will be necessary before passing any order under this subclause.

Explanation. - For the purpose of this sub-clause, **the proceedings under Sub-clause (1) shall be deemed to have been initiated on the date of issue of the show-cause notice by the licensing authority.**

17. **Appeal**. - (1) All appeals under this order shall lie before the Appellate Authority.

(2) **Any person aggrieved by an order of the Licensing Authority** refusing to grant or renew or reissue a licence **or suspending** or cancelling a licence or forfeiting the security deposit or withholding the allocation of quota under the provisions of this order **may prefer an appeal before the Appellate Authority within thirty days of the date of receipt of the order.**

(3) The memorandum of appeal should be accompanied by a copy of the license of the appellant and a copy of the order appealed against.

(4) Any appeal preferred after the expiry of the aforesaid period may be summarily rejected by the Appellate Authority.

(5) No such appeal shall be disposed of unless the aggrieved person has been given a reasonable opportunity of stating his/her case in writing and being heard in person.

(6) **Pending disposal of an appeal, the Appellate Authority may direct that the order of the licensing authority, against which the appeal is preferred, shall not take effect until the appeal is disposed of. (Emphasis Supplied)**

11. Based on the submissions made by the learned Counsel for the parties as detailed above and on perusal of the provisions enshrined under Clause-14 & 17 of the Control Order, 2008, visa- vis the impugned office order dated 06.08.2015 as at annexure-3, this Court is of the view that there being no provision under Clause 14 (3) of the Act to supply the basis on which the authority concerned got satisfied before issuance of the order of suspension, the submission made by the learned Counsel for the Petitioner as to non supply of report and prayer for interference with the impugned order on the said ground is misconceived and not acceptable. Rather, the said clause provides, no prior notice is necessary before passing any order under Sub-clause-3 of Clause-14 before issuance of the suspension order.

12. In view of such specific provision, the Petitioner had no right to ask for a copy of the report, based on which the licensing authority, being satisfied, issued the impugned order dated 06.08.2015. Admittedly, show cause notice dated 06.08.2015 was issued to the Petitioner in terms of Clause 14 (1) of the Control Order, 2008. Proviso under the said clause mandates that no order shall be made under the said clause, unless the licensee has been given a reasonable opportunity of stating his case and if he so desires of personal hearing against the proposed cancellation & forfeiture, such opportunity has to be extended to the licensee.

13. Though there is no interim order staying further proceeding pursuant to show cause notice dated 06.08.2015 as at Annexure-3 and there was no legal bar to proceed further by the licensing authority pursuant to the said show cause notice dated 06.08.2015, till date no communication has been made to the Petitioner intimating him about outcome of the said proceeding. As the license was valid till

31.03.2016, this Court is of the view that the said proceeding initiated against the Petitioner U/s. 14 (1) of the Control Order, 2008 has become infructuous.

14. This Court is of further view that, since the license of the Petitioner was in vogue till 31.03.2016, the impugned order of suspension of his license was in force till the expiry of the licensing period and by efflux of time, the prayer made in the writ petition has also become infructuous and needs no interference.

15. However, it is made clear that this order will not prevent the Petitioner to approach the licensing authority for renewal of his wholesale SK Oil license bearing No.-08/ 2008-09. If the Petitioner approaches the authority concern for renewal of his license within four weeks hence, it shall be dealt with and disposed of by the Opposite Party No.2 (Collector, Ganjam) in terms of various provisions under the Odisha PDS (Control) Order, 2016, which is in vogue now, within a period of two months from the date of receipt of such application for renewal of license and the outcome of the same shall be communicated to the Petitioner within two weeks thereafter.

16. With the said observation, the writ petition stands disposed of.

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2024 (I) ILR-CUT-1421

SANJAY KUMAR MISHRA, J.

W.P(C) NO. 20160 OF 2019

THE Sr, BRANCH MANAGER, N.S.I.C. LTD, BBSR & ANR. ……Petitioners

-V-

THE DY. CHIEF LABOUR COMMISSIONER (CENTRAL), BHUBANESWAR-CUM-THE APPELLATE AUTHORITY & ORS. ……Opp.Parties

PAYMENT OF GRATUITY ACT, 1972 – Section 7(3), 73-A r/w Rule 3(3) of the N.S.I.C. Ltd (Control & Appeal Rules, 1968) – Whether the employer has a right to impose punishment of forfeiture of gratuity in a disciplinary proceeding? – Held, there is no such provision under the said rule to impose the punishment of forfeiture of gratuity – The said act of petitioner/employer is illegal and beyond the jurisdiction.

(Para 49)

Case Laws Relied on and Referred to :-

1. AIR 2020 SC 2978 : Chairman-cum-Managing Director, Mahanadi Coalfields Limited vs. Rabindranath Choubey
2. (2007) 1 SCC 663 : Jaswant Singh Gill vs. Bharat Cooking Co. Ltd.
3. (1997) 4 SCC 1 : Allahabad bank and others Vs. Deepak Kumar Bhola.
4. (2018) 9 SCC 529 : Union Bank of India & Ors. vs. C.G. Ajay Babu & Ors.

5. (2007) 1 SCC 663 : Jaswant Singh Gill vs. Bharat Cooking Coal Ltd. & Ors.
6. (1990) 4 SCC 314 : D.V. Kappor vs. Union of India & Ors.
7. (2003) 3 SCC 40 : H. Gangahanume Gowda vs. Karnataka Agro Industries Corpn. Ltd.
8. 2009 III LLJ 90 Kant : Karnataka State Road Transport Corp. & Anr. vs. Mahadev & Ors.
9. W.P(C) No.1572/2022 (High Court, Bombay) dt.19.08.2022 : The Chairman and Managing Director, Bank of Maharashtra & Ors. vs. Shri Kishore & Ors.
10. AIR 2009 SC 3121: General Manager Uttaranchal Jal Sansthan vs. Laxmi Devi & Ors.
11. 2015 AIR SCW 279 : B.A. Linga Reddy Etc. Etc. Vs. Karnataka State Transport Authority.
12. (2012) 3 SCC 495 : Madhya Pradesh Road Development Authority & Anr. Vs. L.G. Chaudhary Engineers & Contractors.
13. (2010) 5 SCC 513 : V Kishan Rao Vs. Nikhil Super Speciality Hospital & Anr.

For Petitioners : Mr. P.K. Jena
For Opp.Parties : Mr. R.D. Sarkar

JUDGMENT Date of Hearing : 20.12.2023 : Date of Judgment : 15.03.2024

S.K.MISHRA, J.

The Writ Petition has been preferred by the Employer- Corporation challenging the Order dated 12.11.2018 passed by the Controlling Authority-cum-Assistant Labour Commissioner (C), Bhubaneswar under Payment of Gratuity Act, 1972 (shortly, "P.G. Act" 1972) in Application Case No.36(03)/2018-B.III (Annexure-2). Vide the said order a direction was given to the Petitioners-Employer to pay the Opposite Party No.3 an amount of Rs.10,00,000/- along with simple interest @ 10% per annum for the period from 01.12.2016 till the date of payment. The said order being confirmed by the Order dated 26.09.2019 (Annexure-1) passed by the Appellate Authority under the P.G. Act, 1972 & Deputy Chief Labour Commissioner (Central), Bhubaneswar, is also under challenge.

2. The background facts, as detailed in the Writ Petition, are that the Opposite Party No.3 joined on 10.03.1981 as Lower Division Clerk (LDC) in the National Small Industries Corporation Ltd. at the Sub-Office, Patna, in the State of Bihar under the control of Regional Office, Kolkata of the Corporation. Thereafter, he was promoted from time to time. At the time of retirement, he was working as Manager, Sub-Branch, Balasore. On attaining the age of superannuation, the Opposite Party No.3 was superannuated from service w.e.f. 30.11.2016.

3. While working as Manager in the Sub-Branch of the Corporation at Bhubaneswar, just before his retirement, a disciplinary proceeding was contemplated against the Opposite Party No.3 by the Zonal General Manager (East) vide Order dated 24.08.2016. The Opposite Party No.3 was placed under suspension with immediate effect in terms of rule 4 of National Small Industries Corporation Limited (Control and Appeal Rules, 1968), shortly, "NSIC Ltd (C & A Rules, 1968)". On 24.11.2016, by order of the Disciplinary Authority i.e. the ZGM-SG (East), it was proposed to hold an enquiry against the Opposite Party No.3 under rule 8 of the NSIC Ltd (C & A Rules, 1968). The Opposite Party No.3 was directed to submit his written statement of defence so also to state as to whether he desires to be heard in person.

4. In response to the said charge-sheet, the Opposite Party No.3, by submitting his statement of defence dated 03.04.2017, denied the charges. Thereafter, the Disciplinary Authority, vide Order dated 12.09.2017, in exercise of power conferred under sub-rule (2) of rule 9 of the NSIC Ltd (C & A Rules, 1968), appointed an Enquiry Officer to enquire into the charges framed against the Opposite Party No.3.

5. In spite of several intimation and service of notices, the Opposite Party No.3 did not cooperate in the said enquiry. Rather, he sent letters dated 13.12.2017 and 23.07.2017 to the Inquiry Officer indicating therein that he being a retired employee of the Corporation cannot be proceeded against and the place of inquiry at New Delhi is against his wishes. In response to the said communication made by the Opposite Party No.3, the Inquiry Officer, vide Order dated 29.12.2017, recorded that rule 3 (3) of the NSIC Ltd (C & A Rules, 1968) is very clear on the subject as well as the rules and Policy of NSIC with regard to travel, lodging and boarding expenses and the charged employee intentionally and deliberately, showing ignorance of the same, writing so with the sole intention to delay the inquiry proceeding for indefinite period. In absence of the Opposite Party No.3, for his deliberate non-cooperation, the inquiry was proceeded ex-parte and finally, the same was concluded.

6. The Inquiry Officer submitted his report dated 20.02.2018 to the Disciplinary Authority with the finding that the charges laid down in Article of Charges I to VII are well proved against the Opposite Party No.3. The copy of the Inquiry Report was sent to the Opposite Party No.3 vide letter dated 20.02.2018 by the Disciplinary Authority providing him with an opportunity to submit his response to the said findings of the Inquiry Officer's Report, if any, within a period of fifteen days from the date of receipt of the said Report. The Opposite Party No.3 duly received the copy of the said Report and chose not to submit any response to the findings given by the Inquiry Officer, though various letters were sent by him opposing to the place of enquiry, jurisdiction of NSIC, etc.

7. The Disciplinary Authority dealt with the points raised by the Opposite Party No.3 and was finally convinced that the inquiry was conducted as per the prescribed procedure. The charges being grave and serious in nature, putting investment of the Corporation at greater risk, it was held that the Opposite Party No.3 is liable for major penalty. Accordingly, it was ordered to dismiss him from service w.e.f. 30.11.2016 i.e. the date of his superannuation and to forfeit his retiral dues i.e. gratuity and encashment of leave. In the said Order, the Disciplinary Authority made it clear that the Appellate Authority in the said case would be the Board of Directors.

8. It is further case of the Petitioners-Corporation that in course of service of Opposite Party No.3 as Manager (B.D.) in the Branch Office of the Corporation at Salt Lake, Kolkata, regarding involvement in financial irregularities, FIR was lodged in Bidhan Nagar P.S.Case No.161/16 dated 26.07.2016 under sections 420/ 406/408/409/467/468 and 120-B of the IPC. Upon investigation, charge sheet was

submitted by the CID, West Bengal, on 28.04.2018 against the Opposite Party No.3 and others, who are facing criminal charges in the Special Court of Additional District Judge, Barasat, in Case No.157 of 2018. In the said case, the Opposite Party No.3 was arrested and subsequently released on bail.

9. Thereafter, he approached the High Court of West Bengal at Kolkata in W.P.(C) No.25663 of 2017 assailing the initiation of disciplinary proceeding at New Delhi. However, the Kolkata High Court not being inclined to entertain such Application, the Opposite Party No.3 did not press the Writ Petition and withdrew the case on 15.02.2018 with liberty to file the case before the appropriate forum.

10. Thereafter, the Opposite Party No.3 approached the Central Administrative Tribunal, Kolkata Bench vide O.A. No.382/2018, which was filed on 19.03.2018, challenging the legality of the disciplinary proceeding initiated against him. Ultimately, the Tribunal, vide Order dated 13.06.2019, disposed of the case by observing that no statutory Appeal has been preferred against the penalty imposed by the Disciplinary Authority. Accordingly, the Opposite Party No.3 was given liberty to approach the Appellate Authority within four weeks from the date of receipt of the copy of the said Order, with a further direction to dispose of the said Appeal within a period of four weeks from the date of receipt of the said Order dated 13.06.2019. Liberty being so granted by the Tribunal, the Opposite Party No.3 preferred an Appeal before the Appellate Authority i.e. Board of NSIC, which is still pending for disposal.

11. When the matter stood thus, the Opposite Party No.3 approached the Controlling Authority under Payment of Gratuity Act, 1972 (present Opposite Party No.2) praying for release of the gratuity in his favour. The Petitioners-Corporation, being noticed, resisted the said prayer contending that the services of the Opposite Party No.3 were terminated for his involvement in financial irregularities amounting to Rs.173.50 crores. Hence, the Order of forfeiting gratuity by the Employer is justified. It was also contended before the Controlling Authority that when the matter regarding initiation of proceeding is pending before the Tribunal, any order passed by the Opposite Party No.2 (Controlling Authority) would lead to multiplicity of proceeding. Upon consideration of the materials on record and hearing the Parties, the Controlling Authority-Cum-Assistant Labour Commissioner, Bhubaneswar, vide Order dated 12.11.2018 directed the Petitioners-Corporation to pay Rs.10.00 lacs with simple interest @ 10% per annum over the principal gratuity amount for the period from 01.12.2016 till the date of payment with a further direction to pay the said amount within a period of 30 days from the date of receipt of the said Order.

12. Being aggrieved by the said order dated 12.11.2018 passed by the Opposite Party No.2, the Petitioners-Corporation preferred P.G. Appeal No.36 (431)/2018-B.I. before the Opposite Party No.1. However, without application of mind to the facts and law involved in the case, the Opposite Party No. 1 confirmed the order of

the Opposite Party No. 2 vide its Order dated 26.09.2019. Hence, this Writ Petition.

13. The Order passed by the Controlling Authority so also confirming Order passed by the Appellate Authority have been challenged basically on the following grounds:

i) The Petitioners-Corporation was justified to forfeit the gratuity of the Opposite Party No.3 as the Inquiry Officer submitted a report regarding fraud of Rs. 173.50 Crores committed by the accused persons, including the present Opposite Party No.3.

ii) The Opposite Party No.3 was very much in service while he was put under suspension on the allegation of financial irregularities. Only after service of charge sheet upon him on 24.11.2016, the Opposite Party No.3 was superannuated on 30.11.2016. In terms of rule 3(3) of the NSIC Ltd (C & A Rules, 1968), it will be deemed that the Opposite Party No.3 continued in service and the proceeding, which was instituted before his retirement, is allowed to be continued and concluded by the Authority after his retirement. So, the finding of the Authority under the P.G. Act, 1972 that such proceeding is technically not correct is untenable/ unsustainable in the eye of law.

iii) The Controlling Authority, so also Appellate Authority under the P.G. Act, 1972 have failed to appreciate that in course of departmental inquiry, several opportunities were provided to the Opposite Party No.3 in order to defend himself. However, he chose not to participate in the said proceeding and was set ex-parte. Hence, the Disciplinary Authority has passed the Order rightly with regard to forfeiture of gratuity of the Opposite Party No.3.

iv) During pendency of the Appeal preferred by the Opposite Party No.3 before the Board of Directors, the impugned Orders have been passed without waiting for the outcome of the said Appeal, despite bringing the said fact to the notice of the Authorities under the P.G. Act, 1972.

v) The findings of the Opposite Parties about non-service of notice under the P.G. Act, 1972 on the issue of forfeiture of gratuity of Opposite Party No.3 is not sustainable in view of the settled position of law that technicality should not stand as a bar against dispensation of justice. Since the Opposite Party No.3 was given ample opportunity to safeguard his interest before the Enquiry Officer on the allegation of huge financial irregularities, which culminated in the termination of the services so also forfeiture of gratuity of the Opposite Party No.3, the Opposite Party Nos.1 and 2 are not justified in passing the said impugned Orders.

vi) The view taken by the Appellate Authority under the Act, 1972 that after retirement, the Employer and employee relationship no more existed is incorrect in view of rule 3(3) of the NSIC Ltd. (C & A Rules, 1968) and the Opposite Party No.3 was deemed to have continued in service in view of the initiation of the departmental proceeding during his service tenure.

vii) The Opposite Party No.1 has misinterpreted the provision of section 14 of the P.G. Act, 1972, which categorically provides that the provision of the Act or any Rules made there under shall have effect notwithstanding anything inconsistent therewith, contained in any enactment other than the Act or any instrument or contract having effect by virtue of any enactment other than the Act.

viii) Even though it was not possible to exactly quantify the amount of loss sustained by the Corporation for the negligence of the Opposite Party No.3, he may not be absolved from the charges on the ground that the criminal trial has not been concluded. Hence, the

Opposite Party Nos. 1 and 2 should not have passed the Orders for release of gratuity of an amount of Rs.10,00,000/- with interest and the impugned Orders are unjustified and irrational.

14. Opposing to the prayer made in the Writ Petition, an affidavit-in-opposition has been filed by the Opposite Party No.3 stating therein that there is no infirmity in the impugned order dated 26th September, 2019 passed by the Appellate Authority in P.G. Appeal Case No.36 (431)/2018-B.1 so also the Order dated 12th November, 2018 passed by the Controlling Authority in Application Case No.36(03)/2018-B.III. Apart from that, it has been stated in the said Affidavit that in absence of conviction of the employee for an offence involving moral turpitude, a strict application of the said provision of the Act, 1972 does not disentitle the employee to receive gratuity amount. In the present case, the Employer held up the payment of gratuity in anticipation of the conviction likely to be awarded by the Special Criminal Court, which may lead to forfeiture of gratuity amount. It has further been averred in the said Affidavit that mere termination or dismissal of an employee concerned would not ipso facto constitute an offence involving moral turpitude to attract section 4(6)(b)(ii) of the Payment of Gratuity Act, 1972 and an Employer would have no jurisdiction to invoke the said provision to forfeit gratuity of an employee under the said Act, 1972. It has been further pleaded that no Show Cause for forfeiture of gratuity was issued at any point of time. Since the Opposite Party No.3 retired w.e.f. 30.11.2016 on attaining the age of superannuation, the relationship between the Employer and employee ceased from that date. Therefore, such act of Petitioners amount to violation of principles of natural justice.

15. Mr. Jena, learned Counsel for the Petitioners, reiterating the stand taken in the Writ Petition submitted, sub-section 6 of section 4 of P.G. Act, 1972 clearly provides for forfeiture of gratuity of an employee, whose services have been terminated for willful omission or negligence causing damage/loss or destruction of property belonging to the Employer to the extent of damage or loss so caused. He further submitted that during the course of enquiry, huge financial irregularity of Rs.173.50 crores was found to have been committed by the accused persons, including the Opposite Party No.3, to whom sufficient opportunity was given in order to defend his case. In spite of receiving notice and submission of reply, the Opposite Party No.-3 did not participate in the said proceeding for which he was rightly set ex-parte by the Inquiry Officer. He did not even prefer to submit any representation to the Disciplinary Authority after receiving the copy of the inquiry report, as a result of which the order of dismissal was passed vide which his gratuity as well as other after retiral dues were forfeited. Hence, it cannot be said that the Disciplinary Authority has passed the order in violation of principles of natural justice.

16. Mr. Jena further submitted, as per rule 3 (3) of Rules, 1968, since the Disciplinary Proceeding was instituted before his retirement, the Opposite Party No.3 is deemed to have continued in service and his dismissal from service and

forfeiture of gratuity is justified. He further submitted that the Disciplinary Authority is competent to forfeit the Gratuity of Opposite Party No.3, who was provided opportunity by issuance of notice to participate in the departmental proceeding. Since the provisions under Rules, 1968 are not inconsistent with the provisions of P.G. Act and Rules made there under, no separate notice was required to be issued to Opposite Party No.3. He further submitted that both the Authorities under the Act, 1972 have failed to appreciate that when the order of dismissal and forfeiture of gratuity was passed by the Disciplinary Authority, the Opposite Party No.3 was informed that the Appellate Authority would be the Board of Directors. But the Opposite Party No.3 choose not to prefer any appeal in time. Rather, he challenged the order of the Disciplinary Authority before the Central Administrative Tribunal, which was not inclined to entertain the application, though liberty was given to him to approach the Appellate Authority of the Corporation vide order dated 13.06.2019. Though the Opposite Party No.3 preferred an appeal against his termination and forfeiture of gratuity before the Board of Directors, NSIC, during pendency of the said Appeal, the Opposite Party No.1, without waiting for the outcome of the said Appeal, has passed the impugned order under Annexure-1, which is bad in the eye of law and deserves interference.

17. Mr. Jena further submitted that finding of the Opposite Party No.1 that after retirement, the Employer and employee relationship no more existed is incorrect in view of rule 3(3) of the Rules, 1968. The Opp. Party No.3 was deemed to be continuing in service in view of the initiation of the disciplinary proceeding during his service-tenure. He further submitted that Opposite Part No.1 has misinterpreted the Provision of section 14 of the P.G. Act, 1972.

18. Mr. Jena submitted that the Opposite Party Nos.1 and 2 have failed to appreciate that a criminal case has already been instituted during the service tenure of the Opposite Party No.3 and charge sheet has been submitted on 28.04.2018 before the trial Court against the Opposite Party No.3 and others and in the disciplinary proceeding, financial irregularities amounting to Rs.173.50 Crores was recorded. He further submitted that both the authorities have failed to appreciate that it is not possible to exactly quantify the amount of loss sustained by the Corporation for the negligence of the Opposite Party No.3 at this stage and on that ground he cannot be absolved from the charges, as the criminal trial is yet to be concluded. Therefore, the Opposite Party Nos.1 and 2 should not have passed orders for release of gratuity amount of Rs.10,00,000/- with interest.

19. Relying on Judgments of the apex Court in **Chairman-cum-Managing Director, Mahanadi Coalfields Limited vs. Rabindranath Choubey**, reported in AIR 2020 SC 2978, Mr. Jena submitted that since the impugned orders have been passed by the Controlling Authority so also the Appellate Authority relying on the judgment passed by the apex Court in **Jaswant Singh Gill vs. Bharat Cooking Co. Ltd.**, reported in (2007) 1 SCC 663, which has been over ruled by the apex Court in

Rabindranath Choubey (supra), both the said impugned orders/judgments deserve to be set aside.

20. Though no such stand has been taken in the writ petition, Mr. Jena further submitted that even though there is no such finding given by the Inquiry Officer, in view of the judgment of the apex Court in **Allahabad bank and others Vs. Deepak Kumar Bhola**, reported in (1997) 4 SCC 1, the misconducts, which have been proved against the Opposite Party No.3, amount to moral turpitude. Hence, the Petitioners-Employer was also justified to impose the punishment of forfeiture of gratuity of the Opposite Party No.3.

21. Apart from reiterating the facts detailed in the Counter Affidavit, vide which most of the averments made in the Writ Petition have been denied, Mr. Sarkar, learned Counsel for Opposite Party No.3 submitted that in view of the settled position of law, so also pleadings and evidences on record, taking into account his total period of service, the Appellate Authority was justified in upholding the order of the Controlling Authority, wherein a direction was given to the Opposite Party/Employer (Petitioners herein) to pay the gratuity amount of Rs.10,00,000/- and also simple interest thereon @10% per annum for the period from 01.12.2016 till the date of actual payment. He further submitted that the Controlling Authority, while passing the order, has rightly observed that though there was certain fraudulent activity where the Officers of United Bank of India (UBI), Hazra Branch and Jadavpur Vidyapith Branch issued two bank guarantees on the same number against the rules and the bank officials were arrested, nothing has been recovered from Opposite Party No.3. Hence, the question of wrongful gain and wilful loss, as alleged, does not arise. Therefore, no offence can be attributed to the Opposite Party No.3, thereby forfeiting his gratuity by way of punishment.

22. Mr. Sarkar further submitted that mere termination or dismissal of an employee concerned would not ipso facto constitute an offence involving moral turpitude to attract section 4(6)(b)(ii) of the Act, 1972, without any finding or observation made to the said effect and the Petitioners-Employer has no jurisdiction to invoke the said provision to forfeit the gratuity of his client under the Payment of Gratuity Act, 1972.

To counter the submission made by the learned Counsel for the Petitioners as to applicability of the judgment of the apex Court in **Rabindranath Choubey** (supra), Mr. Sarkar submitted that the facts and circumstances of the said case is different from the present case. That apart, the said Judgment has been delivered after the impugned orders were delivered by the Controlling Authority as well as the Appellate Authority under the Act, 1972 and hence, will have prospective effect.

Mr. Sarkar further submitted that though in Rabindranath Choubey (supra) it was held that the Employer has a right to withhold the gratuity during pendency of the disciplinary proceeding, but no where it has been held or observed vide the said Judgment that gratuity can be forfeited without any notice, that to by way of punishment, in absence of any rules to the said effect to impose such punishment.

Mr. Sarkar also submitted, though the Administrative Tribunal gave a direction to deal with and dispose of the Appeal of the Opposite Party No.3 within a period of four month from the date of receipt of the order dated 13.06.2019, but the same was intentionally kept pending to debar the Opposite Party No.3 from getting the gratuity and to take a plea before the Authority concerned as to pendency of the said Appeal before the Appellate Authority i.e. Board of Directors. Relying on the order dated 17.01.2020, which has been filed by the Opposite Party No.3 along with his written notes, Mr. Jena submitted, the Appeal was rejected much after the period as directed by the Administrative Tribunal during pendency of the present Writ Petition. Even though there is no such provision under rule 5 of the NSIC Ltd.(C & A Rules, 1968) to impose the punishment of forfeiture of gratuity and the Appellate Authority could have dealt with the said issue while dealing with the Appeal of the Opposite Party No.3, but have left the said issue unattended on the plea of pendency of the present Writ Petition.

23. To substantiate his submission, Mr. Sarkar relied on Judgments of the apex Court in **Union Bank of India and others vs. C.G. Ajay Babu and others**, reported in (2018) 9 SCC 529, in **Jaswant Singh Gill vs. Bharat Cooking Coal Ltd. and others**, reported in (2007) 1 SCC 663, **D.V. Kappor vs. Union of India and others**, reported in (1990) 4 SCC 314 and in **H. Gangahanume Gowda vs. Karnataka Agro Industries Corpn. Ltd.**, reported in (2003) 3 SCC 40. He also relied on the Judgment of the High Court of Karnataka in **Karnataka State Road Transport Corporation and another vs. Mahadev and others**, reported in **2009 III LLJ 90 Kant** and Judgment of the High Court of Judicature at Bombay in **The Chairman and Managing Director, Bank of Maharashtra and others vs. Shri Kishore and others**, passed in W.P.(C) No.1572 of 2022 on 19.08.2022.

24. So far as the judgments cited by the learned Counsel for the Petitioners, in **Rabindranath Choubey** (supra) the apex Court, vide paragraphs-9, 9.2, 10.21, 10.30, 11 and 28 held as follows:

> *"9. Once it is held that a major penalty which includes the dismissal from service can be imposed,* ***even after the employee has attained the age of superannuation and/or was permitted to retire on attaining the age of superannuation, provided the disciplinary proceedings were initiated while the employee was in service, sub-section 6 of Section 4 of the Payment of Gratuity Act shall be attracted and the amount of gratuity can be withheld till the disciplinary proceedings are concluded****.*
>
> *9.2 It is required to be noted that in the present case the disciplinary proceedings were initiated against the respondent- employee for very serious allegations of misconduct alleging dishonestly causing coal stock shortages amounting to Rs.31.65 crores and thereby causing substantial loss to the employer.* ***Therefore, if such a charge is proved and punishment of dismissal is given thereon, the provisions of sub-section 6 of Section 4 of the Payment of Gratuity Act would be attracted and it would be within the discretion of the appellant-employer to forfeit the gratuity payable to the respondent. Therefore, the appellant- employer has a right to withhold the payment of gratuity during the pendency of the disciplinary proceedings****.*

10.21 In view of the various decisions of this Court and considering the provisions in rules in question, it is apparent that the punishment which is prescribed under Rule 27 of the CDA Rules, minor as well as major, both can be imposed. Apart from that, recovery can also be made of ***the pecuniary loss caused as provided in Rule 34.3 of the CDA Rules, which takes care of the provision under sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972. The recovery is in addition to a punishment that can be imposed after attaining the age of superannuation. The legal fiction provided in Rules 34.2 of the CDA Rules of deemed continuation in service has to be given full effect****.*

10.30 In view of the various decisions, it is apparent that under Rule 34.2 of the CDA Rules inquiry can be held in the same manner as if the employee had continued in service and the appropriate major and minor punishment commensurate to guilt can be imposed including dismissal as provided in Rule 27 of the CDA Rules ***and apart from that in case pecuniary loss had been caused that can be recovered. Gratuity can be forfeited wholly or partially****.*

11. In view of the above and for the reasons stated above and in view of the decision of three Judge Bench of this Court in Ram Lal Bhaskar (supra) and our conclusions as above, it is observed and held that ***(1) the appellant – employer has a right to withhold the gratuity during the pendency of the disciplinary proceedings, and (2) the disciplinary authority has powers to impose the penalty of dismissal/major penalty upon the respondent even after his attaining the age of superannuation, as the disciplinary proceedings were initiated while the employee was in service****.*

Under the circumstances, the impugned judgment and order passed by the High Court cannot be sustained and the same deserves to be quashed and set aside and is accordingly hereby quashed and set aside and the order passed by the Controlling Authority is hereby restored. However, the appellant-employer is hereby directed to conclude the disciplinary proceedings at the earliest and within a period of four months from today and pass appropriate order in accordance with law and on merits and ***thereafter necessary consequences as per Section 4 of the Payment of Gratuity Act, 1972, more particularly sub-section (6) of Section 4 of the Gratuity Act and Rule 34.3 of the CDA Rules shall follow****. The present appeal is accordingly allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.*

28. Thus, according to me, where the disciplinary proceedings are instituted while the employee was in service but retired thereafter during its pendency, under the special procedure provided under Rule 34.2 of the Rules, 1978 the authority is empowered to continue and conclude the disciplinary inquiry in the same manner as if the employee had continued in service by deeming fiction, ***however, the relationship of employer and employee shall not be severed until conclusion of the disciplinary enquiry but may withhold payment of gratuity in terms of Rule 34.3 pending disciplinary inquiry and in furtherance thereof if later held guilty, the competent authority to the extent pecuniary loss has been caused for the misconduct, negligence in the discharge of duties order for recovery from gratuity either be forfeited in the whole or in part, to the extent pecuniary loss has been caused to the company for the offences/misconduct as a measure of penalty in terms of Rule 34.3 of the Rules read with sub-section (6) of Section 4 of the Act, 1972.****" (Emphasis supplied)*

25. In **Jaswant Singh Gill** (supra) which was partially overruled in **Rabindranath Choubey** (supra) the apex Court, vide paragraphs-7 and 10 to 14, held as follows:

"7. The short question which arises for consideration in this appeal is as to whether the provisions of the said Act shall prevail over the rules framed by Coal India Limited, holding company of Respondent No. 1, known as Coal India Executives' Conduct Discipline and Appeal Rules, 1978 (for short "the Rules"). Indisputably, the appellant was governed by the Rules. Rule 27 provides for the nature of penalties including 'recovering from pay or gratuity of the whole of or part of any pecuniary loss caused to the company by negligence or breach of orders or trust'. Major penalties prescribed in Rule 27, however, include reduction to a lower grade, compulsory retirement, removal from service; and dismissal. Rule 34 provides for special procedure in certain cases stating:

"34.2 Disciplinary proceeding, if instituted while the employee was in service whether before his retirement or during his re-employment shall, after the final retirement of the employee, be deemed to be proceeding and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service.

34.3 During the pendency of the disciplinary proceedings, the Disciplinary Authority may withhold payment of gratuity, for ordering the recovery from gratuity of the whole or part of any pecuniary loss caused to the company if have been guilty of offences/ misconduct as mentioned in Sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972 or to have caused pecuniary loss to the company by misconduct or negligence, during his service including service rendered on deputation or on re-employment after retirement. However, the provisions of Section 7(3) and 7(3A) of the Payment of Gratuity Act, 1972 should be kept in view in the event of delayed payment, in the case the employee is fully exonerated."

10. The provisions of the Act, therefore, must prevail over the Rules. ***Rule 27 of the Rules provides for recovery from gratuity only to the extent of loss caused to the company by negligence or breach of orders or trust. Penalties, however, must be imposed so long an employee remains in service. Even if a disciplinary proceeding was initiated prior to the attaining of the age of superannuation, in the event, the employee retires from service, the question of imposing a major penalty by removal or dismissal from service would not arise. Rule 34.2 no doubt provides for continuation of a disciplinary proceeding despite retirement of employee if the same was initiated before his retirement but the same would not mean that although he was permitted to retire and his services had not been extended for the said purpose, a major penalty in terms of Rule 27 can be imposed****.*

11. Power to withhold penalty (sic gratuity) contained in Rule 34.3 of the Rules must be subject to the provisions of the Act. Gratuity becomes payable as soon as the employee retires. The only condition therefor is rendition of five years continuous service.

12. A statutory right accrued, thus, cannot be impaired by reason of a rule which does not have the force of a statute. It will bear repetition to state that the Rules framed by Respondent No. 1 or its holding company are not statutory in nature. The Rules in any event do not provide for withholding of retrial benefits or gratuity.

13. The Act provides for a closely neat scheme providing for payment of gratuity. It is a complete code containing detailed provisions covering the essential provisions of a scheme for a gratuity. It not only creates a right to payment of gratuity but also lays down the principles for quantification thereof as also the conditions on which he may be denied therefrom. ***As noticed hereinbefore, sub-section (6) of Section 4 of the Act contains a non- obstante clause vis-a-vis sub-section (1) thereof. As by reason thereof,***

an accrued or vested right is sought to be taken away, the conditions laid down thereunder must be fulfilled. The provisions contained therein must, therefore, be scrupulously observed. Clause (a) of Sub-section (6) of Section 4 of the Act speaks of termination of service of an employee for any act, willful omission or negligence causing any damage. However, the amount liable to be forfeited would be only to the extent of damage or loss caused. The disciplinary authority has not quantified the loss or damage. It was not found that the damages or loss caused to Respondent No. 1 was more than the amount of gratuity payable to the appellant. Clause (b) of Sub-section (6) of Section 4 of the Act also provides for forfeiture of the whole amount of gratuity or part in the event his services had been terminated for his riotous or disorderly conduct or any other act of violence on his part or if he has been convicted for an offence involving moral turpitude. Conditions laid down therein are also not satisfied.

14. Termination of services for any of the causes enumerated in Sub- section (6) of Section 4 of the Act, therefore, is imperative." (Emphasis supplied)

26. In **Allahabad Bank** (supra) the apex Court, vide paragraphs-8 & 9, held as follows:

"8. What is an offence involving "moral turpitude" must depend upon the facts of each case. But whatever may be the meaning which may be given to the term "moral turpitude" it appears to us that one of the most serious offences involving "moral turpitude" would be where a person employed in a banking company dealing with money of the general public, commits forgery and wrongfully withdraws money which he is not entitled to withdraw.

9. This Court in Pawan Kumar vs. State of Haryana and another. (1996) 4 SCC 17 dealt with the question as to what is the meaning of expression "moral turpitude" and it was observed as follows:

"Moral turpitude" is an expression which is used in legal as also societal parlance to describe conduct which is inherently base, vile, depraved or having any connection showing depravity".

This expression has been more elaborately explained in Baleshwar Singh vs. District Magistrate and Collector, Banaras, AIR 1959 all. 71 where it was observed as follows:

"The expression "moral turpitude' is not defined anywhere. But it means anything done contrary to justice, honesty, modesty or good morals. It implies depravity and weakness of character or disposition of the person charged with the particular conduct. Every false statement made by a person may not be moral turpitude, but it would be so if it discloses vileness or depravity in the doing of any private and social duty which a person owes to his fellowmen or to the society in general. If therefore the individual charged with a certain conduct owes a duty, either to another individual or to the society in general, to act in a specific manner or not to so act and he still acts contrary to it and does so knowingly, his conduct must be held to be due to vileness and depravity. It will be contrary to accepted customary rule and duty between man and man"

27. So far as the judgment cited by the learned Counsel for the Opposite Party No.3 in **Union Bank of India** (Supra), the apex Court, vide Paragraph Nos.17 to 21, held as follows:

*"17. **Though the learned counsel for the appellant Bank has contended that the conduct of the respondent employee, which leads to the framing of charges in the***

departmental proceedings involves moral turpitude, we are afraid the contention cannot be appreciated. It is not the conduct of a person involving moral turpitude that is required for forfeiture of gratuity but the conduct or the act should constitute an offence involving moral turpitude. To be an offence, the act should be made punishable under law. That is absolutely in the realm of criminal law. It is not for the Bank to decide whether an offence has been committed. It is for the court. *Apart from the disciplinary proceedings initiated by the appellant Bank, the Bank has not set the criminal law in motion either by registering an FIR or by filing a criminal complaint so as to establish that the misconduct leading to dismissal is an offence involving moral turpitude. Under sub-section (6)(b)(ii) of the Act, forfeiture of gratuity is permissible only if the termination of an employee is for any misconduct which constitutes an offence involving moral turpitude, and convicted accordingly by a court of competent jurisdiction.*

18. In Jaswant Singh Gill v. Bharat Coking Coal Ltd. [Jaswant Singh Gill v. Bharat Coking Coal Ltd., (2007) 1 SCC 663 : (2007) 1 SCC (L&S) 584] , it has been held by this Court that forfeiture of gratuity either wholly or partially is permissible under sub-section (6)(b)(ii) only in the event that the termination is on account of riotous or disorderly conduct or any other act of violence or on account of an act constituting an offence involving moral turpitude when he is convicted. To quote para 13: (SCC p. 670)

xxx xxx xxx

"13. The Act provides for a close-knit scheme providing for payment of gratuity. It is a complete code containing detailed provisions covering the essential provisions of a scheme for a gratuity. It not only creates a right to payment of gratuity but also lays down the principles for quantification thereof as also the conditions on which he may be denied therefrom. As noticed hereinbefore, sub-section (6) of Section 4 of the Act contains a non obstante clause vis-à-vis sub-section (1) thereof. As by reason thereof, an accrued or vested right is sought to be taken away, the conditions laid down thereunder must be fulfilled. The provisions contained therein must, therefore, be scrupulously observed. Clause (a) of sub-section (6) of Section 4 of the Act speaks of termination of service of an employee for any act, wilful omission or negligence causing any damage. However, the amount liable to be forfeited would be only to the extent of damage or loss caused. The disciplinary authority has not quantified the loss or damage. It was not found that the damage or loss caused to Respondent 1 was more than the amount of gratuity payable to the appellant. Clause (b) of sub-section (6) of Section 4 of the Act also provides for forfeiture of the whole amount of gratuity or part in the event his services had been terminated for his riotous or disorderly conduct or any other act of violence on his part or if he has been convicted for an offence involving moral turpitude. Conditions laid down therein are also not satisfied."

19. ***In the present case, there is no conviction of the respondent for the misconduct which according to the Bank is an offence involving moral turpitude. Hence, there is no justification for the forfeiture of gratuity on the ground stated in the order dated 20-4-2004 that the "misconduct proved against you amounts to acts involving moral turpitude". At the risk of redundancy, we may state that the requirement of the statute is not the proof of misconduct of acts involving moral turpitude but the acts should constitute an offence involving moral turpitude and such offence should be duly established in a court of law***.

20. That the Act must prevail over the Rules on Payment of Gratuity framed by the employer is also a settled position as per Jaswant Singh Gill. Therefore, the appellant cannot take recourse to its own Rules, ignoring the Act, for denying gratuity.

21. ***To sum up, forfeiture of gratuity is not automatic on dismissal from service; it is subject to sub-sections (5) and (6) of Section 4 of the Payment of Gratuity Act, 1972.****"*
(Emphasis supplied)

28. In **D.V. Kappor vs. Union of India and** (supra) the apex Court, vide paragraph-10 held as follows:

"10. Rule 9 of the rules empowers the President only to with- hold or withdraw pension permanently or for a specified period in whole or in part or to order recovery of pecuniary loss caused to the State in whole or in part subject to minimum. The employee's right to pension is a statutory fight. The measure of deprivation therefore, must be correlative to or commensurate with the gravity of the grave misconduct or irregularity as it offends the right to assistance at the evening of his life as assured under Art. 41 of the Constitution. ***The impugned 'order discloses that the President withheld on permanent basis the payment of gratuity in addition to pension. The fight to gratuity is also a statutory right. The appellant was not charged with nor was given an opportunity that his gratuity would be withheld as a measure of punishment****. No provision of law has been brought to our notice under which, the President is empowered to withhold gratuity as well, after his retirement as a measure of punishment.* ***Therefore, the order to withhold the gratuity as a measure of penalty is obviously illegal and is devoid of jurisdiction.****"* ***(Emphasis supplied)***

29. In **H. Gangahanume Gowda** (supra) the apex Court, vide paragraph-9, held as follows:

"9. It is clear from what is extracted above from the order of learned Single Judge that interest on delayed payment of gratuity was denied only on the ground that there was doubt whether the appellant was entitled to gratuity, cash equivalent to leave etc., in view of divergent opinion of the courts during the pendency of enquiry. The learned Single Judge having held that the appellant was entitled for payment of gratuity was not right in denying the interest on the delayed payment of gratuity having due regard to Section 7(3A) of the Act. ***It was not the case of the respondent that the delay in the payment of gratuity was due to the fault of the employee and that it had obtained permission in writing from the controlling authority for the delayed payment on that ground****. As noticed above, there is a clear mandate in the provisions of Section 7 to the employer for payment of gratuity within time and to pay interest on the delayed payment of gratuity. There is also provision to recover the amount of gratuity with compound interest in case amount of gratuity payable was not paid by the employer in terms of Section 8 of the Act.* ***Since the employer did not satisfy the mandatory requirements of the proviso to Section 7(3A), no discretion was left to deny the interest to the appellant on belated payment of gratuity****. Unfortunately, the Division Bench of the High Court, having found that the appellant was entitled for interest, declined to interfere with the order of the learned Single Judge as regards the claim of interest on delayed payment of gratuity only on the ground that the discretion exercised by the learned Single Judge could not be said to be arbitrary. In the first place in the light of what is stated above, the learned Single Judge could not refuse the grant of interest exercising discretion as against the mandatory provisions contained in Section 7 of the Act. The Division Bench, in our opinion, committed an error in assuming that the learned Single Judge could exercise the discretion in the matter of awarding interest and that such a discretion exercised was not arbitrary."* ***(Emphasis supplied)***

30. In **Karnataka State Road Transport Corporation** (supra) the Karnataka High Court, vide paragraphs-3, 4 & 5, held as follows:

> *"3. A bare reading of the aforesaid provision of the Act discloses that the full amount of Gratuity can be forfeited, in the event the employee is convicted for an offence involving moral turpitude.* ***In the absence of a conviction, of the respondent for an offence involving moral turpitude, a strict application for the said provision of the Act does not disentitle, the respondent to receive gratuity amount, and the petitioner was not justified in denying the gratuity to the respondent****.*
>
> *4. The observation of the Apex Court in JASWANT SING GILL –VS- BHARAT COOKING COAL LOTD & OTHERS reported in (2007) 1 SCC 663 while interpreting Sec.4(6)(b)(ii) of the Act in the circumstances is apposite:*
>
> *"The Act provides for close-knit scheme providing for payment of gratuity. It is complete code containing detailed provisions covering the essential provisions of a scheme for a gratuity. It not only creates a right to payment of gratuity but also lays down the principles for quantification thereof as also the conditions on which he may be denied therefrom. As noticed hereinbefore, sub-section(6) of Section 4 of the Act contains a non obstante clause vis-à-vis sub section (1) thereof. As by reason thereof, an accrued or vested rights is sought to be taken away, the conditions laid down thereunder must be fulfilled.* ***The provisions contained therein must, therefore, be scrupulously observed. Clause (a) of sub-section (6) of Section 4 of the Act speaks of termination of service of an employee for any act, willful omission or negligence causing any damage. However, the amount liable to be forfeited would be only to the extent of damage or loss caused. The disciplinary authority has not quantified the loss or damage****. It was not found that the damages or loss caused to respondent was more than the amount of gratuity payable to the appellant. Clause (b) of sub-section (6) of Section 4 of the Act also provides for forfeiture of the whole amount of gratuity or part in the event his services had been terminated for his riotous or disorderly conduct or any other act of violence on his part* ***or if he has been convicted for an offence involving moral turpitude****. Conditions laid down therein are also not satisfied." (Emphasis supplied)*
>
> *5. In the light of the aforesaid observations, an exception can be taken to the orders impugned of the controlling authority and the appellate authority, holding that the petitioner is liable to make payment of the entire sum of gratuity due and payable to the respondent under the Act."* ***(Emphasis supplied)***

31. In **Chairman and Managing Director** (supra) the Bombay High Court, vide paragraphs-30 & 31, held as follows:

> *"30.* ***This Court is of the opinion that an employer cannot simply issue notice in Form-M to the employee rejecting claim for payment of gratuity. This has to be preceded by a show cause notice, because the gratuity amount to which the employee is otherwise entitled is to be forfeited, which is a drastic consequence for the employee****. Such a notice would enumerate the basis and extent of financial loss as claimed by the petitioner- employer, due to the alleged willful omission or negligence of the employee. An opportunity would also be available for the employee to contest the same, ensuring fairness of procedure. In the present case, admittedly show cause notice was not issued to the respondent No.1 before the said notice rejecting claim for payment of gratuity was directly issued to him under Form-M on 06/10/2012. The reason stated by the petitioner-employer in the said notice for forfeiting gratuity reads as follows:*

"Reasons: - There is a loss to the Bank to the extent of Rs.69.72 lacs plus unapplied interest thereon on account of your misconduct."

31. The said reason is not only cryptic, but there are no details as to on what basis, the petitioner-employer concluded that the respondent No.1 was responsible for loss to the extent of Rs.69.72 Lakhs plus unapplied interest thereon. The manner in which the petitioner-employer proceeded is clearly arbitrary, apart from being violative of the principles of natural justice. The petitioner-employer is not justified in referring to and relying upon the enquiry report, on the basis of which the respondent No.1 was compulsorily retired from service. An attempt was made on behalf of the petitioner-employer to refer to the contents of the enquiry report to contend that grave financial loss was caused due to the alleged willful negligence on the part of respondent No.1. It is found that on the basis of the conclusions rendered in the enquiry report, the respondent No.1 has already suffered the punishment of compulsory retirement. ***The respondent No.1 is justified in contending that even if the contents of the enquiry report are to be referred, it is recorded therein that due to the alleged negligence of the respondent No.1, certain loan amounts disbursed to individuals, could be only partially recovered or not recovered at all. But, there was no material on record to indicate as to what steps the petitioner-employer had taken for recovery of amounts from those individuals and after having taken any such steps, as to what was the extent of financial loss really caused to the petitioner-employer."*** ***(Emphasis supplied)***

32. So far as applicability of a Judgment, in **General Manager Uttaranchal Jal Sansthan vs. Laxmi Devi & others** reported in AIR 2009 SC 3121, vide paragraph Nos.23 & 24, it was held as follows.

*"**23. Submission of the learned counsel for the respondents is that the said decision in Umadevi (3) case [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] is not applicable**:*

(a) as it was rendered in 2006 whereas the cause of action for filing the writ petition arose in 2002; and

(b) a distinction must be made between the appointment on ad hoc basis and appointment on compassionate ground.

*24. **As to the first submission above, it is worth mentioning that judicial decisions unless otherwise specified are retrospective. They would only be prospective in nature if it has been provided therein**. Such is clearly not the case in Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] . Accordingly, even though the cause of action would have arisen in 2002 but the decision of Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] would squarely be applicable to the facts and circumstances of the case. Secondly, before a person can claim a status of a government servant not only his appointment must be made in terms of the recruitment rules, he must otherwise fulfil the criterion therefor. Appointment made in violation of the constitutional scheme is a nullity. Rendition of service for a long time, it is well known, does not confer permanency. It is furthermore not a mode of appointment."* ***(Emphasis supplied)***

33. Similarly, in **B.A. Linga Reddy Etc. Etc. Vs. Karnataka State Transport Authority** reported in 2015 AIR SCW 279 vide paragraph No.36, the apex Court held as follows:

"36. The view of the High Court in Ashrafulla (AIR 2002 SC 629) (supra) has been reversed by this Court. The decision is of retrospective operation, as it has not been laid down that it would operate prospectively; moreso, in the case of reversal of the judgment.

> ***This Court in P.V.George and Ors. v. State of Kerala and Ors. [2007 (3) SCC 557 : (AIR 2007 SC 1034 in paras 19 and 29)] held that the law declared by a court will have a retrospective effect if not declared so specifically. Referring to Golak Nath v. State of Punjab [AIR 1967 SC 1643] it had also been observed that the power of prospective overruling is vested only in the Supreme Court and that too in constitutional matters****. It was observed :*
>
> *"19. It may be true that when the doctrine of stare decisis is not adhered to, a change in the law may adversely affect the interest of the citizens.* ***The doctrine of prospective overruling although is applied to overcome such a situation, but then it must be stated expressly. The power must be exercised in the clearest possible term. The decisions of this Court are clear pointer thereto****.x x x x x*
>
> *29. Moreover, the judgment of the Full Bench has attained finality. The special leave petition has been dismissed. The subsequent Division Bench, therefore, could not have said as to whether the law declared by the Full Bench would have a prospective operation or not. The law declared by a court will have a retrospective effect if not otherwise stated to be so specifically. The Full Bench having not said so, the subsequent Division Bench did not have the jurisdiction in that behalf."* ***(Emphasis supplied)***

34. So far as the doctrine of per incuriam, in **Madhya Pradesh Road Development Authority and another Vs. L.G. Chaudhary Engineers and Contractors**, reported in (2012) 3 SCC 495, the apex Court vide paragraph Nos.26 to 34 held as follows.

> *"26. It is clear, therefore, that in view of the aforesaid finding of a coordinate Bench of this Court on the distinct features of an Arbitral Tribunal under the said M.P. Act in Anshuman Shukla case [(2008) 7 SCC 487] the provisions of the M.P. Act are saved under Section 2(4) of the AC Act, 1996.* ***This Court while rendering the decision in Va Tech [(2011) 13 SCC 261] has not either noticed the previous decision of the coordinate Bench of this Court in Anshuman Shukla [(2008) 7 SCC 487] or the provisions of Section 2(4) of the AC Act, 1996. Therefore, we are constrained to hold that the decision of this Court in Va Tech [(2011) 13 SCC 261] was rendered per incuriam****.*
>
> *27. This was the only point argued before us by the learned counsel for the appellant.*
>
> *28. The principle of per incuriam has been very succinctly formulated by the Court of Appeal in Young v. Bristol Aeroplane Co. Ltd. [1944 KB 718 (CA)] Lord Greene, Master of Rolls formulated the principles on the basis of which a decision can be said to have been rendered "per incuriam". The principles are: (KB p. 729)*
>
> *"... Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different.* ***It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam.****"*
>
> *29. The decision in Young [1944 KB 718 (CA)] was subsequently approved by the House of Lords in Young v. Bristol Aeroplane Co. Ltd. [1946 AC 163 (HL)] , AC at p. 169 of the Report. Lord Viscount Simon in the House of Lords expressed His Lordship's agreement with the views expressed by Lord Greene, the Master of Rolls in the Court of*

Appeal on the principle of per incuriam (see the speech of Lord Viscount Simon in Bristol Aeroplane Co. Ltd. case [1946 AC 163 (HL)] , AC at p. 169 of the Report).

30. Those principles have been followed by the Constitution Bench of this Court in Bengal Immunity Co. Ltd. v. State of Bihar [AIR 1955 SC 661 : (1955) 2 SCR 603] (see the discussion in SCR at pp. 622 and 623 of the Report).

31. The same principle has been reiterated by Lord Evershed, Master of Rolls, in Morelle Ld. v. Wakeling [(1955) 2 QB 379 (CA)] , QB at p. 406. The principle has been stated as follows:

"... As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned; so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong."

32. In State of U.P. v. Synthetics and Chemicals Ltd. [(1991) 4 SCC 139] this Court held (SCC p. 162, para 40) that the doctrine of "per incuriam" in practice means "per ignoratium" and noted that the English courts have developed this principle in relaxation of the rule of stare decisis and referred to the decision in Bristol Aeroplane Co. Ltd. [1946 AC 163 (HL)] The learned Judges also made it clear that the same principle has been approved and adopted by this Court while interpreting Article 141 of the Constitution (see Synthetics and Chemicals Ltd. case [(1991) 4 SCC 139] , SCC para 41).

33. ***In MCD v. Gurnam Kaur [(1989) 1 SCC 101] a three-Judge Bench of this Court explained this principle of per incuriam very elaborately in SCC para 11 at p. 110 of the Report and in explaining the principle of per incuriam the learned Judges held:***

"11. … A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute."

34. In para 12 the learned Judges observed as follows: (Gurnam Kaur case [(1989) 1 SCC 101] , SCC p. 111)

"12. ...One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority." ***(Emphasis supplied)***

35. Similarly, in **V Kishan Rao Vs. Nikhil Super Speciality Hospital and another**, reported in (2010) 5 SCC 513 vide paragraphs No.54, the apex Court held as follows:

"54. ***When a judgment is rendered by ignoring the provisions of the governing statute and earlier larger Bench decision on the point such decisions are rendered per incuriam****. This concept of per incuriam has been explained in many decisions of this Court. Sabyasachi Mukharji, J. (as his Lordship then was) speaking for the majority in A.R. Antulay v. R.S. Nayak [(1988) 2 SCC 602 : 1988 SCC (Cri) 372] explained the concept in the following words : (SCC p. 652, para 42)*

"42. ... ***'Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision*** *or of some authority binding on the court concerned,* ***so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong.****"*

Subsequently also in the Constitution Bench judgment of this Court in Punjab Land Development and Reclamation Corpn. Ltd. v. Labour Court [(1990) 3 SCC 682 : 1991 SCC (L&S) 71] , similar views were expressed in para 40 at p. 705 of the report."

(Emphasis supplied)

36. As is revealed from one of the impugned orders, as at Annexure-2, while deciding the Application filed by the Opposite Party No.3, the Controlling Authority framed the following two issues.

"1. Whether the OP has the right to forfeit the amount of gratuity payable to the applicant and has done so in accordance with the provision of the law?

2. Whether there is delay in payment of gratuity and if so whether the applicant is entitled to get interest upon delayed payment of gratuity amount?"

37. So far as Issue No.1 as to right to forfeit the amount of gratuity payable to Opposite Party No.3, the Controlling Authority (Opposite Party No.2) observed as follows:

"As far as 1st issue is concerned, ***it is an admitted fact that the OP/employer has withheld the gratuity if any payable to the applicant. The same was not communicated to the applicant at all and only after filing of this application before Controlling Authority the reasons have been brought in writing. Thus, it remains primarily un-notified and non-communicated. It is also an admitted fact that the OP has not communicated any order regarding forfeiture of gratuity as required under Section 4 Sub Section (6) of PG Act, 1972 to be read with rule (8) (ii) under the Payment of Gratuity (Central) Rules, 1972 which is against the Principle of Natural justice****. The reason communicated during hearing indicates, since the criminal proceeding initiated by the departmental lodged through an FIR filed by the authorities of NSIC Ltd. is still pending before the Special Court, it is not possible at this stage to arrive at the conclusion regarding imposition of penalty or otherwise is considered against provision of law.* ***Moreover, the criminal proceeding has been submitted by the police in favour of 11 persons including the applicant over fraudulent bank guarantees issued by the respective branches of UBI for releasing the payment to different suppliers of raw materials****.*

Moreover, a department regulation cannot override the provisions of the Act. A departmental enquiry is to meet the obligations of an employer to follow the procedure stipulated under the standing order/service rules so as to find out whether an employee has committed any misconduct. The scope and focus of the enquiry is thus different from that of given under section 4(6) of the act. ***Even though a charge sheet is issued and even if the financial loss is quantified therein and departmental enquiry is conducted and the charges are proved, it would not amount to compliance of requirement under section 4(6) as the employee is not put on notice about forfeiture of gratuity in a departmental enquiry. The object of section 4(6) is to require the employer to put the employee on notice that his conduct would result in forfeiture of gratuity. Therefore, it is incumbent upon the employer to serve a show cause notice on the employee, putting him on notice that his conduct would lead to forfeiture of his gratuity and after hearing his submission, the employer has to pass an order of forfeiture."***

(Emphasis supplied)

38. Similarly, while confirming the said order dated 12.11.2018 passed by the Controlling Authority under the Act, 1972, the Appellate Authority, vide Order dated 26.09.2019, observed as follows:

> *"**Findings of the Appellate Authority***
>
> *1. That the respondent had joined as a Lower Division Clerk on 10.03.1981 and retired from service w.e.f. 30.11.2017 on attaining the age of superannuation. At the time of superannuation, the respondent was working as Manager (under suspension) Sub-Branch, Balasore, Bhubaneswar. He had served with the appellant bank for 36 years and 8 months. The disciplinary action were initiated on 24.8.2016 and termination took place on 20.02.2018 which is much after his retirement/superannuation on 30.11.2016.*
>
> *2. That though the disciplinary proceedings were contemplated which matured to termination after superannuation the same is technically wrong as by that time the non-applicant has already retired from the services. That the entitlement of gratuity starts soon after retirement as per section 4(1)(a) read with section 7(3) of the P.G. Act, 1972.*
>
> *3. In the instant case, it is found that Section 4(6)(a)(b) of the Gratuity Act, 1972 has not been followed because the non-applicant has already retired from service on 30.11.2016 whereby his service with the aforesaid management is already dispensed with. In the event of having no employer and employee relationship following the provision of Payment of Gratuity Act, 1972 under Section 4(6)(a) and (b) does not arise. That the aforesaid situation only would have arisen when the applicant was still in job. A look at the case of Jaswant Singh Vrs Bharat Cooking coal Ltd the Hon'ble Supreme Court has categorically stated that it is infirm to forfeit gratuity in the event of a person who has already retired from his services.*
>
> *4. In the present case department rule which mandates for disciplinary action after superannuation cannot overrule the statutory provision as per section 14 of the PG Act, 1972. More so when the departmental rule and statutory rule and regulations both apply to a situation statutory rule will always prevail.*
>
> *5. **That the quantum of loss has not been quantified before the forfeiture of gratuity. It has been pointed out by the appellant that quantum could not be assessed because loss is attributed to a group of people. However, as per section 4(6)(a) of the PG Act 1972 gratuity can be forfeited to the extent of damage or loss which has not been quantified hence the forfeitures is not as per the statutory provision.***
>
> ***6. No notice has been given to the applicant as a part of natural justice before such forfeiture.***
>
> ***That there is no provision under the Gratuity Act, 1972 to forfeit gratuity without following due procedure of law as gratuity is being considered as property under article 300 A of the constitution which can be forfeited only after following due procedure of law**.*
>
> *7. As far as the present case is concerned the non-applicant has become entitled for gratuity and as per section 4(1) read with section 7(3) and 7(3A) when he has superannuated from this service which is much before imposition of penalty.*
>
> *8. **That there is no such decision of the Apex Court which mandates to withhold gratuity with interest if a criminal proceeding/Termination is not in consonance with Section 4(6)(a) and (b) of the PG Act 1972 and the rules there under." (Emphasis Supplied)***

39. In view of the stand taken by the Petitioners in the Writ Petition so also the stand of the contesting Opposite Party No.3, it would be apt to extract below the rules 3 & 5 of the National Small Industries Corporation Ltd. (Control & Appeal

Rules, 1968), shortly, hereinafter "Rules, 1968", being relevant for the purpose of proper adjudication of the present lis.

*"**Rules 3 & 5 of NSIC Ltd (C & A Rules, 1968)***

*3. **Application:***

(1) These rules shall apply to every employee but shall not apply to:

a. Those employees working in the Prototype Production & Training Centres to whom the Standing Orders framed for the respective P.T.Cs, are applicable.

b. Any person in casual employment.

(2) If any doubt arises relating to the interpretation of these rules, it shall be referred to the Corporation whose decision shall be final.

(3) Note: As amended vide Board's Resolution No. 4 dt. 31 Oct. 2000.

*"Disciplinary proceedings, **if instituted while the employee was in service whether before his retirement or during his re-employment, shall after the final retirement of the employee, be deemed to be proceeding and shall be continued and concluded** by the authority by which it was commenced in the same manner as if the employee had continued in service.*

5. Penalties:

The following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed on an employee…..

Minor Penalties:

(i) Censure
(ii) With holding of his promotion
(iii) Recovery from his pay of the whole or part of any pecuniary loss caused by him to the Corporation by negligence or breach of orders;
(iv) With holding of increment of pay;

Major Penalties:

(v) Reduction to a lower stage in the time scale of pay for a specified period, with further directions as to whether or not the employee will earn increments of pay during the period of such reduction and whether on the expiry of such period, the reduction will or will not have the effect of postponing the further increments of his pay.

(vi) Reduction to a lower time scale of pay 'grade' post or service which shall ordinarily be a bar to the promotion of the employee to the time scale of pay, grade, post or service from which he was reduced, with or without further directions regarding condition of restoration to the grade or post or service from which the employee was reduced and his seniority and pay on such restoration to that grade; post or service.

(vii) Compulsory retirement;

(viii) Removal from service which shall not be disqualification for future employment.

(ix) Dismissal from service which shall ordinarily be a disqualification for future employment.

(x) Note: As amended vide Board's Resolution No.4 dt. 31 Oct. 2000.

"During the pendency of the disciplinary proceedings, the disciplinary authority, may withhold payment of gratuity, for ordering the recovery from gratuity of the whole or part of any pecuniary loss caused to the Company if the employee is found in a disciplinary proceedings or judicial proceeding to have been guilty of offences/misconduct as mentioned in Sub-section(6) of section 4 of the Payment of Gratuity Act, 1972 or to have

caused pecuniary loss to the Company by misconduct or negligence, during his service including service rendered on deputation or on re-employment after retirement. However, the provisions of Section 7(3) and 7(3A) of the Payment of Gratuity Act, 1972 should be kept in view the event of delayed payment, in case the employee is fully exonerated."
(Emphasis supplied)

40. Since in rule 5 of the said Rules, 1968, there is a reference to sub-section (6) of Section 4 so also section 7(3) and section 7(3A) of the Payment of Gratuity Act, 1972, the said provisions under the Act, 1972 are also extracted below for ready reference.

*"**Sub-section (6) of section 4 of P.G. Act, 1972***

(6) Notwithstanding anything contained in sub-section (1), -

*(a) the gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, **shall be forfeited to the extent of the damage or loss so caused.***

(b) the gratuity payable to an employee may be wholly or partially forfeited] –

*(i) if the services of such employee have been **terminated for his riotous or disorderly conduct or any other act of violence on his part, or***

*(ii) if the services of such employee have been **terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment**.*

Section-7(3) & (3A) of P.G. Act, 1972

*7.(3) **The employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable to the person to whom the gratuity is payable**.*

(3A) If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify:

Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground.]" (Emphasis supplied)

41. To decide the issue involved in the present lis, it would also be appropriate to reproduce below section 4(1) of the Act, 1972 so also rules, 7(1)(5) & (6), 8 (1) & (4) & 10 of Rules, 1972 and Form 'M' (as prescribed under Clause (ii) of sub-rule (1) of rule 8 of the 1972 Rules).

"Section-4(1) of Payment of Gratuity Act, 1972

*4. **Payment of gratuity**.- (1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years, -*

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease:

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement: Provided further that in the case of death of the employee, gratuity payable

to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.]

Explanation. : For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he, was capable of performing before the accident or disease resulting in such disablement.

Relevant portions of Rules-7, 8 & 10 & Form 'M' under clause(ii) of sub-rule (1) of Rule-8 of Payment of Gratuity (Central) Rules, 1972

7. ***Application for gratuity****.— (1) An employee who is eligible for payment of gratuity under the Act, or any person authorised, in writing, to act on his behalf, shall apply, ordinarily* ***within thirty days from the date the gratuity became payable, in Form 'I' to the employer****:*

Provided that where the date of superannuation or retirement of an employee is known, the employee may apply to the employer before thirty days of the date of superannuation or retirement.
(2) XXX
(3) XXX
(4) XXX
(5) An application for payment of gratuity filed after the expiry of the periods specified in this rule shall also be entertained by the employer, if the applicant adduces sufficient cause for the delay in preferring his claim, and ***no claim for gratuity under the Act shall be invalid merely because the claimant failed to present his application within the specified period****. Any dispute in this regard shall be referred to the controlling authority for his decision.*

(6) An application under this rule shall be presented to the employer either by personal service or by registered post acknowledgement due.

"8. ***Notice for payment of gratuity****.— (1) Within fifteen days of the receipt of an application under rule 7 for payment of gratuity, the employer shall—*

(i) if the claim is found admissible on verification, issue a notice in Form 'L' to the applicant employee, nominee or legal heir, as the case may be, specifying the amount of gratuity payable and fixing a date, not being later than the thirtieth day after the date of receipt of the application, for payment thereof, or

(ii) ***if the claim for gratuity is not found admissible, issue a notice in Form 'M' to the applicant employee, nominee or legal heir, as the case may be, specifying the reasons why the claim for gratuity is not considered admissible.***

In either case a copy of the notice shall be endorsed to the controlling authority."
(2) xxx
3) xxx
(4) A notice in form 'L' or Form 'M' shall be served on the applicant either by personal service after taking receipt or by registered post with acknowledgement due.
(5) xxx

10. ***Application to controlling authority for direction****.—(1) If an employer—*

(i) refuses to accept a nomination ***or to entertain an application sought to be filed under rule 7****, or*

(ii) ***issues a notice under sub-rule (1) of rule 8*** *either specifying an amount of gratuity which is considered by the applicant less than what is payable or* ***rejecting eligibility to payment of gratuity****, or*

(iii) having received an application under rule 7 fails to issue any notice as required under rule 8 within the time specified therein, the claimant employee, nominee or legal heir, as the case may be, may, within ninety days of the occurrence of the cause for the application, apply in Form 'N' to the controlling authority for issuing a direction under sub-section (4) of section 7 with as many extra copies as are the opposite parties:

Provided that the controlling authority may accept any application under this sub-rule, on sufficient cause being shown by the applicant, after the expiry of the specified period.

(2) Application under sub-rule (1) and other documents relevant to such an application shall be presented in person to the controlling authority or shall be sent by registered post acknowledgement due.

FORM 'M'

[See clause (ii) of sub-rule (1) of rule 8]

NOTICE REJECTING CLAIM FOR PAYMENT OF GRATUITY

To

……

[Name and address of the applicant employee/ nominee/ legal heir]

You are hereby ***informed as required under clause (ii) of sub-rule (i) of rule 8 of the Payment of Gratuity (Central) Rules, 1972*** *that your claim for payment of gratuity as indicated on your application in Form…… .....under the said rules* ***is not admissible for the reasons stated below****:*

REASONS

[Here specify the reasons]

Place
Date

Signature of the employer/
Authorised Officer.
Name or description of establishment or rubber stamp thereof.

Copy to : The Controlling Authority.

Note: Strike out the words not applicable."

(Emphasis supplied)

42. On examination of the various legal provisions under the Act, 1972 and Rules made thereunder so also the Judgments cited by the learned Counsel for the parties, as detailed above, this Court is of the following views:

a) As prescribed under section 4(1) of the Act, 1972, gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years on his superannuation or on his retirement or resignation or on his death or disablement due to accident or disease. However, completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement.

b) In terms of section 7(1) of the Act, 1972 read with rule 7(1) & (6) of the Rules, 1972, a person, who is eligible for payment of gratuity under the said Act, 1972 or any person authorized, in writing, to act on his behalf, shall send a written application to the Employer

in Form 'I' ordinarily within thirty days from the date the gratuity became payable, either by personal service or by registered post acknowledgement due.

c) As provided under rule 7 (1) of the Rules, 1972, where the date of superannuation or retirement of an employee is known, the employee may apply to the Employer before thirty days of the date of superannuation or retirement for payment of gratuity.

d) Rule 7(5) of the Rules, 1972 provides that an application for payment of gratuity filed after the expiry of the periods specified in rule 7(1) of the Rules, 1972 shall also be entertained by the Employer, if the applicant adduces sufficient cause for the delay in preferring his claim.

e) As provided under rule 7(5) of the Rules, 1972, no claim for the gratuity under the Act, 1972 shall be invalid merely because the claimant has failed to present his application within the specified period.

f) In terms of Rule-8(1) under Rules, 1972, within fifteen days of the receipt of an application under rule 7 for payment of gratuity, the Employer shall, if the claim is found admissible on verification, issue a notice in Form 'L' to the applicant employee, nominee or legal heir, as the case may be, specifying the amount of gratuity payable and fixing a date, not being later than the thirtieth day after the date of receipt of the application, for payment thereof.

g) As provided under rule 8(1) (ii) of the Rules, 1972, if the claim for gratuity is not found admissible, the Employer is to issue a notice in Form 'M' to the applicant employee, nominee or legal heir, as the case may be, specifying the reasons as to why the claim for gratuity is not considered admissible. In either case, where the gratuity claimed is admissible or inadmissible, a copy of the notice in Form 'L' or 'M' given to the applicant shall be endorsed to the Controlling Authority.

h) An Employer cannot simply issue notice in Form-M to the employee rejecting claim for payment of gratuity. If the Employer so desires to forfeit the gratuity, a Show Cause Notice has to be given, because the gratuity amount to which the Employee is otherwise entitled is to be forfeited, which is a drastic consequence for the Employee concerned.

i) As provided under rule 10(1)(iii) of the Rules, 1972, if pursuant to the application filed in terms of rule 7 of Rules, 1972 a notice is given under rule 8(1) either specifying an amount of gratuity which is considered by the application less than what is payable or rejecting his/her eligibility for payment of gratuity or the Employer fails to issue any notice as required under rule 8 within the time specified therein, the claimant employee, nominee or legal heir, as the case may be, may, within ninety days of the occurrence of the cause for the application, apply in Form 'N' to the Controlling Authority for issuing a direction under section 7(4) of the Act, 1972 with as many extra copies as are the opposite parties.

j) In view of the provisions enshrined under section 7(2) of the Act, 1972, as soon as gratuity becomes payable, the Employer shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also the Controlling Authority, specifying the amount of gratuity so determined.

k) As prescribed under section 7(3) of the Act, 1972, the Employer shall arrange to pay the amount of gratuity, within thirty days from the date it becomes payable to the person to whom the gratuity is payable.

l) In terms of section 7(3-A) of the Act, 1972, if the amount of gratuity payable under sub-section (3) is not paid by the Employer within the period specified in sub-section(3),

the Employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify (As per the notification dated 10.10.1987 issued by the Central Government, in exercise of powers conferred under sub-section (3-A) of section 7 of the P.G. Act, 1972, 10% interest is payable).

m) In view of the proviso under section 7(3-A) of the Act, 1972, no such interest is payable if the delay in the payment is due to the fault of the employee and the Employer has obtained permission in writing from the Controlling Authority for the delayed payment on the said ground.

n) As prescribed under section 7(4)(a) of the Act, 1972, if there is any dispute as to the amount of gratuity payable to an employee under the said Act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the Employer shall deposit with the Controlling Authority such amount as he admits to be payable by him as gratuity.

o) Where there is a dispute with regard to any matter or matters specified in clause (a), the Employer or employee or any other person raising the dispute may make an application to the Controlling Authority for deciding the dispute, in terms of section 7(4)(b) of the Act, 1972.

p) As provided under section 7(4)(c) of the Act, 1972, the Controlling Authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the matter or matters in dispute and if, as a result of such inquiry any amount is found to be payable to the employee, the Controlling Authority shall direct the Employer to pay such amount or, as the case may be, such amount as reduced by the amount already deposited by the Employer.

q) As provided in sub-section (6) of section 4 of the Act, 1972, the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the Employer, shall be forfeited to the extent of the damage or loss so caused.

r) As per the settled position of law, as detailed above, before forfeiting the gratuity of an employee in terms of clause (1) of sub-section 6 of section 4 of the Act, 1972, any damage or loss to, or destruction of, property belonging to the Employer has to be quantified by the Employer.

s) Similarly, as prescribed in clause (b) of sub-section 6 of section 4 of the Act, 1972, the gratuity payable to an employee may be wholly or partially forfeited, if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in course of his employment.

t) As held by the apex Court in **Union Bank of India** (supra), under sub-section (6)(b)(ii) of section 4 of the Act, forfeiture of gratuity is permissible if the termination of an employee is for any misconduct which constitutes an offence involving moral turpitude, and the employee concerned is convicted accordingly by a Court of competent jurisdiction. It is not for the Employer to decide whether the offence has been committed amounting to involving moral turpitude.

u) As held in **Rabindranath Choubey** (supra), if departmental proceeding has been initiated against an employee before his retirement, if the service rules of the Employer

provide so, the departmental proceeding can continue even after retirement of an employee and if the employee is found guilty, minor or major punishment, including the punishment of dismissal can be imposed by the Employer, even the employee has retired.

v) As was further held by the apex Court in **Rabindranath Choubey** (supra), the enquiry proceeding has to be concluded first on merit and after passing appropriate order in accordance with law, thereafter necessary consequences as per section 4 of the Act, 1972, more particularly sub-section (6) of section-4 of the Act, 1972 and the Rules of the Employer shall to follow. The recovery, as provided under section-4(6) of the Act, 1972, is in addition to a punishment that can be imposed on an employee after his superannuation.

43. Admittedly, as per sub-rule (3) of rule 3 of the Rules, 1968 of the Petitioners-Corporation, as quoted above, disciplinary proceedings, if instituted while the employee was in service, whether before his retirement or during his re-employment, shall after the final retirement of the employee, be deemed to be proceeding and shall be continued and concluded by the Authority by which it was commenced in the same manner, as if the employee had continued in service. Similarly, in terms of sub-rule (x) of rule 5 of the said Rules, 1968, during pendency of the disciplinary proceeding, the Disciplinary Authority may withhold payment of gratuity for ordering the recovery from gratuity of the whole or part of any pecuniary loss caused to the Company, if the employee is found in a disciplinary proceeding or judicial proceeding to have been guilty of offences/misconduct, as prescribed under sub-section (6) of section 4 of the Payment of Gratuity Act, 1972 or have caused pecuniary loss to the Company by misconduct or negligence, during his service, including service rendered on deputation or on re-employment after retirement, which will be subject to provisions of section 7(3) and 7(3A) of the P.G. Act, 1972. On a bare reading of the said rules, as quoted above, it is amply clear that the Employer (present Petitioners) has to follow the provisions under sub-section (3A) of section 7, which mandates that the Employer shall not be liable to pay interest on the gratuity payable, if the delay in payment is due to the fault of the employee and the Employer has obtained permission in writing from the Controlling Authority for the delayed payment on the said ground. Apart from the same, rule 8 of the Payment of Gratuity (Central) Rules, 1972 deals specifically with regard to notice for payment of gratuity. Clause (ii) in sub-rule (1) of rule 8 of the Rules, 1972 prescribes that if the claim for gratuity is not found admissible, the Employer has to issue notice in Form 'M' to the applicant employee, nominee or legal heirs, as the case may be, specifying the reasons as to why the claim for gratuity is not considered admissible and copy of the same has to be endorsed to the Controlling Authority.

44. Though there is no such pleadings in the Writ Petition so also Affidavit-in-Opposition filed by the Opposite Party No.3-employee, in the list of date of events filed by the Opposite Party No.3, it has been mentioned that he claimed gratuity in Form 'I' on 23.11.2017 and the same was rejected by the Employer on 28th November,

2017, as a result of which the Opposite Party No.3 filed an application in Form 'N' before the Controlling Authority on 29th December, 2017 claiming gratuity. Neither the Petitioners nor the Opposite Party No.3 has disclosed the said alleged communication/rejection of the application submitted by the Opposite Party No.3 claiming gratuity to ascertain the reason for rejection of the said application. It is not the case of the Petitioners that due communication was made to the Opposite Party No.3 to withhold his gratuity on the ground of pendency of the departmental proceeding against him and permission was sought for from the Controlling Authority in terms of the proviso in section 7 (3A) of the P.G. Act, 1972. No communication was made in Form-'M' to the Opposite Party No.3 and also no intimation was given to the Controlling Authority regarding rejection of the application of the Opposite Party No.3 for gratuity. For the first time, while passing the order of dismissal dated 27.11.2018, as at Annexure-6, apart from imposing the major penalty of dismissal from service with effect from the date of his superannuation i.e. 30.11.2016, it was also ordered to forfeit the retiral dues of the Opposite Party No.3 i.e. gratuity and encashment of leave as a punishment. The relevant portion of the order of dismissal, vide which it was ordered to forfeit the gratuity of the Opposite Party No.3, is extracted below:

> *"NOW, THEREFORE, the undersigned being the Appointing Authority in the above case decided to* ***impose the major penalty of "Dismissal from service with effect from the date of his superannuation i.e. 30.11.2016 and forfeiture of his retiral dues (i.e. Gratuity and Encashment of Leave)" on Shri Jayanta Das, Manager (u/s) under the NSIC Control & Appeal Rules, 1968*** *and orders accordingly, with immediate effect. As such, the Appellate Authority in this case would be the Board of Directors.*
>
> *The undersigned, in view of the charges having been proved against Shri Jayanta Das and a penalty imposed upon his, has decided that his period of suspension i.e. from 24.08.2016 to 30.11.2016, will not be treated as period spent on duty by Shri Jayanta Das and he will not be paid any pay and allowances for the said period. However, the subsistence allowance already paid to him will remain paid.*
>
> *(RAVINDRA NATH)*
> *Chairman-cum-Managing Director/*
> *Appointing Authority"*
> ***(Emphasis supplied)***

45. Admittedly, the said order of dismissal is based on the ex-parte Enquiry Report dated 20.02.2018 submitted by the Enquiry Officer, as at Annexure-5. The findings of the Enquiry Officer, being relevant, are extracted below:

> *"**Findings of the Inquiry Officer:***
>
> *From the deposition of MW-1, MW-2 & MW-3 and the documents on record of inquiry (MEs),* ***it is proved that the CE has not diligently observed the guidelines specified in the Financial Services Manual regarding appraisal of application received for assistance under RMA against Bank Guarantees as detailed below****:-*
>
> *a) Inadequate infrastructure was available as per the inspection reports, the value of machinery available was inadequate, yet CE recommendation was made for huge sanction of Rs.300 lakh each to these units under RMA.*

b) At the time of appraisal, VAT registration status was not checked, increase/decrease in turnover/raw material was not diligently analyzed by CE in proper perspective.

c) Further at the time of processing of contingent bill for release of payment to supplies, verification of VAT, status of the registration of the supplies etc. was not properly analyzed by CE, but payment was released to the suppliers by CE.

d) The memorandum of receipts being the signature of CE are not backed by forwarding letters of units for such receipts and there have been instances as narrated above where receipt from one unit has been adjusted to accounts of other two units without any supporting document. In few instances as stated above, there has been adjustment of invocation proceeds as repayment from the units and subsequent issue of payment to supplier on account of this false memorandum adjustment causing exposure of NSIC funds to greater rist.

e) There have been instances as stated above of renewal of limits by the CE to the RMA units without completion of proper procedure and approval of the competent authority.
From the above facts detailed, it is proved that the charges laid down in the Articles of Charge-I to VII are proved" ***(Emphasis supplied)***

46. Though in para-10 of the Writ Petition it has been stated that the Appeal preferred by the Opposite Party No.3 before the Board of Directors is pending, during hearing of this case, both the Petitioners-Corporation as well as Opposite Party No.3 filed photocopy of the order dated 17.01.2020 passed by the Appellate Authority, the contents of which is extracted below:

*"**ORDER***

WHEREAS departmental disciplinary proceedings for a major penalty, under Rule 8 of the NSIC Control & Appeal rules, 1968 were initiated against Shri Jayanta Das, the then Manager (u/s). NSIC Ltd., Sub Branch, Balasore vide Office Memorandum No.ZOE/02/2016-17 dated 24.11.2016.

AND WHEREAS after concluding the inquiry proceedings, the manor penalty of "Dismissal from service with effect from the date of his superannuation i.e. 30.11.2016 and forfeiture of his retiral dues (i.e. Gratuity and Encashment of Leave)" was imposed on Shri Jayanta Das, Manager (u/s) vide order No.3/79/SIC/VIG/2016 dated 27.03.2018.

AND WHEREAS, Shri Jayanta Das has made an appeal dated 09.07.2019 to the Appellate Authority (i.e. Board of Directors, NSIC) against the aforementioned order.
AND WHEREAS the appeal dated 09.07.2019 of Shri Jayanta Das was placed before the Board of Directors in its 526th meeting held on 28.08.2019 wherein the Board of Directors decided to have more deliberation on the matter. The said appeal was further considered by the Board of Directors in its 528th meeting held on 16.12.2019. In the said meeting, as directed by the Board, Shri Jayanta Das appeared before the Board of Directors in person. The Board heard the submissions made by Shri Jayanta Das for quashing the dismissal order and for release of his Gratuity.

AND WHEREAS the Board of Directors in its 529th meeting held on 27.12.2019 noted that as the gratuity matter is already under adjudication before the High Court, Cuttack, the relief cannot be considered in another forum and the claim to that extent is barred by res judicata.

AND WHEREAS the Board after deliberations on the facts and circumstances of the case noted that the appeal does not contain any additional points / facts, which were not examined by the inquiry officer. ***The Board further noted that as the gratuity matter is already under adjudication before the High Court, Cuttack, the relief cannot be considered in another forum and the claim to that extent is barred by res judicata****.*

NOW, THEREFORE, the Board decided that the appeal submitted by Shri Jayanta Das is not sustainable and is liable to be rejected. Accordingly, the order issued by the then CMD dated 27.03.2018 is upheld.

By order and on behalf of the
Board of Directors
Sd/-
(Nistha Goyal)
Company Secretary"
(Emphasis supplied)

Admittedly, the said order was passed much after the period as directed by the Central Administrative Tribunal, Kolkata Bench vide order dated 13.06.2019, vide which it was directed to dispose of the Appeal of the Opposite Party No.3 within a period of four weeks from the date of receipt of the Appeal. Since one of the punishments imposed was forfeiture of gratuity and the Opposite Party No.3 had prayed before the Appellate Authority for release of his gratuity, instead of dealing with the said issue, the Appellate Authority has passed the order dated 17.01.2020, as quoted above, keeping it open to be decided by this Court.

47. Law is well settled that any judgment contrary to the statute is hit by the law of per incuriam. Admittedly, the Rule, 1968 is a delegated legislation, whereas Act, 1972 is a parliamentary legislation and provisions under the Act, 1972 will have an overriding effect over the provisions in Rules, 1968, if there is any inconsistency between the Rule, 1968 vis-a-vis the Act, 1972. Rather, in the present case, rule 5 of the 1968 Rules prescribes that so far as withholding of gratuity, the same shall be governed by section 7(3A) of the P.G. Act, 1972, the proviso under which enshrines that the Authority concerned should take permission from the Controlling Authority, if it desires to withhold the payment of gratuity on the plea of pendency of disciplinary proceeding or judicial proceeding.

48. The law is also well settled that power of prospective overruling is vested only in the Supreme Court. Unless it is so mentioned in a judgment, vide which an earlier judgment of the apex Court is overruled, that the same will be made applicable prospectively, it will have a retrospective operation and will be made applicable to all the pending litigations, even though the impugned order/judgment in the pending litigation is based on a judgment of the apex Court, which was in vogue at the relevant juncture, but was subsequently overruled by a larger Bench.

49. From the background admitted facts, various provisions under the P.G. Act, 1972 and rules made thereunder, so also relevant Rules of the Petitioners-Employer pertaining to continuance of Departmental Enquiry after retirement of an employee

and penalties to be imposed on the delinquent employee so also settled position of law, as detailed above, this Court is of the following irresistible conclusions:

i) The provisions of the Rules, 1968 cannot be in derogation of the provisions enshrined under section 7(3) & 7(3A) of the P.G. Act, 1972.

ii) In view of the provisions under rule 3(3) of the Rules, 1968, the Petitioners-Employer had a right to continue with the disciplinary proceeding till its conclusion, as the same was instituted before retirement of the Opposite Party No.3.

iii) The Petitioners-Employer had a right to impose the major penalty of dismissal with retrospective effect i.e. the date when the Opposite Party No.3 was superannuated, and legality of punishment imposed is subject to judicial scrutiny.

iv) In terms of proviso in sub-section (3-A) of section 7 of the Act, 1972, if the Employer wants to withhold the gratuity of a retired employee, it has to seek permission from the Controlling Authority to do so, failing which the Employer is liable to pay interest. But no such permission was sought for in the present case to withhold the gratuity of Opposite Party No.3, till it was mentioned in order of dismissal dated 27.03.2018 that from the date of dismissing him from service i.e. with effect from 30.11.2016, his gratuity and encashment of leave stand forfeited.

*v) So far as the penalty to be imposed by the Disciplinary Authority has been detailed in rule 5 of the Rules, 1968. There is no such provision under the said rule to impose the punishment of forfeiture of gratuity. Though the said rule prescribes as to withholding payment of gratuity, for ordering the recovery from the gratuity of whole or part of the pecuniary loss caused to the Corporation, in the order of dismissal, it was mentioned that the Appointing Authority decided to impose major penalty of "**Dismissal from service with effect from the date of his superannuation i.e. 30.11.2016, and forfeiture of his retiral dues i.e. Gratuity and Encashment of Leave.**" The said act of the Petitioners-Employer is illegal and is devoid of jurisdiction, as held by the apex court in Para-10 of its judgment reported in **D.V. Kappor** (supra).* ***(Emphasis supplied)***

*vi) There is no such findings given by the Enquiry Officer or the Disciplinary Authority that the misconduct, allegedly proved against the present Opposite Party No.3, amounts to moral turpitude. Apart from that, as held in Paras-17 & 19 of the judgment of the apex Court in **Union Bank of India** (supra), the requirement of the statute is not the proof of misconduct of acts involving moral turpitude, but the acts should constitute an offence involving moral turpitude and such offence should be duly established in a Court of law. It is not for the Petitioners-Employer to decide whether the offence has been committed amounting to involving moral turpitude.*

vii) Though there was an alleged loss caused to the Corporation for the misconduct proved against the Opposite Party No.3, the said loss has never been quantified by the Enquiry Officer or the Disciplinary Authority. Still, invoking the alleged power delegated under rule 5 of the Rules, 1968, the Disciplinary Authority imposed the punishment of forfeiture of gratuity in addition to forfeiture of earned leave, without following the procedure to forfeit the Gratuity prescribed under the Act, 1972.

*viii) As held by the apex Court in **Jaswant Singh Gill** (supra), which was partially overruled in **Rabindranath Choubey** (supra), it is held that the amount liable to be forfeited would be only to the extent of damage or loss caused and the disciplinary authority has to quantify the same before ordering for forfeiture of the gratuity.*

ix) Though the Opposite Party No.3 submitted an application in Form 'I' in terms of sub-rule (1) of rule 7 of the Rules, 1972 claiming gratuity, no communication was made to him in Form 'M' in terms of Clause (i) in sub-rule (1) of rule 8 of Rules, 1972, intimating him that his claim for payment of gratuity, as indicated in his application in Form 'I' under the said

rule, is not admissible assigning cogent reason to do so marking a copy of the same to the Controlling Authority.

x) Admittedly, the judgment in ***Rabindranath Choubey*** *(supra) is a larger Bench judgment, vide which the judgment of the apex Court in* ***Jaswant Singh Gill*** *(supra) was partially overruled to the effect that the Disciplinary Authority has power to impose the penalty of dismissal/major penalty upon the delinquent employee even after his attaining the age of superannuation, as the disciplinary proceedings were initiated while the employee was in service.*

As there is no such observation in the said judgment as to applicability of the said judgment prospectively, the principles decided in the said case shall be made applicable to the present case.

xi) In view of the observation made by the apex Court in Para-11 of the judgment in ***Rabindranath Choubey*** *(Supra), the Appellant– Employer has a right to withhold the gratuity during pendency of the disciplinary proceedings and the Disciplinary Authority has power to impose the penalty of dismissal/major penalty on the Opposite Party No.3 even after his attaining the age of superannuation, as the disciplinary proceeding was initiated against him while he was in service. Hence, the observation made in paras- 2 to 4 of the impugned order passed by the Opposite Party No.1 (the Appellate Authority under the P.G. Act, 1972), relying on the judgment of the apex Court in* ***Jaswant Singh Gill*** *(Supra), the same having been overruled to the effect as indicated above, is bad and liable to be set aside.*

xii) However, further observations of the Appellate Authority, as detailed in Paragraphs-5 to 8 of the impugned judgment passed in P.G. Appeal No.36(431)/2018-B.I., being in consonance with the various provisions under the P.G. Act, 1972, as detailed above, so also the settled position of law, needs no interference.

xiii) There being no error or infirmity in the impugned order dated 12.11.2018 passed by the Controlling Authority, as at Annexure.2, needs no interference.

50. In view of the observations as detailed above so also the views taken by this Court, as detailed in Para-42 above, the findings of the Appellate Authority in Paras 2 to 4 of the impugned order dated 26.09.2019 as at Annexure-1, being contrary to the observations made in **Rabindranath Choubey** (supra), are hereby set aside.

51. Though there is a specific mechanism provided under section 8 of the Act, 1972 read with rule 19 of Rules, 1972 for recovery of gratuity ordered by the Controlling Authority, in the peculiar facts and circumstances, as the issue regarding payment of gratuity to the Opposite Party No.3 is pending since 2016 and the Petitioners obtained an order of stay of operation of the impugned orders, thereby debarring the Opposite Party No.3 to get his gratuity in terms of the order passed by the Controlling Authority, this Court directs the Petitioners to promptly act in terms of the direction given by the Controlling Authority vide order dated 12.11.2018, as at Anenxure-2 and implement the same within a period of four weeks from the date of production of the certified copy of this order.

52. With the aforesaid observations and directions, the Writ Petition stands disposed.

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2024 (I) ILR-CUT-1453

G. SATAPATHY, J.

CRLREV NO.795 OF 2014

NANDAKISHORE PAL ……Petitioner

-V-

STATE OF ORISSA (VIGILANCE) ……Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – Section 197 – Sanction – Criterias for issuance of sanction – Discussed with reference to case laws. (Paras 6-11)

Case Laws Relied on and Referred to :-

1. (2020) live law SC 485 : A. Srinivasulu Vrs. State represented by Inspector of Police.
2. (2009) 3 SCC 355 : Vakil Prasad Singh Vrs. State of Bihar.
3. (1998) 6 SCC 411 : Kalicharan Mahapatra Vrs. State of Orissa.
4. (2007) 1 SCC 4 : Lalu Prasad alias Lalu Prasad Yadav Vrs. State of Bihar.
5. (2023) 8 SCC 711 : A. Sreenivasa Reddy Vrs. Rakesh Sharma & Anr.
6. (2021) 8 SCC 768 : Indradevi Vrs. State of Rajstan and another.
7. (1997) 5 SCC 326 : Sambhoo Nath Misra Vrs. State of UP.
8. (2004) 8 SCC 40 : State of Orissa Vrs. Ganesh Chandra Jew.

For Petitioner : Mr.R. Roy
For Opp.Party : Mr. S. Das, Standing Counsel (Vigilance)

JUDGMENT Date of Judgment : 27.02.2024

G. SATAPATHY, J.

1. This criminal revision U/S. 401 read with Section 397 of the Code of Criminal Procedure, 1973 (In short the 'Cr.P.C.') assails the order passed on 18.08.2014 by learned Special Judge, Vigilance, Cuttack in TR Case No. 213 of 2007 refusing to discharge the Petitioner for commission of the offences under IPC while discharging him for commission of offence under Prevention of Corruption Act, 1988 (in short, "PC Act") in an application U/S. 239 of Cr.P.C.

2. Facts in nutshell are, on receipt of reliable information of misappropriation of Government subsidy money of Rs. 1,50,000/-, an enquiry was taken up by the Vigilance Unit of Cuttack and accordingly, it was found that during 1990-91, 150 shallow point tube-wells (SPTW) were sanctioned by the Government for Raghunathpur Block and accordingly, an amount of Rs. 2,49,000/- was granted and placed under the disposal of BDO, Raghunathpur for execution of the work under the scheme, but the Petitioner who was a JE then and other officials including the BDO in connivance with the beneficiaries misappropriated the subsidy money of Rs. 1,47,000/- sanctioned against 49 beneficiaries and thereby, committed criminal misconduct by producing fake cash memos regarding purchase of materials for sinking of SPTWs and furnishing false completion certificates of installation.

On this incident, an FIR was lodged against the Petitioner and others which was registered vide Cuttack Vigilance PS Case No.05 of 1993 and the matter was investigated into. On completion of investigation, charge-sheet was filed against the Petitioner and 55 others for commission of offences punishable U/Ss. 13(2) r/w Sec.

13(1)(c)(d) of the Prevention of Corruption Act, 1988 (in short the 'Act') and U/Ss. 409/420/468/471/477(A)/34 of IPC under which cognizance was taken, but subsequently the Petitioner preferred an application before the Special Judge, Vigilance, Cuttack seeking discharge in this case for commission of the offences under PC Act and IPC for want of sanction. However, the learned Special Judge, Vigilance, by the impugned order dated 18.08.2014 discharged the Petitioner for commission of offences under the PC Act for want of sanction U/S. 19 of the PC Act, but directed to frame charge against him for commission of offences punishable U/Ss. 409/420/ 468/ 471/477(A)/34 of IPC on the ground that Sec. 197 of the Cr.P.C. does not provide protection to the Petitioner since commission of offences by the Petitioner has no nexus in due discharge of his duties. Hence, this criminal revision by the Petitioner.

3. Mr. R. Roy, learned counsel for the Petitioner has confined his submission only in respect of discharge of the Petitioner for offences U/Ss. 409/420/468/471/ 477(A)/34 IPC for want of sanction as contemplated U/S. 197 of the Cr.P.C. and for delay in disposal of the case which seriously affects the right of the Petitioner to speedy trial. Mr. Roy has accordingly, relied upon the decisions in ***A. Srinivasulu Vrs. State represented by Inspector of Police; (2020) live law SC 485 and Vakil Prasad Singh Vrs. State of Bihar;(2009) 3 SCC 355***.

4. On the other hand, Mr. S. Das, learned Standing Counsel for Vigilance by supporting the impugned order has submitted that although Sec. 19 of the PC Act provides protection to the Petitioner from proceeding further against him in respect of offences committed under the PC Act, but there is no such protection U/S. 197 of the Cr.P.C. to proceed against the Petitioner for commission of offences under IPC since by no stretch of imagination, commission of offences by a public servant can be construed to have any nexus in due discharge of his duties. Accordingly, Mr. Das has prayed to dismiss the criminal revision.

5. On a careful scrutiny of the impugned order keeping in view the materials on record vis-à-vis the rival submissions, primarily it appears to the Court that no sanction order has been obtained from the Competent Authority to prosecute the Petitioner in this case and that is why the learned Special Judge by the impugned order has discharged the Petitioner from the offence U/S. 13 of the PC Act, but he, however, being of the opinion that no sanction is necessary for misconduct of the Petitioner in respect of commission of offences under different Sections of IPC directed for framing of charge against the Petitioner for commission of offences U/Ss. 409/420/468 /471/477(A)/34 of IPC. It is undisputed that the protection of public servant from prosecution for commission of offences under general law is distinct and different from the protection provided in Sec. 19 of the PC Act, no matter the object behind both the enactments is for protection of public servant from false and frivolous prosecution, but the previous sanction as contemplated U/S. 19 of the PC Act is invariably intended to protect the public servant from prosecution of

the offences under the PC Act by the very issue of the status of the accused to be a public servant. In simple word, if the offences for which the public servant is likely to be prosecuted is for commission of the offences punishable U/Ss. 7,11,13 and 15 of the PC Act as stood prior to Amendment Act of 2018, no Court shall take cognizance of offences without previous sanction of competent authority, but the protection as provided Under Section 197 of the Cr.P.C. is meant to protect the public servant accused of any offences alleged to have been committed by him while acting or purporting to act in discharge of his official duty. It is, therefore, very clear that a public servant is protected from prosecution under the aforesaid offences under the PC Act without previous sanction from the Competent Authority merely on his very status as a public servant, but in later case of the protection as provided U/S.197 of the Cr.P.C., the public servant is protected till sanction is accorded against him from Competent Authority when his act is in discharge of his official duty. True it is that to commit an offence punishable under law can never be a part of official duty of a public servant, but if such public duty has reasonable nexus with the act complained of against the public servant in excess of his official duty can also be given protection under the umbrage of official duty. To make it more lucid, it would be appropriate to give an illustration; if a police officer in discharge of his official duty to execute a warrant against an offender has committed some excesses in official duty by entering into the premises of the house of the offender without having any search warrant, even though the act complained of against such police officer is in excess of his duty, but his such act having reasonable connection with due discharge of his official duty is protected U/S. 197 of the Cr.P.C.

6. In order to clearly understand the issue, this Court considers it profitable to refer to the following decisions. In ***Kalicharan Mahapatra Vrs. State of Orissa; (1998) 6 SCC 411***, wherein the Apex Court has held as under:-

> *"...The sanction contemplated in Section 197 of the Code concerns a public servant who is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty', whereas the offences contemplated in the PC Act are those which cannot be treated as acts either directly or even purportedly done in the discharge of his official duties. Parliament must have desired to maintain the distinction and hence the wording in the corresponding provision in the former PC Act was materially imported in the new PC Act, 1988 without any change in spite of the change made in Section 197 of the Code..."*

6.1 In ***Lalu Prasad alias Lalu Prasad Yadav Vrs. State of Bihar; (2007) 1 SCC 4***, it has been held by the Apex Court which reads as under:-

> *"10. It may be noted that Section 197 of the CrPC and Section 19 of the PC Act, 1988 operate in conceptually different fields. In cases covered under the Act, in respect of public servants the sanction is of automatic nature and thus factual aspects are of little or no consequence. Conversely, in a case relatable to Section 197 of the CrPC, the substratum and basic features of the case have to be considered to find out whether the alleged act has any nexus with the discharge of duties. Position is not so in case of Section 19 of the Act."*

7. Moreover, "the test" for sanction U/S. 197 of the Cr.P.C. has been laid down by the Apex Court in another decision in ***A. Sreenivasa Reddy Vrs. Rakesh Sharma and another; (2023) 8 SCC 711***, wherein it has been held that:-

> *"61. Xx xx.The test in the latter case(Sec.197 Cr.P.C) is of the "nexus" between the act of commission or omission and the official duty of the public servant. To commit an offence punishable under law can never be a part of the official duty of a public servant. It is too simplistic an approach to adopt and to reject the necessity of sanction under Section 197 of the Cr.P.C. on such reasoning. The "safe and sure test", is to ascertain if the omission or neglect to commit the act complained of would have made the public servant answerable for the charge of dereliction of his official duty. He may have acted "in excess of his duty", but if there is a "reasonable connection" between the impugned act and the performance of the official duty, the protective umbrella of Section 197 of the CrPC cannot be denied, so long as the discharge of official duty is not used as a cloak for illicit acts."*

8. Whether the sanction U/S. 197 Cr.P.C. is required or not for the act or omission of the accused, has been laid down in Paragraph-10 in ***Indradevi Vrs. State of Rajstan and another; (2021) 8 SCC 768***, wherein the Apex Court has held as under:-

> *"10. xx xx. The alleged indulgence of the officers in cheating, fabrication of records or misappropriation cannot be said to be in discharge of their official duty. However, such sanction is necessary if the offence alleged against the public servant is committed by him "while acting or purporting to act in the discharge of his official duty and in order to find out whether the alleged offence is committed "while acting or purporting to act in the discharge of his official duty", the yardstick to be followed is to form a prima facie view whether the act of omission for which the accused was charged had a reasonable connection with the discharge of his duties. [See State of Maharashtra Vs. Dr. Budhikota Subbarao; (1993) 3 SCC 339]. The real question, therefore, is whether the act committed is directly concerned with the official duty."*

9. In ***Sambhoo Nath Misra Vrs. State of UP; (1997) 5 SCC 326***, while answering the question as to whether a public servant allegedly found to have committed the offence of fabrication of records or misappropriation of public funds can be said to have acted in discharge of his official duties, the Apex Court has held as under:-

> *"5. The question is when the public servant is alleged to have committed the offence of fabrication of record or misappropriation of public funds etc, can he be said to have acted in discharge of his official duties. It is not the official duty of the public servant to fabricate the false records and misappropriate the public funds etc. in furtherance of or in the discharge of his official duties. The official capacity only enables him to fabricate the record or misappropriate the public funds etc. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of same transaction, as was believed by the learned Judge. Under these circumstances, we are of the opinion that the view expressed by the High Court as well as by the trial Court on the question of sanction is clearly illegal and cannot be sustained."*

10. What constitute an official duty has been explained in ***State of Orissa Vrs. Ganesh Chandra Jew; (2004) 8 SCC 40***, wherein it has been held by the Apex Court as under:-

> *"10. Xx xx. Use of expression "official duty" implies that the act or omission must have been done by the public servant in course of his service and that it should have been in discharge of his duty. This Section (197 of the Cr.P.C.) does not extend its protective cover to every act or omission done by the public servant in service, but restrict its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty."*

11. A careful perusal of the provisions of Sec. 197 of Cr.P.C. keeping in view the mandate of law as laid down by the Apex Court in the decisions referred to above, it clearly appears that the protection as provided U/S. 197 of the Cr.P.C. does not extend to cover every act or omission of public servant while in service, rather the act or omission which are done by public servant in due discharge of official duties are protected under it .and no Court shall take cognizance of offence under general law without obtaining prior sanction as contemplated U/S. 197 of the Cr.P.C., if the act or omission done by a public servant has reasonable connection and nexus with due discharge of his official duties, even he is protected, if the act or omission is in excess of public duty, but there must be some reasonable nexus between the act complained of and the official duty. It is, however, clarified that if the act complained of has no nexus or connection with the official duty of the public servant, Section 197 of Cr.P.C. will not protect such acts of the public servant. It is also abundantly clarified here that committing an offence without having any nexus with official duty, by no stretch of imagination can be construed as public duty.

12. The factual position in this case is somehow peculiar which is not only for want of sanction against the Petitioner, but it appears from the prosecution papers and records that pursuant to an enquiry, it was unearthed that during 1990-91, the Government had introduced implementation of centrally sponsored scheme for assistance to small and marginal farmers for increasing agricultural production and accordingly, 150 shallow point tube well (SPTW) were sanctioned by the Government for Raghunathpur Block with provision for an amount of Rs. 2,49,000/- which was placed under disposal of the BDO, Raghunathpur for execution of the scheme and accordingly, the BDO, Raghunathpur entrusted the Petitioner JE and some other officials to execute the work order. Accordingly, 83 beneficiaries were selected for installation of SPTW with cent percent subsidy @ Rs. 3,000/- per installation of one SPTW, but in the enquiry; out of 83 SPTWs, only 33 were found installed with violation of instructions and the rest 49 SPTWs were found to have not installed against the beneficiaries so selected causing loss of Rs. 1,47,000/- to the Government by way of misappropriation done by the accused persons. Accordingly, FIR was lodged and Vigilance PS Case No. 5 of 1993 was registered on 02.02.1993 against 8 Government officials, but on investigation, charge-sheet was submitted against 56 accused persons, out of whom 25 were arrested and released on bail, but 31 evaded arrest. The BDO was, however, not charge-sheeted since evidence was found deficient against him. In the course of investigation, accordingly, it was found that 7 Government Officials and 49 beneficiaries in collusion had misappropriated a sum of Rs. 1,47,000/- by falsifying records and producing fake vouchers showing purchase of materials for SPTWs and furnishing

false completion certificate of installation of 49 numbers of SPTWs in Jagannthpur & Adheikula GP of Raghunathpur Block.

13. It is also found from the report vide No. 111 dated 04.04.2023 of the learned Special Judge, Vigilance, Cuttack that FIR was registered on 02.02.1993, but charge sheet was submitted against 56 accused persons on 24.07.1997 and cognizance of offence was taken on 30.06.2001 by the learned Special Judge, Vigilance, Bhubaneswar, but the case record was received by the learned Special Judge, Cuttack on transfer on 02.02.2007. According to the report received by this Court vide No. 152 dated 09.05.2023 of the learned Special Judge, Vigilance, Cuttack, it appears that only 39 out of 56 charge-sheeted accused persons had appeared, but subsequently 17 accused persons were reported to be dead and case against them stood abated on different dates and later on, the case record was transferred to the Court of Additional Special Judge Vigilance, Cuttack on 06.01.2019, but in view of the direction of this Court, the case record was again transferred to the original Court which was received on 02.08.2022, but NBWs issued against 7 accused persons were still to be executed and thereby, charge for the offence could not be framed against the accused person till 09.05.2023.

14. A perusal of charge sheet would also reveal that it is not a case where the authority has not been approached for according sanction against the Petitioner, but neither sanction order was received by the investigating officer nor was sanction refused against Petitioner, despite the authority had been moved for according sanction against the Petitioner. It is strange, but of course true that charge is yet to be framed against the Petitioner or any of the accused persons, even after more than 31 years of the commission of offences and that too, is not for the latches or negligence of the petitioner. Further, the perusal of the charge sheet also makes it ample clear that sanction has been accorded by competent authority against the accused Biswanth Jena (CEO), Bhaskar Mohanty, Additional CEO, Pravat Kumar Panda (JE), Pitabas Mishra (JE), Radheshyam Dash (VLW) and Jadunath Jena (VLW). It is also not in dispute that the Petitioner has also approached this Court in CRLMC No. 1180 of 2021 in an application U/S. 482 Cr.P.C. for seeking a direction to split up the trial against the present Petitioner and conclude it within four months and accordingly, this Court by an order passed on 12.05.2023 disposed of the aforesaid CRLMC, granting liberty to petitioner on his own motion to raise all those points before this Court in the aforesaid criminal revision. It is true that the Petitioner has preferred this revision seeking his discharge from the offences under which he is directed to be prosecuted by the impugned order. In the context of right to speedy trial, the Petitioner has also relied upon the decision in ***Vakil Prasad Singh (Supra)***, wherein it has been held that:-

> *"25. Where the Court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, may be quashed unless the Court feels that having regard to the nature of offence and other relevant circumstances, quashing of the proceedings may not be in the interest of justice.*

In such a situation, it is open to the Court to make an appropriate order as it may deem just and equitable including fixation of time-frame for conclusion of trial."

15. In the context, this Court by way of an order passed on 01.03.2023 has directed the Vigilance Department to submit specific instruction with regard to the role played by the Petitioner and the supporting documents in support of such accusations and pursuant to such order, the DSP Vigilance has produced the specific written instruction through learned ASC Vigilance, wherein it has been indicated that the Petitioner along with 4 Government Officials were entrusted for execution of the installation of 28 SPTWs in Jagannathpur GP under Raghunathpur Block, but the same were found missing during site inspection by technical team and investigation, but subsidy amount of Rs. 84,000/- had been paid to 28 beneficiaries and the certificates for 28 SPTWs being found unavailable on record, it was reported to be difficult to bifurcate the misappropriation amount in between two JEs. In the context of right to speedy trial, this Court reminds that the criminal trial is voyage of discovery in which the truth is the quest, but it is the duty of the presiding Judge to explore every possibility to discover the truth to advance the cause of justice by providing speedy trial to the person accused of offence, which is of course the fundamental right of the accused as guaranteed under article 21 of the Constitution of India. It is, however, true that, if the system is unable to provide right to speedy trial and more particularly in this case, when the trial has not begun even after 31 years of the alleged incident by framing charge, it can be reasonably said that there is no grounds for presuming the Petitioner to have committed the offence as required U/S. 239 of the Cr.P.C. to frame charge against him. In this case, it is also not in dispute that the Petitioner was discharged of the offences under PC Act for want of sanction, but since the Petitioner was allegedly being charge sheeted for commission of offence of misappropriation and cheating, it was accordingly found by the learned trial Judge that the offence committed by the Petitioner cannot be considered in due discharge of his duty and there is no reasonable nexus between discharge of duty and commission of offence and thereby, the learned trial Judge has directed to proceed against the Petitioner for commission of offence under IPC. It is, however, considered that the offence alleged against the Petitioner has no reasonable nexus with due discharge of his official duty, but taking into consideration the authority having not reverted back to the motion of the Investigating Officer for according sanction against the petitioner and charge having yet to be framed, even after 31 years of the alleged occurrence thwarting the right to speedy trial of the Petitioner as guaranteed under Constitution. This Court in the peculiar facts and circumstance of the case is constrained to consider that the charge sought to be brought against the Petitioner appears to be groundless, especially when the trial would commence is eventually a guess and how much time it would require to complete the trial is uncertain. In the peculiar facts and situation of the case, this Court considers it fit to discharge the Petitioner for commission of the offences under IPC and, accordingly, quashes the impugned order.

16. In the result, the criminal revision stands allowed on contest, but there is no order as to costs. As a necessary corollary, the impugned order stands set aside and the Petitioner is discharged of the offences under IPC.

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2024 (I) ILR-CUT-1460

CHITTARANJAN DASH, J.

ABLAPL NO. 2751 OF 2024

RABINARAYAN NAYAK ……Petitioner

-V-

STATE OF ODISHA ……Opp.Party

CODE OF CRIMINAL PROCEDURE, 1973 – Section 438 – Anticipatory bail – Duty of the court while exercising its extra ordinary jurisdiction in the matter of anticipatory bail – Discussed with reference to case laws. (Paras 7-8)

Case Law Relied on and Referred to :-

1. Special Leave Petition (Crl.) No.7940 of 2023 (dtd.14th March,2024) : Srikant Upadhyaya & Ors. Vrs. State of Bihar & Anr.

For Petitioner : Mr. B.P.B. Bahali
For Opp.Party : Mr. M.K. Mohanty, ASC

ORDER Date of Order : 02.04.2024

CHITTARANJAN DASH, J.

1. Heard learned counsel for the Petitioner and the State.

2. By means of this application, the Petitioner seeks grant of anticipatory bail Under Section.438 of Cr.P.C. in apprehension of arrest for his alleged involvement in the offences U/s.294/336/341/353/354/379/506 of IPC, R/w. Section 3 of the Orissa Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage of Property) Act, arising out of Naugaon P.S. Case No.37 of 2024 corresponding to G.R Case No.310 of 2024 pending on the files of learned S.D.J.M., Jagatsinghpur.

3. Mr. Bahali, the learned counsel for the Petitioner submitted that the allegations are false and fabricated in the manner the narration has been made. According to him there might be an altercation considering the fact that the Petitioner was undergoing treatment for allegedly meeting with a road traffic accident. It is further submitted by Mr. Bahali that the Petitioner is an Ex-army Man.

4. The learned counsel for the State on the other hand submitted that it has become a regular phenomenon and the doctors and para medical staff are taken to task despite they are ready to serve the people at any point of time under any

circumstances and as such in case the Petitioner is allowed the pre arrest bail it would not only encourage him but the people in general will not hesitate to deal with the doctors taking the law into their hand thereby the patients in general will be affected to a great extent.

5. It is apt to mention that the need for enactment of law i.e ***Orissa Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage of Property) Act*** found imminent despite the provision available in the Indian Penal Code with the sole purpose to give utmost primacy to the area so that prevention of violence against medicare personnel and institutions can be best assured.

6. The law as above prohibits violence by or against medicare service persons, and damaging the property of medicare service institutions. Medicare service includes providing medical care, including ante-natal and post-natal care, and care for any sickness, injury, or infirmities. Violent acts include causing threat, intimidation, harm, injury, hindering the duty or endangering the lives of medicare service persons such as registered medical practitioners and nurses, paramedical personnel, and medical and nursing students. Therefore, it is required for all purposes to ensure its implementation and to ensure that the very purpose of the enactment does not get frustrated.

7. Needless to mention that while exercising its extra ordinary jurisdiction such as the one in the matter of anticipatory bail, the Court must look to the nature and gravity of the crime alleged vis-à-vis its impact on the society in the event of a grant of anticipatory bail. A number of issues are before us wherein invariably it is seen that people are getting repulsive in matters of trivial nature while its ramification is very high in the society. In hospitals the common man in particular is getting impatient to deal with doctors when they are meant to save the life of the patients. From the ground taken in the application for bail herein, there appears no such circumstance upon which the Petitioner was to take the law into his hand, more so when the Petitioner is stated to be retired defence personnel though for him it was incumbent to show utmost discipline. The grant of anticipatory bail in such case would not only encourage the people rather they will not hesitate to deal with the doctors in taking them to task thereby it would not only create a chaous but the people themselves will be at stake who would be waiting for the attendance of the doctors in emergency.

8. The Apex Court in the matter of ***Srikant Upadhyaya & others Vrs. State of Bihar & another*** (in ***Special Leave Petition (Crl.) No.7940 of 2023*** dated ***14th March,2024***) held as follows:-

> *We have already held that the power to grant anticipatory bail is an extraordinary power. Though in many cases it was held that bail is said to be a rule, it cannot, by any stretch of imagination, be said that anticipatory bail is the rule. It cannot be the rule and the question of its grant should be left to the cautious and judicious discretion by the Court depending on the facts and circumstances of each case.*

9. Having regard to the aforesaid discussion and keeping in view the fact that the front line warriors of the society is in jeopardy, this Court is not inclined to grant anticipatory bail to the Petitioner.

10. Accordingly the prayer for bail stands rejected and the ABLAPL is dismissed.

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2024 (I) ILR-CUT-1462

CHITTARANJAN DASH, J.

CRLREV NO. 41 OF 2006

OM BABA NILAMANI ……Appellant

-V-

STATE OF ODISHA (VIGILANCE) ……Respondent

CODE OF CRIMINAL PROCEDURE, 1973 – Sections 397, 401 – Whether upon the death of the sole appellant the revision application is to be abated? – Held, No – The court can continue with the hearing of the case even in absence of petitioner or its legal representatives whose interests are jeopardized directly by the decision.

Case Laws Relied on and Referred to :-

1. AIR 1959 SC 144 : Pranab Kumar Mitra Vs. State of West Bengal and Anr.
2. AIR 1964 SC 1645 : Bondada Gajapathi Rao Vs. State of Andhra Pradesh.
3. Criminal Revision No. 310 of 2003 dated 9th of October, 2014 : Suresh Tiwari Vs. State of Chhattisgarh.
4. [1955] 2 All ER 234 : R. Vs. Rowe.

For Appellant : None

For Respondent : Mr. M. S. Rizvi, ASC (Vigilance)

JUDGMENT Date of Judgment : 18.03.2024

CHITTARANJAN DASH, J.

1. This Criminal Revision is filed challenging the legality, propriety and correctness of the judgment dated 10.11.2004 passed by Spl. C. J. M. (Vig), Bhubaneswar convicting the Appellant Om Baba Nilamani Sahoo in Vig. G. R. Case No. 04 of 1999/Tr. R. No. 26 of 2002 under section 7 and 9 of Essential Commodities Act, 1955 and sentenced to undergo for S.I. for six months for the offence under section 7 and one year for the offence under section 9 of the said Act with fine of ₹5,000/- on each count and in default, to undergo S.I. for three months on each count.

2. The learned standing counsel for the State (Vigilance), Mr. Das reported that the Appellant expired on 21.08.2007 in Bhagbanpur, Khorda and filed the photocopy of the Death Certificate issued by the P.H.C., Khorda which is taken into record.

3. The moot question before this Court is whether upon the death of the sole Appellant, the revision application is to be abated.

4. There is no express provision for abatement of revisions upon the death of the petitioner or for permitting the legal heirs to move ahead with the revision applications, however, reliance can be placed in the decision of the Apex Court in the matter of ***Pranab Kumar Mitra Vs. State of West Bengal and Anr. AIR 1959 SC 144*** wherein it has been held as follows –

> "But in the absence of any such enactment, we may infer that the power of revision vested in the High Court under Chapter XXXII of the Code, was left untouched-to be exercised according to the exigencies of each case. The High Court is not bound to entertain an application in revision, or having entertained one, to order substitution in every case. It is not bound the other way, namely, to treat a pending application in revision as having abated by reason of the fact that there was a composite sentence of imprisonment and fine, as some of the single Judge decisions placed before us, would seem to indicate. The High Court has been left complete discretion to deal with a pending matter on the death of the petitioner in accordance with the requirements of justice. The petitioner in the High Court may have been an accused person who has been convicted and sentenced, or he may have been a complainant who may have been directed under s. 250 of the Code to pay compensation to an accused person upon his discharge or acquittal. Whether it was an accused person or it was a complainant who has moved the High Court in its revisional jurisdiction, if the High Court has issued a Rule, that Rule has to be beard and determined in accordance with law, whether or not the petitioner in the High Court is alive or dead, or whether he is represented in court by a legal practitioner. In hearing and determining cases under s. 439 of the Code, the High Court discharges its statutory function of supervising the administration of justice on the criminal side. Hence, the considerations applying to abatement of an appeal, may not apply to the case of revisional applications…
>
> … On the death of the convicted person, the question of his serving the whole or a portion of his sentence of imprisonment, does not arise. But the sentence of fine still remains to be examined- whether it was well founded in law. This question cannot be effectively gone into unless the order of conviction itself is examined on its merits. If the fact that the fine will have to be paid out of the estate of the deceased appellant or petitioner in revision, is the ground for giving the heir or legal representative a right - to continue the appeal or a privilege of maintaining or continuing a revision, the same principle should entitle him to question the correctness of the conviction itself, for, if the conviction remains, at least some fine, however nominal, will have to be paid by the heir or the legal representative out of the estate of the deceased. In our opinion, therefore, where the High Court thinks it fit and proper to entertain an application in revision or calls for the record suo motu, it has the power to examine the whole question of the correctness, propriety or legality of the sentence of fine, which necessarily involves examining the order of conviction itself from that point of view."

5. In the light of observation made by the Supreme Court, it can very well be perceived that the court can continue with the hearing of the matter in absence of Petitioner or it's legal representatives whose interests are jeopardized directly by the decision. In the opinion of the Supreme Court in the matter of in ***Bondada Gajapathi Rao Vs. State of Andhra Pradesh AIR 1964 SC 1645***, while in a case

otherwise, the ordinary rule that a criminal proceeding against a person comes to an end on his demise, must apply also to special appeals, such as the one before us, even though the provisions of the Criminal Procedure Code may not be directly applicable.

6. Further as held by the High Court of Chhattisgarh in ***Suresh Tiwari Vs. State of Chhattisgarh in*** **Criminal Revision No. 310 of 2003** dated **9th of October**, 2014 wherein they have referred to the principles discussed in ***R. Vs. Rowe*** **[1955] 2 All ER 234**, that held as follows–

> "Counsel, instructed not by the prisoner but by his widow, applies to be allowed to continue this application, but, in the opinion of the court, we cannot allow a widow, or an executor, or an administrator of a deceased person to appeal to this court unless they can show an interest, which must be a legal interest. If a person is sentenced to pay a fine and, having appealed, dies, or even if he dies after or immediately after the fine has been paid, the court would, perhaps, allow his executors or administrators to carry on the appeal or to appeal merely on the ground that, if they can get the conviction quashed, they can save or recover the fine for the benefit of the estate of the deceased which they are bound of administer.....
>
> ....Nobody is affected now by the judgment of the court because the judgment of the court was a sentence of imprisonment and the prisoner has died. If the sentence of the court had been a fine then, as I say, somebody would be affected by the judgment of the court and would have an interest in getting it set aside."

7. In the said judgment, the High Court of Chhattisgarh, also held that –

> "In the case in hand, the deceased applicant convicted under Section 380 of the IPC and has been sentenced to undergo RI for 3 months and fine of Rs.500/-, in default of payment of fine to further undergo SI for one month, therefore, in view of the law laid down by the Supreme Court in Pranab Kumar Mitra (supra) and Bondada Gajapathi Rao (supra) and by the English Court of appeal in Rowe (supra), the legal heirs of the deceased applicant were entitled to prosecute the revision application even though no express provision is made applicable to revision application for abatement of revisions or for permitting the legal heirs to prosecute the revision applications, however, since no application has been made by the legal heirs of the deceased applicant seeking permission to prosecute the revision, the instant revision application is dismissed as abated."

8. In the present matter, the deceased applicant neither has a legal representative nor did the legal heirs move ahead to prosecute the revision application. Hence, this Court is of the view that there is no purpose left in proceeding with the Criminal Revision as the charge against the Appellant has become infructuous. The CRLREV thereby is dismissed as abated.

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2024 (I) ILR-CUT-1465

SIBO SANKAR MISHRA, J.

CRLMC NO. 2660 OF 2023

SMT. E.SWARNALATA @P.SWARNALATA ……Petitioner

-V-

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

INDIAN PENAL CODE, 1860 – Sections 107, 109 r/w Section 13(2)/ 13(1)(e) of Prevention of Corruption Act – Petitioner is the wife of the main accused – She is admittedly a housewife and had no independent income – The only allegation against the petitioner is that there are certain assets in her name – She has been entangled as accused under the aid of Section 109 IPC – Whether mere participation with her husband in purchasing movable or immovable property can *ipso facto* prove guilt of petitioner? – Held, No – It is the natural course that an unemployed wife is always depend upon the will of her employed husband – The principal accused is in a position and capacity to dominate the will of the petitioner.

Case Laws Relied on and Referred to :-

1. (1999) 6 SCC 559 : P. Nallammal & Anr. vrs. State Represented by Inspector of Police.
2. AIR ONLINE 2019 ORI153 & (2019) 2 OLR732 : Smt. Kumudini Padhy vrs. State of Odisha (Vig.)

For Petitioner : Mr. Bishnu Prasad Pradhan

For Opp.Party : Mr. Niranjan Maharana, ASC (Vig)

JUDGMENT Date of Hearing : 13.02.2024 : Date of Judgment: 06.03.2024

S.S. MISHRA, J.

1. The husband of the petitioner being the principal accused and the petitioner are facing prosecution in Disproportionate Assets case arising out of the F.I.R. in Berhampur Vigilance P.S. Case No.45 of 2016 corresponding to GR (V) Case No.33/2016(v) for the offences under Sections-13(2)/13(1)(e) of the Prevention of Corruption Act r/w Section109 IPC pending in the Court of the learned Special Judge, Vigilance, Berhampur. The petitioner is seeking quashing of the criminal proceeding initiated against her under the aid of Section-109 IPC.

2. The petitioner is the wife of the main accused in the said F.I.R. She is admittedly a housewife. The only allegation against the petitioner is that there are certain assets in her name. Therefore, under the aid of Section-109 IPC, she has been made accused and made to suffer the proceeding. The petitioner in the present proceeding is assailing the entire criminal prosecution initiated against her.

3. Mr. Maharana, learned counsel for the opposite party submits that the principal accused had approached this Court by filing of CRLMC No. 687 of 2021

seeking quashing of the entire proceeding against him. After the removal of the properties counted towards his disproportionate assets belongs to his father. The coordinate Bench of this Court quashed the proceeding vide its order dated 01.09.2021 on the ground that after the removal of the assets of the father of the petitioner the disproportionate amount falls less than 100%, the Criminal prosecution initiated against the petitioner is not sustainable. Thereafter, the Vigilance Department approached the Hon'ble Supreme Court by filing SLP (CRL) No. 5244/2022. Vide order dated 13.07.2022 while staying the operation of the impugned order, the Apex Court directed continuance of the investigation and allowed the investigating agency to file the report under Section.173 of Cr.P.C. The investigation was concluded and charge sheet was filed. Thereafter, the matter was finally taken up by the Hon'ble Supreme Court on 03.03.2023. While disposing of the petition following order was passed:-

> *"Leave granted.*
>
> *The impugned judgment dated 01.09.2021 allows the petition under Section 482 of the Code of Criminal Procedure, 1973, filed by the respondent-E Sankar Rao and quashes the proceedings emanating from FIR No. 45 of 2016 dated 11.08.2016 registered at Police Station – Berhampur Vigilance, District Ganjam, Odisha under Section 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988 and Section 109 of the Indian Penal Code, 1860.*
>
> *By order dated 13.07.2022, while issuing notice in the present appeal by special leave, we had stayed the operation of the impugned judgment, clarifying that the investigation will continue, and the appellant would be at liberty to file the charge sheet/closure report before the trial Court.*
>
> *We have examined the reasoning in the impugned judgment, and we are of the opinion that the High Court has conducted a mini trial when the investigation was still pending. The judgment refers to the stand of the respondent with regard to the properties of his father, and examines whether or not a case for disproportionate assets is established. Reference is made to the Vigilance Department's Circular No. 4/2015. According to us, this is not the correct and proper approach to be adopted by the High Court. Normally, the High Court's do not interfere at the stage of the investigation as facts are ascertained and thereupon either the closure report or the charge sheet is filed by the Police.*
>
> *We are informed that charge-sheet has been filed relying on evidence and material collected during investigation.*
>
> *During the course of hearing, our attention was drawn to the Vigilance Department's Circular No. 4/2015, which are guidelines for the registration of cases/open enquiries in petty matters, etc. We make no comments in this regard and it is open to the respondent to raise all these pleas and contentions before the trial court. We clarify that the observations made in this order are for the disposal of the present appeal and would not be considered as findings on the merits of the case.*
>
> *Recording the aforesaid, we allow the present appeal and set aside the impugned judgment dated 01.09.2021.*
>
> *Pending application(s), if any, shall stand disposed of,"*

In view of the aforementioned development Mr. Maharana submits that this is the second attempt being made by the wife of the principal accused for quashing of the proceeding. In view of the order of the Hon'ble Supreme Court no interference is called for.

4. Mr. Pradhan, learned counsel for the petitioner submits that neither this Court nor the Hon'ble Supreme Court had occasioned to deal with the issues raised by the petitioner in the present case. The petitioner being the wife of principal accused has been made an accused under the aid of Section 109 of Indian Penal Code. Therefore, role and overt act attributed to the petitioner by the prosecution needs to be analyzed in the light of the provisions contained in the Sections 107 and 109 of Indian Penal Code. Mr. Pradhan, further submits that even if the allegations are taken at its face value, no case as such is made out against his client under Section-109 IPC. Section-109 IPC reads as under:-

> ***"109. Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment****.—Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.*
>
> *Explanation.—An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment."*

The only ingredient requires attracting offence under Section-109 IPC is the active participation in the abetment of the crime. The abetment is defined under Section-107 IPC which reads as under.

> ***"107. Abetment of a thing****.—A person abets the doing of a thing, who—*
> *First.—Instigates any person to do that thing; or*
> *Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or*
> *Thirdly.—intentionally aids, by any act or illegal omission, the doing of that thing.*
>
> *Explanation 1.—A person who, by willful misrepresentation, by willful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing."*

In the case of ***Sri Sushnta Dasgupta & another vs. Central Bureau of Investigation***, the Hon'ble High Court of Calcutta while defining 'instigation' has held as under:-

> *"The word 'instigate' denotes incitement or urging to do some drastic or inadvisable action or to stimulate or incite. Presence of mens rea, therefore, is necessary to concomitant of instigation.*
>
> *To prove the offence punishable U/s. 109 IPC, there are some ingredients to be proved; they are-*
>
> *The abettor in exercise of his mental process caused the principal accused to commit an offence and the abettor has done it in the following way-*

(i) by way of instigating the principal accused, or
(ii) by way of conspiracy that one or more other person for doing that offence by the principal accused or
(iii) by way of intentionally aiding by act or illegal omission, for doing offence by the principal accused. In the present case the O.P. has not collected any evidence against petitioner that she has any point 6 of time instigate her husband for commission of such offence. On the other hand the peculiar facts and circumstances of this case goes to show that the petitioner is the wife of principal accused.

5. In the light of the above, if the allegations are weighed to elucidate the role of the petitioner to ascertain as to whether she has indeed 'instigated' or 'abetted' her husband to commit the crime, no case as such is made out against the petitioner from the allegation or material placed on record. Usually, it is the natural course that an unemployed wife is always dependent upon the will of her employed husband. The petitioner is within the fiduciary relationship with her husband. The principal accused is in a position and capacity to dominate the will of the petitioner. Thus in the situation the petitioner has no scope to deny the will of her husband to participate in the purchasing of the movable or immovable property. Mere participation with her husband cannot *ipsofacto* prove guilt of the petitioner. From the statement of the petitioner under Section161 Cr.P.C. it reveals that although she owns the assets but she has not claimed that she has independent income and she has also not attempted to justify the acquisition of assets and shelve the Principal accused. In absence of any defense put forth by her by justifying the assets acquired by her and on the face of her plain and simple statement that the properties are purchased by her husband in her name *per se* will not attract the offence of abetment as contemplated under Section 107 IPC. It's only the principal accused who has to explain the source of income from which the property has been acquired, therefore, the onus to prove the known source solely rests on the principal accused.

6. To further analyze the case of prosecution, benefit could be derived from contents of the counter filed by the opposite party in the present case. Para-10 reads as under:

"In reply to the aforesaid contentions, it is humbly submitted by the present deponent (who has concluded the Investigation and submitted Charge Sheet) that no such money receipt regarding sale of gold ornaments and RSDs in respect of sale of lands were available either during search, or in the file as contended by the petitioner, for which the same were not taken into consideration in the income side of the charge sheet. Moreover, the same can be examined during trial. It is further submitted that apart from the immovable properties, there were investments/deposits in banks in the name of the petitioner. The petitioner had been examined and in her statement recorded U/S. 161 of the Cr.P.C., she has stated that "she was a housewife. Her husband had purchased 5 nos. of plot at Rikapali Mouja, one at Ramachandrapur Mouja and one at Ralab Mouja in her name. Her husband had made the deposits in her bank accounts and she made the household expenditure by withdrawing money from that Account." Furthermore, the Departmental Circular cannot supersede the statutory provision. Similarly, the other contentions as raised by the petitioner are hereby refuted and the same cannot be adjudicated at this stage. Hence, there is no abuse of process in continuation of the criminal proceeding."

7. Its also elucidated from the record that the assets in subject are bought and also sold during the check period. However, the said immovable properties are factored into the disproportionate assets of the principal accused. The petitioner is not putting forth any defense, calming that she has independently acquired the assets alleged to have been in her name, the onus is on the main accused to prove the source of the income from which the assets were acquired in the name of his wife. But the prosecution is banking upon the allegation of "Abetment" sans any material to prosecute the petitioner. If the analogy of the prosecution is accepted to sustain the criminal proceeding against the petitioner, then in that event, every member of the family of the principal accused in whose name any movable or immovable property was/is purchased by the principal accused shall be liable to be prosecuted under section 109 IPC.

8. In the case of **P. Nallammal and Another vrs. State Represented by Inspector of Police** reported in **(1999) 6 SCC 559** in Para No.15 the Hon'ble Supreme Court has held that:-

> ***"15.*** *Thus, the two postulates must combine together for crystallization into the offence, namely, possession of property or resources disproportionate to the known sources of income of public servant and the inability of the public servant to account for it. Burden of proof regarding the first limb is on the prosecution whereas the onus is on the public servant to prove the second limb. So it is contended that a nonpublic servant has no role in the trial of the said offence and hence he cannot conceivably be tagged with the public servant for the offence under Section 13(1)(e) of the PC Act."*

Our own High Court while relying upon the Judgment of the Hon'ble Apex court in ***P. Nallammal (supra)*** in ***Smt. Kumudini Padhy vrs. State of Odisha (Vig.)*** reported in **AIR ONLINE 2019 ORL153 & (2019)2 OLR732** has held :-

> *"7. It is not in dispute that in view of the ratio laid down in the case of* ***P. Nallammal - Vrs.- State reported in (1999) 6 Supreme Court Cases 559****, if a non-public servant is also a member of the criminal conspiracy for a public servant to commit any offence under the 1988 Act, or if such non-public servant has abetted any of the offences which the public servant commits, such non-public servant is also liable to be tried along with the public servant before the Court of a Special Judge having jurisdiction in the matter. Merely because some of the disproportionate assets stand in the name of a non-public servant, without any element of abetment, he cannot be asked to face the trial along with the public servant on the ground that he is the kith and kin of the public servant. However, if there are specific materials against such non-public servant being a kith and kin of the public servant to have abetted the public servant in the acquisition of disproportionate assets, he can be prosecuted along with the public servant in the disproportionate assets case which would depend on the facts and circumstances of each case. In the said case, illustrations have been given as to how the offence under section 13(1)(e) of the 1988 Act can be abetted by non-public servants."*

9. Taking into consideration the stand taken by the opposite party in the counter affidavit, the materials available on record, the peculiar facts of the present case, I am of the considered view that the role attributed to the petitioner does not attract the provisions of Section-107 IPC. Therefore, the petition deserves merit.

10. In the foregoing circumstances, the petition is allowed and the criminal prosecution arising out of the F.I.R. in Berhampur Vigilance P.S. Case No.45 of 2016 corresponding to GR(V) Case No.33/2016(v) for the offences under Sections-13(2)/13(1)(e) of the Prevention of Corruption Act r/w Section-109 IPC pending in the Court of the learned Special Judge, Vigilance, Berhampur and the consequential proceeding arising therefrom qua the present petitioner are quashed.

11. Accordingly, the CRLMC is disposed of.

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2024 (I) ILR-CUT-1470

SIBO SANKAR MISHRA, J.

CRLMC NO. 659 OF 2024

ARUNA NAIK ……Petitioner

-V-

STATE OF ODISHA .....Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – Section 482 – The petitioner along with other 16 co-accused were entangled in a P.S case for commission of offence U/ss. 147/148/307/323/324/149 of IPC – The petitioner was an absconder– The learned Trial Court acquitted 15 persons in the year 2003 – The petitioner prays to quash the proceeding against him – Held, it is apparent that the parties have settled their dispute outside the court – Therefore none of the witnesses have supported the prosecution case for which 15 persons had been acquitted – The proceeding pending against the petitioner is quashed subject to payment of fine.

Case Law Relied on and Referred to :-

1. 2012 (10) SCC 303 : Gian Singh vs. State of Punjab and Another.

For Petitioner : Mr. Satya Ranjan Mulia
For Opp.Party : Mr. P.K. Maharaj ASC

JUDGMENT Date of Hearing & Judgment : 21.03.2024

S.S. MISHRA, J.

1. In the present case, the F.I.R. in Angul P.S. Case No.139 of 2000 came to be registered against the petitioner and 16 other accused persons for allegedly having committed the offences under Sections-147/148/307/323/326/149 IPC. Out of 16, 15 persons were apprehended and they were subjected to trial.

2. Learned C.J.M.-cum-Asst. Sessions Judge, Angul vide its detailed judgment dated 15.11.2003 in C.T. (Sessions) Case No.17 of 2003 acquitted 15 persons. The acquittal order is on record. Learned trial Court while evaluating the entire evidence of the prosecution has returned the following finding:

"6. Though to bring home the charges against the accused persons the prosecution has examined 8 P.Ws., practically it has relied on the oral evidence of P.Ws. 1, 2, 3, 5 & 6 and the medical report of the doctor P.W.8, as P.Ws. 4 & 7 are the two independent seizure witnesses. Though all the accused persons are charged U/s. 148 IPC on the allegation that on 18.8.2000 at about 4 P.M. in front of the betel shop of Naresha Naik at village Ghunchapada they had formed an unlawful assembly and had committed rioting being armed with deadly weapons like tangia, sword, gupti etc. and accused Sridhar, Maheswar and Naresha have been charged U/s. 307 IPC on the allegation that they had assaulted Sanjaya and Mangaraj intending to murder them and the rest accused persons are charged U/s. 307 IPC read with Sec. 149 IPC with allegation that they were members of an unlawful assembly in prosecution of the common object of which Sridhar, Maheswar and Ramesha had assaulted Sanjaya and Mangaraj intending to murder them, accused Sardar and Pabitra are charged U/s. 323 IPC for voluntarily caused simple hurt to Sanjaya Naik and accused Maheswar Naik is charged U/s. 326 IPC on the allegation that he had voluntarily caused grievous hurt to Sanjaya Naik, none of the P.Ws. including the informant (P.W.1) and the injured persons (P.Ws. 5 & 6) have whispered a single word about the alleged incident implicating the accused persons. There is no iota of evidence in the testimony of P.Ws. 1, 2, 3, 5 & 6 to show the involvement of the accused persons or any one of them in the alleged incident. Rather the evidence of the informant P.W.1 and the injured persons P.Ws. 5 & 6 reveals that at the relevant time of the occurrence a meeting was being held in the village and "Gandagola" took place among the villagers present in that meeting and in that "Gandagola" somebody had assaulted P.W.6 causing injury on his person while the other injured P.W.5 had sustained injury on his person by coming in contact with the sharp edge of tin plate affixed on the cabin of Naresha Naik. Even P.W.5 has stated that he had not seen the accused persons at the meeting place. So, though the injury report of P.Ws. 5 & 6 given by the doctor P.W.8 shows that P.Ws. 5 & 6 had sustained injuries on their persons, it cannot be said that it was caused due to assault of the accused persons. As P.W.5, one of the injured, has deposed that he has not seen the accused persons at the meeting place it can not be said that the accused 3 persons had formed an unlawful assembly or were members of an unlawful assembly. There is also no evidence to show that Sridhar, Maheswar and Ramesha had assaulted Sanjaya intending to murder them and they had done so in prosecution of the common object of the unlawful assembly. Evidence is also lacking to prove and establish that Shardar Naik and Pabitra Naik had assaulted Sanjaya Naik and had caused simple hurt to him and accused Maheswar Naik had assaulted Sanjaya Naik and he had caused grievous hurt to him. Rather it appears from the cross-examination of the informant P.W.1 that there was free fighting, assault and counter assault between two groups for which a counter-case is also filed against the members of the informant party and the same is subjudiced in the Court of the S.D.J.M., Angul. From the trend of evidence of the P.Ws. available in the record it appears that during the pendency of the case both the groups have settled their dispute amicably between them out of Court and so they are no more interested to proceed with the case pending in the Court and for that reason they are not disclosing the truth before the Court. P.W.1 has also admitted this fact in his cross-examination. As the parties have already entered into a compromise and have already settled their dispute out of the Court and are not willing to disclose the truth before the Court, and as there is no incriminating material in the testimony of any of the P.Ws. against any of the accused persons to prove and establish any of the charges against them, I have no other alternative but to exonerate the accused persons from the charges levelled against them."

3. Eventually, all the accused persons were acquitted from the charges under Sections- 148/149/307/323/326 IPC. The petitioner has been absconding. Therefore, N.B.W. was issued against him. At this belated stage, he has approached this Court for quashing of the criminal prosecution against him relying upon the judgment of the learned Sessions Court acquitting all other accused persons.

4. Learned counsel for the petitioner has relied upon the testimony of the victim being P.Ws. 5 & 6. P.W.5 has stated that he was sitting on a bench near the cabin of one Naresha, when hearing hulla-gulla, he got up from the bench and a sharp edged tin plate affixed on the cabin came in front of him. He could not see the same as a result of which he sustained bleeding injury. P.W.6, who is another injured has stated that when he reached the spot, he saw there was a free fight among the people those who were present there. When he arrived at the spot, somebody dealt with a lathi blow on his right side of his head as a result of which he fell down. The said witness has not identified who has given the lathi blow to him. P.W.6 was declared hostile.

5. Learned Trial Court while recording the acquittal in favour of the co-accused persons has also noted the fact that during pendency of the trial, the parties have settled their dispute outside the Court. Therefore, none of the witnesses have supported the prosecution as a result of which the prosecution has miserably failed to establish the charges against the accused persons.

6. On the basis of the aforementioned finding of the learned Court below, the petitioner is seeking quashing of the entire criminal prosecution against him, inter alia, stating that subjecting him to the rigors of trial would be a futile exercise for two reasons namely, the injured witnesses have not supported the prosecution and secondly, the parties have already settled their dispute outside the Court. Therefore, none of the witnesses are likely to support the prosecution and the prosecution would fail to prove the guilt of the charges against the petitioner. Therefore, he is entitled for acquittal.

7. Mr. Maharaj, learned Addl. Standing Counsel appearing for the State submits that although the submissions made by learned counsel for the petitioner are matters of record, but the fact remains that the petitioner has been an absconder. The acquittal order is recorded way back in the year 2003 whereas the petitioner is now approaching this Court. Therefore, no leniency should be shown to him and he should be subjected to trial.

8. The Hon'ble Supreme Court in the case of ***Gian Singh vs. State of Punjab and another,*** reported in **2012 (10) SCC 303** has observed the following :-

> *"52. The question is with regard to the inherent power of the High Court in quashing the criminal proceedings against an offender who has settled his dispute with the victim of the crime but the crime in which he is allegedly involved is not compoundable under Section 320 of the Code.*

55. In the very nature of its constitution, it is the judicial obligation of the High Court to undo a wrong in course of administration of justice or to prevent continuation of unnecessary judicial process. This is founded on the legal maxim quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest. The full import of which is whenever anything is authorised, and especially if, as a matter of duty, required to be done by law, it is found impossible to do that thing unless something else not authorised in express terms be also done, may also be done, then that something else will be supplied by necessary intendment. Ex debito justitiae is inbuilt in such exercise; the whole idea is to do real, complete and substantial justice for which it exists. The power possessed by the High Court under Section 482 of the Code is of wide amplitude but requires exercise with great caution and circumspection.

58. Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrong doing that seriously endangers and threatens well-being of society and it is not safe to leave the crime- doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without permission of the Court. In respect of serious offences like murder, rape, dacoity, etc; or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between offender and victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to victim and the offender and victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard and fast category can be prescribed.

61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled

the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre- dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, ***High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim.*** *In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."*

9. The present case was registered way back on 18.08.2000. Fifteen accused persons were apprehended and subjected to trial. On 15.11.2003, all the fifteen accused persons have been acquitted. Although, the present petitioner has been an absconder in the present case, but the fact remains the present case is more than two decades old case. In the interregnum, it is apparent that the parties have settled their dispute in the village. Therefore, none of the witnesses have supported the prosecution case. In the present case, the offences were rioting, assault etc. in the village Ghunchapal in the district of Angul. The injured witnesses in the case have also not supported the prosecution case. Therefore, applying the settled ratio of the judgment of the Hon'ble Supreme Court in **Gian Singh** (supra) the proceeding against the petitioner is liable to be quashed.

10. Taking into consideration the peculiar facts of the present case and the law laid down by the Hon'ble Supreme Court in the case of **Gian Singh** (supra), I am of the considered view that the present petition deserves merit. However, due to the deliberate prolongation by the petitioner in approaching the Court, he should be saddled with heavy cost of Rs.5,000/-. Therefore, the charge sheet arising out of the F.I.R. in Angul P.S. Case No.139 of 2000 corresponding to G.R. Case No.542 (A)/2000 pending in the Court of the learned J.M.F.C., Banarpal and the consequential proceeding arising there from qua the petitioner are quashed, subject to the petitioner depositing cost of Rs.5,000/- (Rupees five thousand) to the Orissa High Court Advocates' Welfare Fund.

11. The CRLMC is accordingly disposed of.

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2024 (I) ILR-CUT-1475

A.C. BEHERA, J.

S.A. NO.27 OF 1989

BRAJA PATEL & ANR. ……Appellants

-V-

CHANDRAMANI NAIK ……Respondent

(A) PROPERTY LAW – Suit for declaration of title and permanent injunction – Whether suit for permanent injunction is maintainable in absence of any prayer for recovery of possession? – Held, Yes – When the defendants are not disputing the ownership and possession of the plaintiff over the suit properties, suit for permanent injunction without prayer for recovery of possession is maintainable.

(B) INDIAN EVIDENCE ACT, 1872 – Section 58 – Admission made in the written statement – Effect of – Held, facts admitted by a party need not be proved. (Para 20)

Case Laws Relied on and Referred to :-

1. 2020 (1) CCC 394 (Jhar.) : Miss China Moitra Vrs. Dinanath Moitra & Ors.
2. 2023 (3) CCC 645 (Telengana) : Dantaluri Venkatapathi Raju Vrs. D.Rajeswari Sirisha&Anr.
3. 2006 (II) OLR 458 & 2006 (II) CLR 348 : Tarini Kanta Giri Vrs. Bhajanananda Giri & Ors.
4. 2012 (4) CCC 171 (A.P) : Devarapalli Malla Reddy (died) & Ors. Vrs. Gadiyam Hanumavamma & Ors.
5. 2005 (2) CCC 66 (Bombay) : Mrs. Gocul B Naik (deceased through LRs.) vrs. Sanso Chudu Naik & Anr.
6. AIR 1975 (S.C.) 117 : Biswanath Prasad Vrs. Dwarakanath Prasad.
7. AIR 1977 (S.C.) 1724 : Thiru John Vrs. The Returning Officer & Ors.
8. 2015 (II) CLR (S.C.) 1126 & 2015 (3) CCC 222 (S.C.) : Zarif Ahmad (D) through LRs. & Another Vrs. Mohd. Farooq.
9. 2017 (I) CLR (SC) 256 : Kundan Lal & Anr. Vrs. Kamruddin & Anr.
10. 2021 (1) CCC 155 (S.C) : A. Subramanian & Anr. Vrs. R. Pannerselvam.

For Appellants : Mr. B. Das, on behalf of Mr.N. C. Pati.

For Respondent : None

JUDGMENT Date of Hearing : 04.12.2023 : Date of Judgment : 16.01.2024

A.C. BEHERA, J.

This Second Appeal has been preferred against the reversing judgment.

2. The Appellants of this Second Appeal were the defendants in the suit vide T.S. No.20 of 1977 and they were the Respondents in the First Appeal vide T.A.20/35 of 1984-87.

The Respondent of this Second Appeal was the sole plaintiff in the suit vide T.S. No.20 of 1977 and he was the appellant in the First Appeal vide T.A.20/35 of 1984-87.

The suit of the plaintiff (Respondent in this Second Appeal) was a suit for declaration, confirmation of possession and permanent injunction against the defendants (Appellants in this Second Appeal).

3. The total area of the suit properties is Ac.0.02 decimal i.e. Ac.0.0 ½ decimal out of Ac.1.76 decimals of Plot No.473 and Ac.0.0 ½ decimal out of Ac.1.86 decimal of Plot No.470 under Khata No.8/1 in Mouza Bhaler under the jurisdiction of Balangir P.S. in the district of Balangir, which corresponds to Hal Settlement Plot Nos.764 and 557 under Khata No.49.

4. As per the averments made by the plaintiff in his plaint, the suit properties were originally bhogra lands and through bhogra conversion proceeding, the suit properties vide suit Plot Nos.473 and 470 along with other properties were settled in the name of the father of the plaintiff. After the death of the father of the plaintiff, the suit properties along with other properties left by him devolved upon the plaintiff and his brothers by way of succession and thereafter, the plaintiff and his brothers partitioned the suit plots along with other plots between them in the year 1958-59 and in such partition, the suit properties vide Plot Nos.473 and 470 corresponding to Hal Plot Nos.764 and 557 fell into the share of the plaintiff and thereafter, the plaintiff being the exclusive owner of suit Plot Nos.473 and 470 mutated the same to his name through Revenue Case No.8/23 of 1959-60 and paid rent for the same to the Government in his name and accordingly, the plaintiff is the exclusive owner over the suit plot Nos.473 and 470, which corresponds to Hal plot Nos.764 and 557. As such, the Hal Plot Nos.764 and 557 have been recorded exclusively in the name of the plaintiff under Hal Khata No.49.

The defendants being the neighbours of the plaintiff started digging plinth for construction of their boundary wall and latrine and tried to encroach the suit properties covered under Plot Nos.473 and 470, to which, the plaintiff protested, but the defendants did not respond the same, though, the defendants have no interest at all over any portion of suit Plot Nos.473 and 470 corresponding to Hal Plot Nos.764 and 557. When without having any interest over the suit properties, the defendants tried to construct their boundary wall and latrine on the same, for which, without getting any way, the plaintiff approached the Civil Court by filing the suit vide T.S. No.20 of 1977 against the defendants praying for declaration of his right, title and interest over the suit properties and also for confirmation of his possession on the same and also prayed for injuncting the defendants permanently from interfering into his possession over the suit properties along with other reliefs, to which, he (plaintiff) is entitled for as the Court deems fit and proper.

5. Having been noticed from the Court in T.S. No.20 of 1977 filed by the plaintiff, the defendants contested the same by filing their joint written statement after taking their stands inter alia therein that, they have never taken any step for construction of their boundary wall and latrine over any portion of suit plot Nos.473 and 470 as alleged by the plaintiff. Their specific plea/case was that, they are making

constructions by digging earth on their own land. Even if, it is held that, they (defendants) have constructed their latrine and boundary wall over the suit properties i.e. over the Plot Nos.473 and 470, then, it will be held that, they were in possession of the same since long and they (defendants) have acquired their title over the suit properties by way of adverse possession. They (defendants) are making constructions at the places, on which, they had their old constructions and after demolishing their old constructions, they (defendants) are making their new constructions. So, it cannot be said that, they (defendants) have encroached any portion of suit Plot Nos.473 and 470 i.e. to the suit properties. For which, the suit of the plaintiff is liable to be dismissed against them (defendants).

6. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether 9 (nine) numbers of issues were framed by the Trial Court in T.S. No.20 of 1977 and the said issues are:-

Issues

(i) *Has the plaintiff cause of action?*
(ii) *Is the suit maintainable in the present form?*
(iii) *Is the suit barred by limitation?*
(iv) *Is the suit land suffers from improper identification?*
(v) *Has the plaintiff, right, title, interest and possession over the suit land?*
(vi) *whether the suit land is within the bari of the defendants and if they have acquire, title over the same by adverse possession?*
(vii) *If the raising of compound wall and latrine would cause inconvenience and injury to the health of the family members of the plaintiff?*
(viii) *If the plaintiff is entitled to a permanent injunction restraining the defendants to put compound wall and construct latrine over the land in question?*
(ix) *To what other relief the plaintiff is entitled to?*

7. In order to substantiate the aforesaid reliefs sought for by the plaintiff against the defendants, he (plaintiff) examined altogether three numbers of witnesses from his side including him as P.W.1 and relied upon series of documents on his behalf vide Exts.1 to 7. But, on the contrary, the defendants examined three witnesses on their behalf including defendant No.2 as D.W.1.

8. After conclusion of hearing and on perusal of the materials, documents and evidence available in the Record, the Trial Court answered all the issues against the plaintiff and in favour of the defendants and basing upon the findings and observations made by the Trial Court in the issues against the plaintiff and in favour of the defendants, the Trial Court dismissed the suit of the plaintiff vide T.S. No.20 of 1977 on contest against the defendants vide its judgment and decree dated 23.07.1984 and 31.07.1984 respectively assigning the reasons that, the plaintiff has not been able to establish his title over the suit properties. For which, he (plaintiff) is not entitled for the reliefs sought for by him against the defendants.

9. On being aggrieved with the aforesaid judgment and decree of dismissal of the suit vide T.S. No.20 of 1977 of the plaintiff passed on dated 23.07.1984 and 31.07.1984 respectively by the Trial Court, he (plaintiff) challenged the same by preferring the First Appeal being the Appellant vide T.A.20/35 of 1984-87 against the defendants by arraying them (defendants) as Respondents.

10. After hearing from both the sides, the First Appellate Court allowed the First Appeal preferred by the plaintiff (appellant) vide T.A.20/35 of 1984-87 and set aside the judgment and decree of the dismissal of the suit dated 23.07.1984 and 31.07.1984 respectively passed by the Trial Court in T.S. No.20 of 1977 and decreed the suit of the plaintiff vide T.S. No.20 of 1977 and declared the title of the plaintiff over the suit properties and restrained the defendants from interfering with the possession of the plaintiff over the suit properties vide its judgment and decree dated 19.08.1988 and 07.09.1988 respectively, observing that, he (plaintiff) is the owner of the suit properties and he (plaintiff) is in possession over the same, but the defendants have no interest thereon.

11. On being aggrieved with the aforesaid judgment and decree dated 19.08.1988 and 07.09.1988 respectively passed in T.A.20/35 of 1984-87 against the defendants (those were the respondents in the First Appeal vide T.A.20/35 of 1984-87), they (defendants) challenged the same by preferring this Second Appeal being the Appellants against the plaintiff by arraying him (plaintiff) as Respondent.

12. This Second Appeal was admitted on formulation of the substantial questions of law i.e.:-

> *(i) When the Amin Commissioner's report does not indicate the length and breadth of the encroached land and the area covered at different point and when the Commissioner has measured the land of defendants and when the said Amin Commissioner's report is inconsistent with the plaintiff's case, then whether the First Appellate Court has acted illegally in decreeing the plaintiff's suit basing on such Commissioner's report?*
>
> *(ii) Whether the suit of the plaintiff was maintainable in view of the evidence of P.W.2 and D.Ws. without prayer for recovery of possession?*

13. I have already heard from the learned counsel for the Appellants only, as none participated from the side of the Respondent at the time of hearing of the Appeal.

14. The suit of the plaintiff vide T.S. No.20 of 1977 was a suit for declaration, confirmation of possession and permanent injunction. The total area of the suit properties is Ac.0.02 decimal i.e. Ac.0.01 ½ decimal from sabik Plot No.473 and Ac.0.0 ½ decimal from sabik Plot No.470 under sabik Khata No.8/1. The suit plot Nos.473 and 470 corresponds to Hal Plot Nos.764 and 557 under Khata No.49.

It is the clear and unambiguous case of the plaintiff as per his pleadings and evidence that, the suit properties vide Plot Nos.473 and 470 were originally bhogra lands and as per the bhogra conversion proceeding, the said two plots vide Plot Nos.473 and 470 along with other plots were settled in the name of the father of the

plaintiff. After the death of the father of the plaintiff, the aforesaid two suit plots vide Plot Nos.473 and 470 along with other plots left by his father had devolved upon him (plaintiff) along with his brothers. So, after the death of the father of the plaintiff, he (plaintiff) and his brothers partitioned their all joint properties including the properties covered under suit Plot Nos.473 & 470 and in such partition, the suit Plot Nos.473 and 470 had fallen into his share and on the basis of such partition, the plaintiff became the exclusive owner over the suit Plot Nos.473 and 470. Accordingly, the Hal R.o.R. in respect of the properties covered under sabik suit Plot Nos.473 and 470 has been prepared exclusively in the name of the plaintiff vide Hal Plot Nos.764 and 557 under Khata No.49. As such, he (plaintiff) is the exclusive owner and in possession over the suit properties.

In the pleadings of defendants, they have not at all denied to the ownership of the plaintiff over the suit plot Nos.473 and 470. In that regard, the defendant No.2 as D.W.1 has deposed in paragraph No.6 of his deposition on oath by stating that, "*he has no claim on the Plot Nos.473 and 470 nor did he possess any portion of those plots. The suit properties are the portions/parts of sabik suit plot Nos.473 and 470, those corresponds to Hal Plot Nos.764 and 557*."

In paragraph No.3 of the written statement, they (defendants) have specifically pleaded that, "*they have not dug the plinth of their boundary wall beyond their own area and they have not started construction of their latrine over any portion of Plot Nos.470 and 473 corresponding to Hal Plot Nos.764 and 557 of the current settlement as marked in red ink in the map of the plaint*."

15. As per the above pleadings and evidence of the defendants, their specific case is that, they are not the owners of the suit properties and they have not dug the plinth for construction of their boundary wall and latrine over any portion of the suit plot Nos.764 and 557 i.e. over any portion of the suit properties.

16. When the plaintiff is establishing his ownership and possession over the suit properties on the basis of his family partition and when recording of such partition, the Hal R.o.R. of the suit properties vide Khata No.49 has been prepared in his name and when, the defendants have admitted the ownership of the plaintiff over the suit plots in their above pleadings and evidence, then at this juncture, it cannot be held that, the judgment and decree passed by the First Appellate Court declaring title and possession of the plaintiff over the suit properties is erroneous in any manner.

So far as the decree for permanent injunction passed by the First Appellate Court in favour of the plaintiff and against the defendants reversing the judgment and decree of dismissal of the suit passed by the Trial Court is concerned;

17. It appears from the paragraph No.16 of the judgment of the First Appellate Court that, at the time of filing of the suit vide T.S. No.20 of 1977 by the plaintiff, he (plaintiff) had filed a Misc. Case vide M.J.C. No.25 of 1977 under Order 39 Rule 1 & 2 of the CPC, 1908 praying for a temporary injunction against the defendants in order to restrain the defendants from interfering into his possession over the suit properties till the final disposal of the suit vide T.S. No.20 of 1977.

In that M.J.C. No.25 of 1977, he (plaintiff) had filed a petition under Order 39 Rule 3 of the CPC, 1908 praying for an *ex parte ad interim* injunction in order to restrain the defendants from interfering into his possession over the suit properties till the final disposal of the M.J.C. Case No.25 of 1977 under Order 39 Rule 1 & 2 of the CPC, 1908. That petition of the plaintiff under Order 39 rule 3 of the CPC, 1908 in M.J.C. No.25 of 1977 for an ex parte ad-interim injunction against the defendants was allowed on dated 13.05.1977 and the defendants were restrained from interfering into the possession of the plaintiff over the suit properties till the final disposal of M.J.C. No.25 of 1977 and subsequent thereto, as per the final order passed on dated 21.06.1977 under Order 39 Rule 1 & 2 of the CPC, 1908 in that M.J.C. No.25 of 1977, the defendants were temporary injucted from interfering into the possession of the plaintiff over the suit properties till the final disposal of the suit vide T.S. No.20 of 1977.

18. The above orders dated 13.05.1977 and 21.06.1977 respectively passed in M.J.C. No.25 of 1977 arising out of T.S. No.20 of 1977 by the Trial Court itself are going to show that, as the defendants were trying to interfere into the peaceful possession of the plaintiff over the suit properties during the pendency of the suit, for which, they (defendants) were injuncted temporarily from interfering in the possession of the plaintiff over the suit properties till the final disposal of the suit vide T.S. No.20 of 1977 and as such, when the defendants have not entered into the suit properties and they (defendants) are trying to enter into the same, then at this juncture, the findings and observations made by the First Appellate Court holding about the maintainability of the suit of the plaintiff for declaration of title and permanent injunction against the defendants without any prayer for recovery of possession cannot be held as erroneous or illegal in any manner.

19. Therefore, the suit of the plaintiff was maintainable in the present form without prayer for recovery of possession and likewise when the defendants are not disputing the ownership and possession of the plaintiff over the suit properties covered under sabik Plot Nos.473 and 470 corresponding to Hal Plot Nos.764 and 557, then at this juncture, any defect in the report of the Amin Commissioner cannot bring any adverse impact/affect on the claim of the plaintiff for declaration of his title over the suit properties and permanent injunction against the defendants.

20. The conclusions drawn above in support of the findings and observations of the First Appellate Court on the basis of the above admissions of the defendants to the title and possession of the plaintiff over the suit properties in their pleadings and evidence finds support from the ratios of the following decisions:-

(i) ***2020 (1) CCC 394 (Jhar.)—Miss China Moitra Vrs. Dinanath Moitra and others—Written statement***—Averments made in written statement are admissible as per the evidence act.

(ii) ***2023 (3) Civil Court Cases 645 (Telengana)—Dantaluri Venkatapathi Raju Vrs. D. Rajeswari Sirisha & Anr. — Evidence Act, 1872 — Section 58 — Admission —***

Admission in the pleadings of written statement are admissible under Section 58 of the Evidence Act.

(iii) ***2006 (II) OLR 458 & 2006 (II) CLR 348—Tarini Kanta Giri Vrs. Bhajanananda Giri and others—(Paragraph 3)—Section 58—***Facts admitted by a party need not be proved.

(iv) ***2012 (4) CCC 171 (A.P.)—Devarapalli Malla Reddy (died) & Ors. Vrs. Gadiyam Hanumavamma & Ors.—Section 17, 18 & 58—***There cannot be a better proof then the admission of a fact in issue by the defendant in a suit.

(v) ***2005 (2) CCC 66 (Bombay)—Mrs. Gocul B Naik (deceased through LRs.) vrs. Sanso Chudu Naik & another—Section 58—***Admission was the best evidence which opposite party could rely, though not conclusive, was decisive of the matter, unless successfully withdrawn or proved to be erroneous.

(vi) ***AIR 1975 (S.C.) 117—Biswanath Prasad Vrs. Dwarakanath Prasad & AIR 1977 (S.C.) 1724—Thiru John Vrs. The Returning Officer and others—Sections 17, 18 & 58—***Admission made in the pleading is substantive evidence and any such admission, if clearly and unequivocally made, is the best evidence against the party.

(vii) ***2015 (II) CLR (S.C.)—1126 & 2015 (3) CCC 222 (S.C.) —Zarif Ahmad (D) through LRs. & another Vrs. Mohd. Farooq—Section 38—***Plaintiff establishing his possession over plot No.358 by oral and documentary evidence- Defendants possessing plot No.357—Trial Court decreeing suit only in respect of plot No.358—No illegality.

(viii) ***2017 (I) CLR (SC)—256—Kundan Lal & another Vrs. Kamruddin & another—Sections 34 & 38—***Concurrent findings of fact that the appellant was in possession and allotted different survey number and that he had no right to claim the suit property are proper.

(ix) ***2021 (1) CCC 155 (S.C.)—A. Subramanian & another Vrs. R. Pannerselvam—Suit for injunction—***When the plaintiff has proved his right over property as well as possession over suit property, he is entitled for decree of injunction.

21. When as per the discussions and observations made above, it is held that, the judgment and decree dated 19.08.1988 & 07.09.1988 respectively passed by the First Appellate Court in T.A.20/35 of 1984-87 declaring the title over the plaintiff over the suit properties and restraining the defendants from interfering with the possession of the plaintiff over the suit properties after setting aside the judgment and decree dated 23.07.1984 & 31.07.1984 respectively passed by the Trial Court in T.S. No.20 of 1977 are not erroneous in any manner, then at this juncture, the question of interfering with the same through this Second Appeal filed by the defendants/Appellants does not arise. Therefore, this Second Appeal filed by the Appellants must fail.

22. In the result, the Second Appeal filed by the Appellants is dismissed on merit, but without costs.

The judgment and decree dated 19.08.1988 & 07.09.1988 respectively passed in T.A.20/35 of 1984-87 by the First Appellate Court are confirmed.

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2024 (I) ILR-CUT-1482

A.C. BEHERA, J

S.A. NO. 324 OF 1989

KHEMI BEWA & ORS. ……Appellants

-V-

SAMBHU MOHANTA & ORS. ……Respondents

(A) ADOPTION – Manner of proof of an ancient adoption – Discussed with reference to case laws.

(B) APPRECIATION OF EVIDENCE – Document prepared long before the controversy – Evidentiary value – Explained.

Case Laws Relied on and Referred to :-

1. AIR 1970 (S.C.) page 1286 : L. Debi Prasad (Dead) by L.Rs. vrs. Smt. Triveni Devi & Ors.
2. AIR 1959 (SC) 504 : Kishorilal Vrs. M.T. Chaltibai.
3. 2015 (2) CCC 446 (A.P.) : Maremmanahalli Nariyappa & Ors. Vrs. Kadirempalli Thippaiah & Ors.
4. AIR 1985 Orissa 171 : Sitaram Naik and Puranmal Sonar & Ors.
5. 35 (1969) CLT 1084 : Tarini Sahu Vrs. Bharat Sahu & Ors.
6. 114 (2012) CLT 799 & 2012 (II) CLR 358 : Sanjukta Mallick Vrs. Bharati Sethi
7. AIR 1956 (S.C.) 305 : Harihar Prasad Singh and another Vrs. Deonarain Prasad & Ors.
8. 82 (1996) CLT 44 : Kshitish Chandra Mishra Vrs. Smt. Sara Sahu & Anr.
9. 1989 (I) OLR 94 : Indumati Dibya Vrs. Sashimani Dibya & Ors.
10. AIR 1971 (S.C.) 240 : Ch. Surat Singh (dead) & Ors. Vrs. Manohar Lal & Ors.
11. 2011 (3) Apex Court judgments 0001 (S.C.) & 2011 (4) Supreme-546 : J.S. Yadav Vrs. State of U.P. & Anr.
12. 2012 (2) CCC 36 (Patna) : Bhagyamani Devi & Ors. Vrs. Sheo Kashara Devi & Ors.
13. AIR 2010 (S.C.) 2617 & 2010 (2) Apex Court judgments : The District Collector, Srikakulam & Ors. Vrs. Bagathi Krishna Rao & Anr.
14. AIR 1934 (Madras) 293 : Manapragada Swarnapathi Vrs. Krovvidi Suryaprakasa Rao.
15. AIR 1963 Supreme Court 1019 : Mahendra Lal Jaini Vrs. State of U.P. & Ors.
16. AIR 1965 Supreme Court 271 : Kanakarathanammal Vrs. V.S. Loganatha Mudaliar & Anr.

For Appellants : Mr. M. Mishra, Sr. Adv., Ms.J. Sahoo.

For Respondents: Mr. S. D. Das, Sr. Adv., Mr. M. Faradish

JUDGMENT Date of Hearing : 23.11.2023 : Date of Judgment : 16.01.2024

A.C.BEHERA, J.

This Second Appeal has been preferred by the Appellants against the reversing judgment.

2. The Respondents of this Second Appeal were the plaintiffs in the suit vide T.S. No.34 of 1984-I and they were the respondents in the First Appeal vide T.A. No.10 of 1986-I.

The Appellants of this Second Appeal were the defendants in the suit vide T.S. No.34 of 1984-I and they were the appellants in the First Appeal vide T.A. No.10 of 1986-I.

3. The suit of the plaintiffs (Respondents in this Second Appeal) against the defendants (Appellants in this Second Appeal) was a suit for declaration and permanent injunction.

4. The case of the plaintiffs (those are the Respondents in the Second Appeal) as per the averments made in their plaint in T.S. No.34 of 1984-I was that, the suit properties were acquired by two brothers i.e. Ganesh Mohanta and Manasa Mohanta. The said Ganesh Mohanta and Manasa Mohanta are the sons of Late Mangala Mohanta. They (Ganesh Mohanta and Manasa Mohanta) had acquired the suit properties prior to 1911-12 settlement. During 1911-12 settlement operation, Manasa Mohanta died leaving behind his only son i.e. Gora Mohanta and at the time of death of Manasa Mohanta, Gora Mohanta was minor.

The first son of Mangala Mohanta i.e. Ganesh Mohanta had no son. But, he had five daughters. The wife of Ganesh Mohanta was Sukurmani Mohanta. As Ganesh had no son, for which, Ganesh Mohanta adopted to the son of Manasa Mohanta i.e. Gora Mohanta as his son as per their caste and customs.

The suit properties were recorded in the name of Ganesh Mohanta son of Mangala Mohanta. But, subsequent thereto i.e. after adopting Gora Mohanta as son, Ganesh Mohanta got the suit properties recorded in the name of his adopted son Gora Mohanta in the year 1920-21 as per Mutation Case No.3 of 1920-21. After adopting Gora Mohanta as the son of Ganesh Mohanta, he (Ganesh Mohanta), his wife Sukurmani and his five daughters resided jointly/unitedly. But, prior to 1930-31 settlement operation, Ganesh Mohanta died leaving behind his widow wife Sukurmani, his adopted son Gora Mohanta and his five daughters. Gora Mohanta had married at village Rasantala. As the wife of Gora Mohanta was the only child of her father, for which, Gora being the only son-in-law, he was looking after the properties of his father-in-law.

5. Surprisingly, during 1930-31 settlement operation, Sukurmani (widow wife of Ganesh Mohanta) raised dispute before the Settlement Authorities to record the suit properties in her name exclusively without recording the same in the name of Gora Mohanta. But, after hearing the objection of Sukurmani Mohanta, the Settlement Authorities passed order to record the note of possession of Sukurmani in respect of the suit properties, though the Settlement Authorities had no power to pass such type of order. Even though the note of possession in respect of the suit properties was mentioned in favour of Sukurmani Mohanta, but Gora Mohanta continued his possession over the suit properties as a lawful owner thereof and he (Gora Mohanta) performed the marriages of the five daughters of Ganesh Mohanta, those are called as sisters of Gora Mohanta. But, Gora Mohanta died on dated 18.10.41 leaving behind his two sons, namely, Palhu Mohanta and Bhalu Mohanta. After the death of Gora Mohanta, there was partition of their all joint properties including the suit properties between Palhu Mohanta and Bhalu Mohanta and in such partition, the suit properties fell into the share of Bhalu Mohanta (second son of

Gora Mohanta). The plaintiffs are the wife and daughters of Bhalu Mohanta. After the death of Bhalu Mohanta, the suit properties devolved upon his widow wife and children i.e. upon the plaintiffs by way of succession. So, after the death of Bhalu Mohanta, the plaintiffs possessed the suit properties as the owners of the same. During the last settlement of the year 1975-76, though Parcha was issued in respect of the suit properties only in favour of the plaintiffs, but the names of the defendants were also recorded in the R.o.R. jointly with them.

The defendants are the children of the first daughter of Ganesh Mohanta and Sukurmani Mohanta i.e. Budhuni Bewa. The said defendants have no interest over the suit properties and they have not possessed the suit properties at any point of time. But, the plaintiffs are the owners thereof. The defendant No.1-Sambhu Mohanta is residing at Sukindagarh in the District of Cuttack. So, taking the advantage of the joint recording of the names of the defendants with the plaintiffs in the Hal R.o.R. of the suit properties, surprisingly on dated 28.04.1982, the defendants trespassed into the suit properties. For which, the plaintiffs instituted a complaint case against them vide I.C.C. No.29/84, which was ended in acquittal as per judgment dated 24.08.1984. So, again on 21.03.1983, the defendant Nos.2, 5 & 6 trespassed into the suit properties. For which, the plaintiffs again filed another complaint case vide I.C.C. No.17/83, which is sub judice. As the defendants tried to take away the crops raised by the plaintiffs over the suit properties forcibly, for which, the plaintiffs approached the civil Court by filing the suit vide T.S. No.34 of 1984-I against the defendants praying for declaration of their right, title and interest over the suit properties and to injunct them (defendants) from entering into the suit properties and also to declare that, entry of the names of the defendants Nos.1 and 5 jointly with them (plaintiffs) in the R.o.R. as wrong and illegal.

6. Having been noticed from Court in T.S.No.34 of 1984-I, the defendants filed their joint written statement taking their stands *inter alia* therein that, the suit lands were the self acquired properties of two brothers i.e. Ganesh Mohanta and Manasa Mohanta and the suit properties were recorded jointly in the name of Ganesh Mohanta and Manasa Mohanta in Sabik Settlement.

Gora Mohanta was the only son of Manasa Mohanta. Ganesh Mohanta had no son, but he (Ganesh Mohanta) had five daughters, namely, Budhuni, Sagri, Gangei, Sani and Chetei. Gora Mohanta was never adopted by Ganesh Mohanta. Sukurmani Mohanta was the wife of Ganesh Mohanta. After the death of Ganesh Mohanta, his half share over the suit properties had devolved upon his wife Sukurmani Mohanta. Therefore, the self acquired properties of Ganesh and Manasa i.e. suit proeprties along with their other properties were partitioned between Sukurmani Mohanta and Gora Mohanta and on the basis of such partition, the suit properties had fallen into the share of Sukurmani Mohanta (wife of Ganesh Mohanta). Accordingly, Sukurmani Mohanta was in exclusive possession over the suit properties being the exclusive owner thereof. Since, Ganesh Mohanta and Sukurmani Mohanta had no son, for which, they (Ganesh and Sukurmani) had kept

their eldest daughter i.e. Budhuni Mohanta and her husband in their house in order to look after them and their all properties including the suit properties. The defendant Nos.1 and 5 i.e. Sambhu Mohanta and Bauri Mohanta are the two sons of Budhuni Mohanta. As the suit properties are the ancestral properties of the defendants, which has devolved upon them through their mother Budhuni Mohanta, for which, the plaintiffs have no right, title, interest and possession over the suit properties. They (defendants) are in peaceful possession over the same. For which, the suit of the plaintiffs for declaration and permanent injunction is not maintainable under law for non joinder of necessary parties i.e. to the other four daughters of Ganesh Mohanta and as such the suit of the plaintiffs is also barred by law of limitation. The plaintiffs have no cause of action to file the suit. Therefore, the suit of the plaintiffs is liable to be dismissed with costs.

7. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether six numbers of issues were framed by the Trial Court in T.S. No. 34 of 1984-I and the said issues are:-

Issues

i. Is the suit maintainable in its present form?
ii. Is the suit bad for mis joinder and non-joinder of parties?
iii. Whether Gora Mohanta was the adopted son of Ganesh Mohanta, the husband of Sukurmani Bewa?
iv. Whether the plaintiff No.1 being the wife and plaintiff Nos.2 & 3 being the daughters of Bhalu Mohanta had inherited the suit properties and are in possession thereon?
v. Whether the suit lands fell into the share of Sukurmani Bewa on a partition with Gora Mohanta and the defendants being the descendants of Sukurmani have acquired title over the suit land and are in continuance possession of the same?
vi. To what relief, the plaintiffs are entitled?

8. In order to substantiate the aforesaid reliefs sought for by the plaintiffs against the defendants in T.S. No.34 of 1984-I, they (plaintiffs) examined four witnesses from their side including the plaintiff No.1 as P.W.1 and relied upon series of documents on their behalf vide Exts.1 to 9. But, on the contrary, the defendants examined two witnesses on their behalf including the defendant No.1 as D.W.2 without relying upon any document.

9. After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the Trial Court answered all the issues in favour of the plaintiffs and against the defendants and basing upon the findings and observation made by the Trial Court in the issues, the Trial Court decreed the suit of the plaintiffs on contest against the defendants vide its judgment and decree dated 23.01.1986 and 30.01.1986 respectively assigning the reasons that, Gora Mohanta was the adopted son of Ganesh Mohanta and after the death of Ganesh Mohanta, the suit properties had devolved upon Gora Mohanta and accordingly, the plaintiffs being the successors of Gora Mohanta, they are the owners of the suit properties and they are in possession over the same. For which, the defendants are injuncted permanently from interfering into the possession of the plaintiffs over the same.

10. On being dissatisfied with the aforesaid judgment and decree dated 23.01.1986 and 30.01.1986 respectively passed in T.S. No.34 of 1984-I in favour of the plaintiffs against the defendants by the Trial Court, they (defendants) challenged the same by preferring the First Appeal vide T.A. No.10 of 1986-I being the Appellants against the plaintiffs by arraying them (plaintiffs) as respondents.

11. After hearing from both the sides, the First Appellate Court allowed that First Appeal vide T.A. No.10 of 1986-I preferred by the defendants vide its judgment and decree dated 22.07.1989 and 05.08.1989 respectively and set aside the judgment and decree dated 23.01.1986 and 30.01.1986 respectively passed by the Trial Court in T.S. No.34 of 1984-I and dismissed the suit vide T.S. No.34 of 1984-I of the plaintiffs on contest by assigning the reasons that, the materials, documents and evidence available in the Record are not sufficient to establish that, Gora Mohanta was the adopted son of Ganesh Mohanta. Rather on the basis of the documents, it is established that, Gora Mohanta is the son of Manasa Mohanta and Gora Mohanta was not adopted by Ganesh Mohanta and as such, Gora Mohanta is not the adopted son of Ganesh Mohanta. For which, Gora Mohanta has never succeeded to the properties including the suit properties left by Ganesh Mohanta. But, after the date of Ganesh Mohanta, the properties including the suit properties left by him (Ganesh Mohanta) has devolved upon his widow wife Sukurmani Mohanta and his daughters including the defendants. For which, the suit of the plaintiffs for declaration of their title over the suit properties along with permanent injunction is not maintainable under law. The suit of the plaintiffs is also bad for non joinder of necessary parties i.e. to all the daughters of Ganesh Mohanta and Sukurmani Mohanta.

12. On being aggrieved with the aforesaid judgment and decree passed by the First Appellate Court in T.S. No.34 of 1984-I on dated 22.07.1989 and 05.08.1989 respectively against the plaintiffs and in favour of the defendants dismissing the suit of the plaintiffs, they (plaintiffs) challenged the same preferring this Second Appeal being the Appellants against the defendants by arraying them (defendants) as Respondents.

13. This Second Appeal was admitted on formulation of the following substantial questions of law i.e.:-

> *i. Whether the learned lower Appellate Court has clearly gone wrong by not accepting the entry made in the R.o.R. (Ext.1), which stood in the name of Gora but, he came to the conclusion that, this entry was not sufficient to hold that Gora was the son of Ganesh.*
>
> *ii. Whether the learned lower Appellate Court has erred in law in interpretation of the documents and also has further erred in law by not taking into consideration the application filed by the adoptive father for the purpose of mutation in the name of Gora Mohanta as the said application was conclusive proof of the fact that Gora Mohanta was adopted by Ganesh.*
>
> *iii. Whether learned Appellate Court has failed to appreciate that, adoption in question was ancient and there were materials on record come to a finding that Gora Mohanta was adopted by Ganesh Mohanta.*

14. I have already heard from the learned counsels of both the sides.

15. According to the plaintiffs, as per their pleadings, their predecessor Gora Mohanta was the son of Manasa Mohanta .But, prior to 1920-21 settlement, while, Gora Mohanta was minor after the death of his father Manasa Mohanta, he (Gora Mohanta) was adopted by Ganesh Mohanta (who is the elder brother of Gora's father) as his adopted son, as Ganesh Mohanta had no son, but he had only five daughters, to which, the defendants have seriously disputed/denied. So, according to the plaintiffs, the aforesaid so called adoption of Gora Mohanta by Ganesh Mohanta prior to the year 1920-21 settlement was an ancient adoption. For which, no document was available in support of the same.

16. The modes and manner of proving of an ancient adoption has already been clarified by the Hon'ble Courts in ***2015(2) CCC 446 (A.P.)*** on the basis of the guidelines formulated by the Apex Court in the decision reported in ***AIR 1970 (S.C.) page 1286; L. Debi Prasad (Dead) by L.Rs. vrs. Smt. Triveni Devi and others***. So, the said decision along with others on this aspect is referred hereunder:-

> **(i)** ***AIR 1959 (SC) 504—Kishorilal Vrs. M.T. Chaltibai***—Adoption—Manner of Proof—when adoption results in changing the course of succession depriving wives and daughters of their rights and transferring properties to comparative strangers or more remote relations, it is necessary that, the evidence to support it should be such that, it is free from all suspicions of fraud and so consistent and probable as to leave no occasion for doubting its truth.
>
> The performance of funeral rites will not sustain an adoption unless it clearly appears that, adoption itself was performed under circumstances as would render it perfectly valid.
>
> ***(ii) 2015 (2) CCC 446 (A.P.)—Maremmanahalli Nariyappa and others Vrs. Kadirempalli Thippaiah and others—(Paragraph 24)—***An Adoption—Ancient Adoption—when adoption is ancient, the best evidence is treatment of the adopted boy and adoptive father, as father and son by the friends and relatives etc. and the burden upon the person, who is disputing the adoption, since the positive oral evidence is lacking in most of the ancient adoptions.
>
> ***(iii) AIR 1985 Orissa 171—Sitaram Naik and Puranmal Sonar and others—Ancient adoption—Manner of proof***—No definite formula can be applied as to the number of years to find out whether the adoption is an old adoption or not.
>
> But, where on account of lapse of time, it is not possible to give evidence of persons for proving the ceremony giving and taking, then a party can take recourse to the theory of ancient adoption, provided of course, there has been a sufficient lapse of time between the date of alleged adoption and the date on which, the same is challenged.

So, in view of the principles of law enunciated in the ratio of the above decisions of Hon'ble Courts and Apex Court, when adoption results in changing the course of succession depriving the wives and daughters of their rights and transferring properties to comparative strangers or more remote relations, then at this juncture, it is necessary to see by the Courts that, the evidence to support the adoption must be free from all suspicions of fraud and the same must be so consistent and probable so as to leave no occasion for doubting its truth.

17. Here in this suit at hand, the own documents relied upon by the plaintiffs vide Exts.3, 4 & 5 itself are creating suspicion to their pleadings and evidence regarding the adoption of Gora Mohanta by Ganesh Mohanta depriving the right of succession of the wife and daughters of Ganesh Mohanta. Because, the plaintiff No.1 (P.W.1- wife of Gora Mohanta) has been examined as P.W.1 and she (P.W.1) has deposed in her evidence by stating that, she had heard that, Ganesh Mohanta had adopted Gora Mohanta without stating, from whom, she (P.W.1) had heard the same and without examining anybody on their behalf, who had told about the same to P.W.1. So, the aforesaid evidence of the P.W.1 is inadmissible under law being hit and barred under Section 60 of the Indian Evidence Act, 1872 as hearsay evidence. For which, the said evidence of the P.W. 1 regarding the adoption of Gora Mohanta by Ganesh Mohanta cannot be taken into the zone of consideration being inadmissible evidence.

Ext.3 has been filed and approved on behalf of plaintiffs. Ext.3 is the certified copy of the R.o.R., in which, it has been reflected that, Gora Mohanta is the son of Manasa Mohanta.

Ext.4 is the certified copy of the disputed list during settlement operation in respect of the properties in Mouza Kunjia.

It appears from Ext.4 that, Sukurmani Mohanta wife of Ganesh Mohanta had claimed before the settlement authority to record the suit properties in her name. In that objection case vide Ext.4, Gora Mohanta being the second party member had filed objection stating him as the son of Manasa Mohanta, but not as the adopted son of Ganesh Mohanta.

Ext.5 is the certified copy of the daily register of death in the Police Station of Karanjia during the month of June, 1941 vide serial Nos.31 and 56, wherein the name of Gora Mohanta has been reflected as the son of Manasa Mohanta.

18. When the aforesaid own documents of the plaintiffs vide Exts.3, 4 & 5 (those have been prepared by the public authorities much prior to the filing of the suit vide T.S. No.34 of 1984-I by the plaintiffs and after the death of Ganesh Mohanta) are showing that, Gora Mohanta is the son of Manasa Mohanta and he (Gora Mohanta) is not the son of Ganesh Mohanta, then at this juncture, it cannot be held that, Gora Mohanta is the adopted son of Ganesh Mohanta. Because, the said documents, vide Exts.3, 4 & 5 (those were prepared much before the controversies between the parties i.e. much before the filing of the suit by the plaintiffs) reflecting Gora Mohanta son of Manasa Mohanta have more probative value having considerable importance to decide the matter.

19. On this aspect, the propositions of law has already been clarified in the ratio of the following decisions:-

> ***(i) 35 (1969) CLT 1084—Tarini Sahu Vrs. Bharat Sahu and others—Document prepared long before controversy—Evidentiary value***—Ext.C is the document, which came into existence at a time, when there was no dispute between the parties and as such it is a document of considerable importance to decide the true nature of Ext.3.

(ii) 114 (2012) CLT 799 & 2012 (II) CLR 358—Sanjukta Mallick Vrs. Bharati Sethi—(Paragraph 8)—Document before cause of action and document after cause of action—The Court must give importance to those materials, which came into existence prior to the rising of cause of action.

But, a document, which came into existence after the cause of action arose, then such document should be viewed with suspicion & such documents have far less probative value then the materials, which have came into existence much prior to the time, when the cause of action arose in the case.

(iii) AIR 1956 (S.C.) 305—Harihar Prasad Singh and another Vrs. Deonarain Prasad and others—(Paragraph 5)—When documents are 'ante litem motam', and as some of them are interparties and extend over a considerable period of time, they form cogent and strong evidence that, the lands are private lands.

(iv) 82 (1996) CLT 44—Kshitish Chandra Mishra Vrs. Smt. Sara Sahu & another—(Pargraph-11)—ordinarily, a document which comes into being during the pendency of a litigation is of very little value for the party relying upon such document.

20. When in this suit at hand, the own documents of the plaintiffs vide Exts.3, 4 & 5 having more probative value are showing that, Gora Mohanta is the son of the Manasa Mohanta, but not the adopted son of Ganesh Mohanta, then at this juncture, the findings and observations made by the First Appellate Court placing much reliance on Exts.3, 4 & 5 disregarding the findings and observations of the Trial Court holding that, Gora Mohanta is not the adopted son of Ganesh Mohanta, but he is the son of Manasa Mohanta, are not unreasonable and improper in any manner.

The Trial Court had given its finding in issue No.5 that, the deceased Ganesh Mohanta was a member of the joint and undivided family at the time of his death. For which, the same is technically called as coparcenary. So, his undivided interest in the coparcenary properties i.e. in the suit properties left by Ganesh Mohanta has devolved upon his coparceners by survivorship. For which, the interest of Ganesh Mohanta over the suit properties had devolved only upon Gora Mohanta, to which, the First Appellate Court had negatived by relying upon Articles 34 and 43 of the old Mulla Hindu Law by holding that, as the suit properties were acquired by Ganesh Mohanta and Manasa Mohanta, for which, the suit properties were the self acquired properties of Ganesh Mohanta and Manasa Mohanta, in which, Ganesh Mohanta had half share and Manasa Mohanta had half share. So, after the death of Ganesh Mohanta, his self acquired half share over the suit properties had devolved by way of succession upon his widow wife Sukurmani Mohanta, but not by way of survivorship upon Gora Mohanta.

Now, it will be seen, whether the aforesaid findings and observations made by the First Appellate Court is acceptable under law?

21. It is the own case of the plaintiffs, as per their pleadings that, the suit properties were acquired/purchased by two brothers i.e. Ganesh Mohanta and Manasa Mohanta. Therefore, according to the plaintiffs, the suit properties were the self acquired properties of Ganesh Mohanta and Manasa Mohanta. Because, Ganesh

Mohanta and Manasa Mohanta both had purchased the same through one transaction.

22. The law on that aspect has already been clarified by the Hon'ble Courts in the ratio of the following decision:-

> ***1989 (I) OLR 94—Indumati Dibya Vrs. Sashimani Dibya and others—T.P. Act, 1882—Section 45***—Two persons, who jointly purchased property shall be presumed to have equal share in the same.

So, in view of the above principles of law enunciated by the Hon'ble Courts through the application under Section 45 of the T.P. Act, 1882, it is held that, due to acquisition of the suit properties through one transaction by Ganesh Mohanta and Manasa Mohanta, they (Ganesh Mohanta and Manasa Mohanta) had half share each over the suit properties.

23. As per the Article 34 (2) of the chapter IV of the Mulla Hindu Law (15th Edition) "even if deceased was joint at the time of his death, he might have left self-acquired or separate property. Such property goes to his heirs by succession according to the order given in Article 43 and not to his coparceners"

When in this suit at hand, Ganesh Mohanta had left self acquired suit properties having his half share therein and when, he (Ganesh Mohanta) had expired while he was in joint with Gora Mohanta, for which, as per law, his half share in the suit properties left by him (Ganesh Mohanta) had devolved upon his successors by way of succession according to the order given in Article 43 of the said old Hindu Law, but the same had not devolved upon his coparceners by way of survivorship.

24. According to Article 43 of the old Hindu Law, the half share left by Ganesh Mohanta in the suit properties had devolved upon his widow Sukurmani on the death of Ganesh Mohanta, but the same had never devolved upon Gora Mohanta. Because, Gora Mohanta is the son of his younger brother i.e. Manasa Mohanta.

So, after the death of Sukurmani (wife of Ganesh Mohanta), her interest in the suit properties had devolved upon her five daughters and on the death of her any daughter, the share of her that deceased daughter shall devolve upon her successors, but not upon any of the successors of Gora Mohanta i.e. plaintiffs. For which, the findings and observations made by the First Appellate Court disregarding the observations made by the Trial Court holding that, the suit properties were not the coparcenary properties of Gora Mohanta and the suit properties had not devolved upon by way of survivorship, but the self acquired half share of Ganesh Mohanta in the suit properties had devolved upon his wife Sukurmani Mohanta after the death of Ganesh Mohanta and after the death of Sukurmani, the same had devolved upon her five daughters and after the death of any daughter of Sukurmani, the share of her deceased daughter shall devolve upon the successors of that deceased daughter of Sukurmani, but not upon any of the successors of Gora Mohanta i.e. defendants are not erroneous in any manner.

25. When all the daughters of Sukurmani Mohanta being her successors have definite interest in the suit properties by inheriting the same from Sukurmani after the death of Sukurmani and when the plaintiffs have prayed for declaration of title over the suit properties, for which, the First Appellate Court has rightly held that, the suit of the plaintiffs was not maintainable in absence of the impletion of all the daughters of Sukurmani Mohanta and the successors of the deceased daughters of Sukurmani, as they have definite share/interest in the suit properties and as they are the co-owners of the suit properties. In their absence, the suit of the plaintiffs is not entertainable under law. Because, they are the necessary parties to the suit.

26. On this aspect, the propositions of law has already been clarified in the ratio of the following decisions:-

> ***(i) AIR 1971 (S.C.) 240—Ch. Surat Singh (dead) & others Vrs. Manohar Lal and others***—Specific Relief Act, 1963—Section 34, 38 & 5—Property of a person cannot be dealt with behind his back.
>
> ***(ii) 2011 (3) Apex Court judgments 0001 (S.C.) & 2011 (4) Supreme-546—J.S. Yadav Vrs. State of U.P. & another***—CPC, 1908—Order 1 Rule 9—Necessary Party—Impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, plaintiff may not entitled for the relief sought by him.
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> ***(iii) 2012 (2) CCC 36 (Patna)—Bhagyamani Devi and others Vrs. Sheo Kashara Devi and others***—CPC, 1908—Order 1 Rule 9—If necessary party is not added, the suit is liable to be dismissed on that score alone.
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> ***(iv) AIR 2010 (S.C.) 2617 & 2010 (2) Apex Court judgments—The District Collector, Srikakulam & Ors. Vrs. Bagathi Krishna Rao & Anr.***—CPC, 1908—Order 1 Rule 9 (proviso)—Necessary party—Non-joinder of necessary party is fatal.
>
> ***(v) AIR 1934 (Madras) 293—Manapragada Swarnapathi Vrs. Krovvidi Suryaprakasa Rao***—Specific Relief Act, 1963—Section 34—The Court will refuse relief, if necessary parties are not impleaded.
>
> ***(vi) AIR 1963 Supreme Court 1019—Mahendra Lal Jaini Vrs. State of U.P. and others & AIR 1965 Supreme Court 271—Kanakarathanammal Vrs. V.S. Loganatha Mudaliar and another***—Specific Relief Act, 1973—Section 34 & 5—In a suit for declaration of title and recovery of possession, all co-owners are necessary parties. For non-joinder of necessary parties, such a suit becomes incompetent.

27. As per the discussions and observations made above, when it is held that, all the successors of Sukurmani Mohanta have definite interest over the suit properties and the defendants being some of the successors of Sukurmani Mohanta have their joint interest over the suit properties, then, at this juncture, they (defendants) cannot be injuncted at the instance of the plaintiffs, as they (defendants) are the co-owners of the suit properties.

28. On analysis of the materials, documents and evidence available in the Record as per the discussions and observations made above, when it is held that, the findings and observations made by the First Appellate Court discarding the findings and observations made by the Trial Court in dismissing the suit of the plaintiffs are

not illegal or improper in any manner, then at this juncture, the question of interfering with the same through this Second Appeal filed by the Appellants does not arise. As such there is no merit in the Appeal of the Appellants (plaintiffs), the same must fail.

29. In the result, the Appeal filed by the Appellants is dismissed on contest, but without cost.

The judgment and decree passed by the First Appellate Court in T.A. No.10 of 1986-I setting aside the judgment and decree passed by the Trial Court in T.S. No.34 of 1984-I in dismissing the suit of the plaintiffs (Appellants) vide T.S. No.34 of 1984-I are hereby confirmed.

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2024 (I) ILR-CUT-1492

A.C. BEHERA, J.

SA NO. 42 OF 1989

KAUSALYA SINGH (DEAD) & ORS. ….Appellants

-V-

SRINATH CH. SAHU (DEAD) & ORS. ….Respondents

(A) CODE OF CIVIL PROCEDURE, 1908 – Object & meaning – The code is a law relating to procedures – The procedural law is always intended to facilitate the process of achieving the ends of Justice – The reforms of the courts would normally favour the interpretation, which will achieve the said object. (Para 7)

(B) CODE OF CIVIL PROCEDURE, 1908 – Order 22, Rules 3, 4 & 12 – Whether substitution of legal heirs of the deceased parties, after passing of the preliminary decree and during the pendency of the final decree is mandatory? – Held, Yes – In case of the death of any party during the pendency of final decree, whose interests are likely to be affected by the drawal of the final decree, the substitution of their legal heirs are compulsory and mandatory. (Para 9)

Case Laws Relied on and Referred to :-

1. AIR(32) 1945 (Patna): Raghunandan Sahu and others vs. Badri Pandey and Others.
2. AIR (35) 1948 (Calcutta): Bhuban Chandra Mandal vs. Chhabirani Das
3. 2011 (2) OJR SC 645:Mahadev Govind Gharge & Others Vs. The Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka.
4. 2012 (1) CLT 28 (Himachal Pradesh):Jyoti Prakash Vs. Kamal Kant.
5. AIR 1961 Orissa Page 140:Jagannath Vs. Sudarsan
6. AIR 1962 (Patna) 178:Ramsewak Mishra & Another Vs. Mt. Deorati Kuer & Others
7. AIR 1990 Orissa 36 & 1989 (1) OLR 571:Saria Bewa Vs. Balaram Puhan & Others.
8. 2004 (Supp.) OLR 460:Jitendra Ballav Burdhan Vs. Dhirendranath Burdhan & Others.

For Appellants : Dr. S. Dash
For Respondents : None

JUDGMENT Date of Hearing : 04.01.2024 : Date of Judgment : 09.02.2024

A.C. BEHERA, J.

1. This Second Appeal has been preferred against the confirming judgment.

2. The appellants of this Second Appeal were the defendants before the Trial Court in the suit vide O.S. No.22 of 1966-II and they were the appellants in the First Appeal vide M.A. No.23 of 1984-I.

The respondents of this Second Appeal were the plaintiffs before the Trial Court in the suit vide O.S. No.22 of 1966-II and they were the respondents in the First Appeal vide M.A. No.23 of 1984-I.

3. The suit of the plaintiffs (those are the respondents in this Second Appeal) vide O.S. No.22 of 1966-II before the Trial Court was a suit for passing of a mortgage decree.

4. The factual backgrounds of this Second Appeal as per the materials on record are that, after passing of the preliminary decree in O.S. No.22 of 1966-II by the Trial Court in favour of the plaintiffs and against the defendants, final decree proceeding was continued before the Trial Court in that suit vide O.S. No.22 of 1966-II for making the preliminary decree final.

After passing of the Preliminary decree in O.S. No.22 of 1966-II and during the pendency of final decree proceeding of the suit vide O.S. No.22 of 1966-II (FD) before the Trial Court, the defendant Nos. 3 & 4 expired, but the plaintiffs did not take any step to substitute their LRs and without, substituting the legal heirs (LRs) of the deceased defendant Nos. 3 and 4, they (plaintiffs) proceeded with the final decree proceeding of O.S. No.22 of 1966-II(FD).

So, the Defendant Nos.6, 11, 12 & 14 filed a petition before the Trial Court in that final decree proceeding of O.S. No.22 of 1966-II(FD) praying for dismissal of the final decree proceeding on the ground of abatement of that final decree proceeding as a whole, for non-substitution of the legal heirs of the defendant Nos.3 & 4, as the Preliminary decree was passed in respect of the undivided shares of all the defendants including the deceased defendant Nos.3 & 4. But the Trial Court rejected the said petition of the defendants for dismissal of the final decree proceeding vide O.S. No.22 of 1966-II(FD) on the ground abatement of the same as a whole for non-substitution of the LRs of defendant Nos.3 & 4 as per its order dated 03.08.1982 by assigning the reasons that, substitution of the LRs of defendant Nos.3 and 4 are not necessary due to in-applicability of Rule 4 of Order 22 of the CPC to the final decree proceeding for substitution of the LRs of the deceased defendant Nos.3 & 4, because, they (defendant Nos.3 & 4) have expired after the passing of the preliminary decree of that O.S. No.22 of 1966-II and during the pendency of final decree proceeding thereof.

On being dissatisfied with the above order dtd.03.08.1982 passed in O.S. No.22 of 1966-II (FD) by the Trial Court rejecting the petition of the defendants for dismissal of the final decree proceeding as a whole on the ground of abatement, they (defendants) challenged the same by preferring the 1st appeal vide M.A. No.23 of 1984-I being the appellants against the plaintiffs by arraying them (plaintiffs) as respondents.

The 1st Appellate Court dismissed that 1st Appeal vide M.A. No.23 of 1984-I of the defendants vide its Judgment and Decree dtd.06.09.1988 and 14.09.1988 respectively accepting the findings and observations made by the Trial Court in its order dtd.03.08.1982 passed in O.S. No.22 of 1966-II against the defendants for continuance of the final decree in O.S. No.22 of 1966-II(FD) without substituting the LRs of the deceased defendants 3 and 4 by placing reliance in the ratio of the decisions of the Hon'ble Courts reported in ***AIR(32) 1945(Patna) Raghunandan Sahu and others vs. Badri Pandey and Others and AIR (35) 1948(Calcutta) Bhuban Chandra Mandal vs. Chhabirani Das*** assigning the reasons that, as the defendants Nos. 3 & 4 have expired after passing of the preliminary decree and during the pending of final decree in O.S. No.22 of 1966-II (FD), the provisions of Rule 4 of Order 22 of the CPC are not applicable for substitution of their legal heirs.

5. On being aggrieved with the aforesaid Judgment and Decree of dismissal of the 1st Appeal of the defendants vide M.A. No.23 of 1984-I passed by the 1st Appellate Court on dated 06.09.1988 and 14.09.1988 respectively, they (defendants) challenged the same by preferring this 2nd Appeal being the appellants against the plaintiffs by arraying them (plaintiffs) as respondents.

This 2nd Appeal was admitted on formulation of the following substantial question of law i.e.

> *"Whether the final decree passed by the courts below in the suit vide O.S. No.22 of 1966-II without substituting the LRs of the defendant Nos.3 and 4 and rejecting the petition of the defendants for dismissal of the final decree proceeding on the ground of non-substitution of the LRs of the defendant Nos.3 and 4 vide order dated 03.08.2022 passed by the trial court in O.S. No.22 of 1966-II and confirmation to the same by the 1st Appellate Court in M.A. No.23 of 1984-I is legal, valid and binding?"*

6. I have already heard from the learned counsel for the appellants (defendants) only, as none appeared from the side of the (respondents/plaintiffs).

7. It appears from the materials available in the record including from the order dated 03.08.1982 passed by the trial court in O.S. No.22 of 1966-II that, after passing of the preliminary decree in that suit vide O.S. No.22 of 1966-II and during the pendency of the final decree proceeding thereof before the trial court, the defendant Nos.3 and 4 have expired leaving behind their LRs and their LRs are alive.

Though the defendants filed petition before the trial court in the final decree proceeding vide O.S. No. 22 of 1966-II praying for dismissal of that final decree on

the ground of abatement of that final decree proceeding as a whole for non-substitution of the LRs of defendant Nos.3 and 4 by the plaintiffs, to which, as per order dated 03.08.1982, the trial court rejected assigning the reasons that, where the defendants in a suit like the defendant Nos.3 and 4 expire after passing of the preliminary decree and during the pendency of the final decree, then, in such a situation, the final decree shall not abate for non-substitution of their LRs as per the provisions of law envisaged in Order 22, Rule 12 of the CPC, 1908. Because, the Order 22, Rule 4 of the CPC for substitution of the LRs of the defendants are not applicable to the final decree proceedings.

The 1st Appellate Court accepted to the aforesaid observations made by the trial court vide its Order dated 03.08.1982 in the Judgment and decree of the 1st Appeal vide M.A. No.23 of 1984-I by placing reliance in the ratio of the decisions of the Hon'ble Courts reported in ***AIR (32) 1945 Patna, 380 & AIR (35) 1948 Calcutta 363***.

As per Orissa High Court Amendment to the Rule 12 of Order 22 of the CPC, "*the provisions of Order 22 Rule 4 for substitution of the LRs deceased defendants are not applicable in the final decree proceedings*".

It is the settled propositions of law that, the object/meaning of the Civil Procedure Code is that, the same is a law relating to procedures and the procedural law is always intended to facilitate the process of achieving the ends of justice.

Therefore, the courts would normally favour the interpretation of the CPC, which will achieve its above object.

Rules and procedures are handmaid of justice. Because, rules are enacted not to thwart justice but to ensure that, court is assisted in its search for truth and justice is done to the parties.

On this aspect the propositions of law has already been clarified in the ratio of the following decisions:

> *I)* ***2011 (2) OJR SC 645—Mahadev Govind Gharge & Others Vs. The Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka (Para No.19).***
> *"Civil Procedure Code, 1908—The Code is a law relating to procedure and procedural law is always intended to facilitate the process of achieving the ends of justice—The courts would normally favour the interpretation which will achieve the said object."*
> *II)* ***2012 (1) CLT 28 (Himachal Pradesh)—Jyoti Prakash Vs. Kamal Kant (Para No.12)****.*
> *"Rules of procedure and its object/purpose—"Rules of procedure" are the handmaiden of justice. Rules are enacted not to thwart justice, but to ensure that, the court is assisted in its search for truth and justice is done to the parties."*

8. The law relating to substitution of the LRs of the defendants, when the defendants expire after the preliminary decree and during the pendency of the final decree has already been clarified in the ratio of the following decisions:

*I) **AIR 1961 Orissa Page 140—Jagannath Vs. Sudarsan, AIR 1962 (Patna) 178—Ramsewak Mishra & Another Vs. Mt. Deorati Kuer & Others, AIR 1990 Orissa 36 & 1989 (1) OLR 571—Saria Bewa Vs. Balaram Puhan & Others (Para No.11).***

"CPC, 1908 Order 22 Rule, Rule 3,4,8 and 12—There would be no question of abatement of final decree, since the death of defendant No.2 occurred after the preliminary decree is passed and during the pendency of the final decree proceeding. But his LRs were necessary parties in the final decree proceeding in whose absence the proceeding could not be continued. This situation can be equated with a case where final decree proceeding is initiated and continued without notice to the parties to the proceeding. The only effect of Orissa Amendment to Order 22, Rule 12, CPC is that Rules 3,4 and 8 of the said Order do not apply to the final decree proceeding. But it does not sanction that, the final decree proceeding shall continue without the legal representatives of a deceased party whose interest is likely to be affected by the final decree. The final decree passed in the absence of necessary parties must be held to be a nullity as it dealt with the rights of the parties without notice to them and in their absence."

*II) **2004 (Supp.) OLR 460—Jitendra Ballav Burdhan Vs. Dhirendranath Burdhan & Others (Para No.10).***

"CPC 1908—Order 22, Rule 12—(Orissa High Court Amendment)—Whether provisions of Order 22, Rule 12 for substitution are applicable to a final decree proceeding?—Held, the only effect of Orissa Amendment to Order 22, Rule 12, CPC is that, Rule 3,4 & 8 of the said Order do not apply to the final decree proceeding—But, it does not sanction that, the final decree proceeding shall continue without the Legal representation of a deceased party, whose interest is likely to be affected in the final decree."

By taking into account to the new provisions of law inserted/added into the provisions of Rule 12 of Order 22 of the CPC through Orissa High Court Amendment regarding the in-applicability of Rule 4 of Order 22 of CPC for substitution of the LRs of the deceased defendants on their expiry after the preliminary decree and during the pendency of the final decree has already been clarified by the Hon'ble Courts in the ratio of the aforesaid decisions that, the provisions of law made through Orissa High Court Amendment regarding the inapplicability of Order 22, Rule 3,4 and 8 for substitution of the LRs of the deceased parties (those expire after passing of the preliminary decree and during the pendency of the final decree) does not sanction that, the final decree proceeding shall continue without legal representative of the deceased-party, whose interest is likely to be affected in the final decree.

9. As per the clarifications made above by the Hon'ble Courts in the ratio of the above decision reported in ***2004 (Supp.) OLR 460*** placing reliance upon the ratio of the earlier decision reported in ***AIR 1990 (Orissa) 36*** that, the insertions of the new provisions into Order 22, Rule 12 of the CPC 1908, through Orissa High Court Amendment regarding the in-applicability of Rules-3,4 & 8 of Order 22 of the CPC 1908 to the final decree proceeding shall not debar/preclude the courts from substituting the legal heirs of the parties, whose interests are likely to be affected by the drawal of the final decree, because, the law does not sanction for continuance of

the final decree proceedings without substituting the legal heirs of the deceased parties including the deceased defendants. Therefore, in case of the death of any party during the pendency of final decree, whose interests are likely to be affected by the drawal of the final decree, the substitution of their LRs are compulsory and mandatory.

When, time and again, it is the considered view of our own Hon'ble Courts as per the ratio of the catena of decisions indicated above in Paragraph No.8 of this Judgment that, in case of death of any of the affected parties after preliminary decree and during the pendency of the final decree, the substitution of his/her legal heir is compulsory and mandatory, then at this juncture, the views taken by the trial court and 1st Appellate Court by placing reliance in the ratio of the decision reported in ***AIR (32) 1945 (Patna) 380 and AIR (35) (Calcutta) 363*** that, the final decree shall not abate in spite of non-substitution of the LRs of defendant Nos.3 and 4, as they (defendant Nos.3 & 4) have expired after preliminary decree and during the pendency of final decree, cannot be sustainable/acceptable under law.

10. When, undisputedly the defendant Nos.3 and 4 have expired during the pendency of the final decree proceeding of O.S. No.22 of 1966-II(FD) and when, their LRs are alive and when, the plaintiffs have not taken any step for substitutions of the LRs of the defendant Nos. 3 and 4 during the pendency of the final decree proceeding and when, as per the discussions and observations made above, the substitution of the legal heirs of the defendant Nos.3 and 4 by the plaintiffs was mandatory and compulsory and when, the LRs of the deceased defendant Nos.3 & 4 shall be affected by the drawal of the final decree and when the Trial Court has rejected to the petition of the defendants vide its order dtd.03.08.1982 holding that the final decree shall not abate in spite of non-substitution of the LRs of the deceased defendant Nos. 3 and 4 and when the 1st Appellate Court has confirmed the said order dtd. 03.08.1982 of the trial court vide its judgment and decree passed in M.A. No.23 of 1984-I and when it is held that, the above findings and observations made by the trial court and 1st Appellate Court have become inacceptable under law, then at this juncture, by applying the principles of law enunciated by this Hon'ble Courts in the ratio of the decisions reported in ***AIR 1961 Orissa 140, AIR 1989 (1) OLR 571, AIR 1990 Orissa 36 & 2004 (Supp.) OLR 460***, to the final decree proceeding in O.S. No.22 of 1966-II at hand, it is held that, the order dtd.03.08.1982 passed by the Trial Court in the final decree proceedings of O.S. No.22 of 1966-II(FD) for continuation of that final decree proceeding without abating the same as a whole for non-substitution of the LRs of defendant Nos.3 & 4 and the confirmation to the same by the 1st Appellate court through its judgment and decree passed in M.A. No.23 of 1984-I cannot be sustainable under law. For which, there is justification under law for making interference with the same through this Second Appeal filed by the defendants.

Therefore, there is merit in this 2nd appeal of the appellants (defendants). The same must succeed.

11. In the result, the Second appeal filed by the appellants/defendants is allowed on merit.

12. The order dtd.03.08.1982 passed by the Trial Court in the final decree proceeding of O.S. No.22 of 1966-II and the confirmation to the same by the 1st Appellate Court through its Judgment and Decree dated 06.09.1988 and 14.09.1988 respectively passed in M.A. No.23 of 1984-I are set aside with a clarification that, the final decree proceeding in O.S. No.22 of 1966-II (FD) before the trial court had abated as a whole as per law for non-substitution of the legal heirs of the defendant Nos.3 & 4.

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2024 (I) ILR-CUT-1498

A.C. BEHERA, J.

R.S.A. NO. 226 OF 2003

STATE OF ORISSA & ORS. ……Appellants

-V-

M/S. JAGANNATH TRADERS ……Respondent

CODE OF CIVIL PROCEDURE, 1908 – Section 34 r/w Section 7 of the Essential Commodities Act – Whether the plaintiff is entitled for the amounts claimed by him from the State and its Officers as he is acquitted from charge U/s. 7 of the Act? – Held, Yes – The amount claimed by the plaintiff from the State and its Officers are his just claim, the State and its Officers cannot shield themselves from paying the just claim of the plaintiff on the technical ground, but the rate of interest on the awarded amount is reduced from 12% to 9% per annum.

Case Laws Relied on and Referred to :-

1. 1999(4) Crimes 115 Orissa : Fakira Subudhi vrs. State of Orissa & Anr.
2. AIR 1991 Orissa-197 : State of Orissa vrs. Ramachandra Das.
3. AIR 1977 S.C.-1749 : Smt. Basava Kom Dyamogouda Patil vrs. State of Mysore & Anr.
4. AIR 1954 (Bombay) 50 (Vol.41, C.N.8) : Firm Kaluram Sitaram vrs. The Dominion of India.
5. AIR 1979(S.C.) 1144, (1979) 4 SCC-176 : Madras Port Trust vrs. Hymanshu International by its Proprietor vrs. Venkatadri (dead) by L.Rs.
6. 2017(I) CLR-313 : State of Orissa & Anr. vrs. Sri Dwarika Das Agarwalla.
7. 2022(II) CCC (S.C.)-6 & 2022(II) CLR (S.C.)-101: Sukh Dutt Ratra & Anr. vrs. State of HP.
8. 2022(II) CCC- (Jharkhand)-204 : Sharada Devi vrs. Central Coalfields Limited & Ors.
9. 2023(4) Civil Court Cases -738 (P&H) : Finance Commissioner and Principal Secretary to Government of Haryana & Ors. vrs. Randhir Singh Yadav

For Appellants : Mr. Subhashis Pattnaik, AGA

For Respondent : Mr. Satyabadi Mantry.

JUDGMENT Date of Hearing : 16.01.2024 : Date of Judgment : 29.02.2024

A.C. BEHERA, J.

This 2nd appeal has been preferred against the reversing judgment.

2. The appellants of this 2nd appeal, i.e., State of Orissa and its officers were the defendants before the trial court in the suit vide M.S. No.05 of 1997 and they were the respondents before the 1st appellate court in the first appeal vide M.A. No.02 of 2000.

3. The respondent of this 2nd appeal was the sole plaintiff before the trial court in the suit vide M.S. No.05 of 1997 and he was the appellant before the 1st appellate court in the 1st appeal vide M.A. No.02 of 2000.

4. The suit of the plaintiff (respondent in this 2nd appeal) before the trial court vide M.S. No.05 of 1997 was a money suit against the defendants for realization of sum of Rs.49,449/- with pendente lite and future interest at the rate of 12% per annum along with additional claim at the rate of Rs.500/- per month with interest thereon since October, 1994 till the realization of the same from the defendants.

5. The case of the plaintiff against the defendants as per the averments made in his plaint was that, he (plaintiff) being the sole proprietor of M/s. Jagannath Traders, he was doing the business of grocery items. On 25.11.1988, the plaintiff purchased 100 bags of rice from Sri Gayatri Traders at Berhampur on payment of Rs.32,700/- through proper bills/receipts and dispatched the same to Nuagaon in the district of Phulbani by a truck bearing Registration number ORL-1232 for unloading of the same at Nuagaon in his business godown. As the plaintiff had some works at Berhampur, for which, he (plaintiff) handed over the way-bills to the driver of that truck. During the course of transportation, the plaintiff paid sales tax at Bhanjanagar through the driver of the truck to the tune of Rs.1308/- as per receipt No.11 dated 26.11.1988. On the way, the officers of Regulated Marketing Cooperative Society, Tikabali also collected a sum of Rs.327/- as per receipt No.42 dated 26.11.1988 from the driver of that truck. The loaded truck carrying 100 bags of rice reached at Nuagaon on 26.11.1988. While there was unloading of the rice bags in presence of the driver of the truck, during that time, surprisingly the Assistant Civil Supply Officer, Balliguda (defendant no.3) along with its staffs seized the said truck and 100 bags of rice of the plaintiff and locked to the godown of the plaintiff and also sealed the same. On 18.12.1988, the defendant no.3, i.e., Assistant Civil Supply Officer, Balliguda prepared a seizure list and handed over the seized rice bags in the zima of one Balarama Panigrahi and subsequent thereto submitted a prosecution report under Section 7 of the Essential Commodities Act, 1955 against him (plaintiff) alleging contravention of clause-2(b)(g), clause-3(1), clause-6(a), (b) and (d) and also clause-8 of Orissa Rice and Paddy Control Order, 1965. In addition to the above criminal case under Section 7 of the Essential Commodities Act, 1955 against the plaintiff an another proceeding under clause-6(a) of the Essential Commodities Act, 1955 was also initiated before the District Magistrate-cum-Collector,

Kandhamal vide Confiscation Proceeding No. 02 of 1989 for confiscation of the seized rice bags. As per the final order of the collector, Kandhamal in Confiscation Proceeding No. 02 of 1989, the seized rice bags were sold through public auction by fixing upset price thereof as Rs.200/- per quintal. Accordingly, sale proceeds of the seized rice bags, i.e., Rs.19,606/- were kept under the deposit of Government Treasury.

6. The final order of the confiscation proceeding in Confiscation Proceeding No.02 of 1989 was passed by the Collector, Kandhamal for confiscation of seized rice bags subject to the result/decision of the criminal prosecution under Section 7 of the Essential Commodities Act, in 2(c) CC No.6 of 1990 by the Special Court. But, subsequent thereto, the judgment of the criminal proceeding under Section 7 of the Essential Commodities Act, 1955 in 2(c) CC No.06 of 1990 was pronounced on dated 30.11.1991 by the Special Court, Phulbani, wherein accused/plaintiff (who was the accused in 2(c)CC No.06 of 1990) was acquitted from the charge/offence under Section 7 of the Essential Commodities Act, 1955.

7. After acquittal of the plaintiff from that case vide 2(c) CC No.6 of 1990, the District Civil Supply Officer paid the deposited auctioned money of the rice bags of the plaintiff, i.e., Rs.19,606/- to the plaintiff without challenging the judgment of acquittal passed by the Special Court, Phulbani in 2(c)CC No.06 of 1990 in favour of the plaintiff. It was held/observed by the Special Court, Phulbani in the judgment of 2(c)CC No.06 of 1990 that, the seized rice bags were not the controlled commodities, but the same were purchased by the plaintiff through proper bills and taxes for his business purpose.

8. The plaintiff had brought that 100 bags of rice to his godown at Nuagon by spending of Rs.35,435/- in total, i.e., Rs.32,700/- purchased price of the rice bags plus Rs.1308/- for Sales Tax plus Rs.327/- towards tax paid to the officers of Regulated Marketing Cooperative Society, Tikabali plus Rs.1,000/- towards transportation charges, i.e., in total 35,435/-.

9. As the plaintiff was paid only Rs.19,606/- by the defendant no.2 on dated 05.09.1992 out of his total expenditures of Rs.35,435/- for the same, for which, the plaintiff had the dues of Rs.15,829/- on the defendants to get.

10. After the seizure of the rice bags, when the plaintiff, applied for the renewal of his trade license, but, the defendants did not allow him to renew his license on the ground of pendency of the above criminal case against him vide 2(c)CC No.6 of 1990, for which, he (plaintiff) sustained loss of income at the rate of Rs.500/- per month since December, 1991 till 30.09.1994 being debarred from running his business due to nonrenewal of his trade license. So in order to compensate his all losses suffered by him (plaintiff) for the above illegal and unauthorized acts and activities of the defendants, he(plaintiff) decided to file a suit against the defendants. For which, he (plaintiff) issued statutory notices under Section 80(1) of the C.P.C.,

1908 to the defendants and when after receiving the said notices under Section 80(1) of the C.P.C., 1908, the defendants did not pay any heed to the same, then, the plaintiff approached the civil court by filing the suit vide M.S. No.05 of 1997 against the defendants praying for a direction to the defendants to pay a sum of Rs.49,449/- with pendente lite and future interest thereon at Bank rate and to direct the defendants to compensate his all losses at the rate of Rs.500/- per month along with interest thereon since October, 1994 till realization of the same from the defendants along with other reliefs, to which, he (plaintiff) is entitled for.

11. Having been noticed from the trial court in M.S. No.05 of 1997, the defendants contested the suit of the plaintiff by filing their written statement jointly after taking their stands inter alia therein that, they (defendants) are not liable to pay anything to the plaintiff. Their specific plea/case was that, since the Collector, Phulbani passed final order in the confiscation proceeding vide Confiscation Proceeding No.02 of 1989 under Section 6 of the Essential Commodities Act, 1955 for the sale of the seized rice through public auction by fixing upset price, i.e., Rs.200/- per quintal of the seized rice as per the Government rate with the knowledge of the plaintiff, for which, the plaintiff is not entitled for any more amount than the deposited sale proceeds of the rice, i.e.,19,606/-. They (defendants) are not at all liable to pay anything towards the loss of income of the plaintiff for non-renewal of his license, because, his license was not renewed only for the fault and mistake of the plaintiff. That apart, the suit of the plaintiff is not maintainable due to lack of cause of action and so also due to non-restoration of his previous suit, which was dismissed for non-compliance of the office order of the court. The suit of the plaintiff is barred by limitation. Because, according to the plaintiff, the cause of action for filing of the suit had arisen on dated 05.09.1992, when Rs.19,606/- was paid to him by the defendants, but the suit has been filed by him (plaintiff) much after three years since 05.09.1992. For which, the suit of the plaintiff is not maintainable under law. Therefore, the suit of the plaintiff is liable to be dismissed with cost against the defendants.

12. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether six numbers of issues were framed by the trial court in the suit vide M.S. No.05 of 1997 and the said issues are:-

ISSUES

1. Whether the suit is maintainable?

2. Whether the suit is barred by time?

3. Whether the plaintiff is entitled to get the claimed amount along with the interest @ 18%?

4. Whether the plaintiff had the valid documents for transporting rice from one place to another?

5. Whether the defendant No.2 had sold the rice as per the price fixed by the Government?

6. Whether the plaintiff is entitled to get the relief(s) as claimed for?

13. In order to substantiate the aforesaid reliefs sought for by the plaintiff against the defendants, he (plaintiff) examined him alone as P.W.1 and relied upon series of documents on his behalf vide Exts.1 to 11.

14. On the contrary, in order to defeat/nullify the suit of the plaintiff, the defendants examined two witnesses from their side, i.e., the Marketing Inspector of Orissa Civil Supply Cooperation, Ltd. and Assistant Civil Supply Officer, Balliguda as D.Ws.1 and 2 and they(defendants) exhibited five documents on their behalf vide Exts.A to E.

15. After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the trial court answered all the issues in the suit vide M.S. No.05 of 1997 against the plaintiff and in favour of the defendants assigning the reasons that, the suit of the plaintiff is barred by limitation, because, he (plaintiff) has filed the suit three years after rising of the cause of action since 05.09.1992, for which, the plaintiff has no cause of action to file the suit against the defendants. Therefore, the plaintiff is not entitled for the amount claimed by him in his plaint against the defendants. Basing upon the findings and observations made by the trial court in M.S. No.05 of 1997 in all the issues against the plaintiff and in favour of the defendants, the trial court dismissed the suit vide M.S. No.05 of 1997 of the plaintiff on contest against the defendants without cost as per its judgment and decree dated 23.12.1999 and 07.01.2000 respectively.

16. On being aggrieved with the aforesaid judgment and decree of the dismissal of the suit of the plaintiff vide M.S. No.05 of 1997 passed by the trial court on 23.12.1999 and 07.01.2000 respectively, he (plaintiff) challenged the same by preferring the 1st appeal vide M.A. No.02 of 2000 being the appellant against the defendants by arraying the defendants as respondents.

17. After hearing from both the sides, the 1st appellate court allowed that 1st appeal vide M.A. No.02 of 2000 of the plaintiff against the defendants (respondents) on contest as per its judgment and decree dated 06.12.2001 and 21.12.2001 respectively and set aside the judgment and decree of the dismissal of the suit of the plaintiff vide M.S. No.05 of 1997 passed by the trial court and directed the defendants to pay a sum of Rs.49,449/- with pendente lite and future interest at the rate of 12% per annum thereon from the date of filing of the suit till the date of realization of the same with a further direction to the defendants to pay the said amount within a period of three months, failing which, the appellant/plaintiff is at liberty to realize the same assigning the reasons that, as the learned Special Court in its judgment dated 30.11.1991passed in 2(c)CC No.06 of 1990 held that, the plaintiff is a licensed dealer to carry-on the rice business and other articles and as, he(plaintiff) had purchased the seized rice bags through valid documents, i.e., bills/receipts, for which, the seizure of the rice bags of the plaintiff by the Assistant

Civil Supply Officer was not legal. Therefore, the plaintiff has not violated any of the provisions of Orissa Rice Paddy Control Order, 1965. So, after acquittal of the plaintiff from the criminal charge under Section 7 of the Essential Commodities Act, 1955 as per judgment vide Ext.1, he (plaintiff) is entitled to compensate his all losses from the defendants.

18. On being aggrieved with the aforesaid judgment and decree dated 06.12.2001 and 21.12.2001 respectively passed by the 1st appellate court in M.A. No.02 of 2000 in favour of the plaintiff and against the defendants for realization of the aforesaid amount, i.e., Rs.49,449/- with pendite lite and future interest thereon, they(defendants) challenged the same by preferring this 2nd appeal being the appellants against the plaintiff by arraying him (plaintiff) as respondent.

19. This 2nd appeal was admitted on formulation of the following substantial question of law:-

> (i) Whether the 1st appellate court in its judgment and decree passed in M.A. No.02 of 2000 is justified in reversing the judgment and decree of the trial court passed against the plaintiff in T.S. No.05 of 1997 without discussing the correctness of the dismissal of the suit on the point of limitation and maintainability, which the trial court had arrived after a detailed discussion on the point of law as well as the fact involved in the suit vide M.S. No.05 of 1997?

20. I have already heard from the learned Additional Government Advocate for the appellants (defendants) and the leaned counsel for the respondent (plaintiff).

21. It is the undisputed case of the parties that, at the time of unloading of 100 bags of rice of the plaintiff from the truck bearing Registration number ORL-1232 in his godown at Nuagaon on dated 26.11.1988, the said Truck along with 100 bags of rice of the plaintiff were seized by the defendant no.3- Assistant Civil Supply Officer, Balliguda and on the basis of the said seizure, two proceedings were initiated against the plaintiff, i.e., a confiscation proceeding vide Confiscation Proceeding No.02 of 1989 under Section 6 of the Essential Commodities Act, 1955 before the District Magistrate-cum-Collector, Kankhamal and as well as a criminal case vide 2(c) CC No.06 of 1990 under Section 7 of the Essential Commodities Act, 1955 before the Special Court, Phulbani alleging the allegations against him (plaintiff) about the illegal transportation of the said 100 bags of rice by him (plaintiff) violating clauses-2(b)(g), clause-2(b), clause-6(a)(b) and (d) as well as clause-8 of the Orissa Rice and Paddy Control Orders, 1965.

22. The final order in the Confiscation Proceeding No.02 of 1989 under Section 6 of the Essential Commodities Act, 1955 was passed by the Collector, Kandhamal as per Ext.3 for confiscation of all the seized rice bags of the plaintiff subject to the result of the decision of the criminal case vide 2(c) CC No.06 of 1990, which was pending against the plaintiff before the Special Court, Phulbani under Section 7 of the Essential Commodities Act, 1955.

23. Accordingly on the basis of the final order passed in the confiscation proceeding by the Collector, Kandhamal, as per Ext.3, all the seized rice bags were sold through public auction by fixing upset price as Rs.200/- per quintal. After selling the rice bags, the sale proceeds thereof, i.e., Rs.19,606/- were deposited in the Government Treasury. But, after acquittal of the plaintiff from the criminal case vide 2(c) CC No.06 of 1990 as per Ext.1, the deposited sale proceeds of the rice bags, i.e., Rs.19,606/- were paid to the plaintiff on 05.09.1992.

24. After receiving the said amount, i.e., 19,906/- from the defendants, the plaintiff claimed more amount from the defendants towards his unpaid expenditures and losses to which, he had suffered for the illegal and unauthorized seizure of his rice bags by the defendants.

25. When, as per the undisputed document vide Ext.3, the Collector, Kandhamal had passed final order in the confiscation proceeding vide Confiscation Proceeding No.02 of 1989 for confiscation of the seized rice bags subject to the disposal of the sale proceeds thereof as per the findings of the judgment in 2(c) CC No.6 of 1990 by the Special Court, and when, in the judgment of the special Court passed in 2(c) CC No.6 of 1990 vide Ext.1, it has been specifically observed by the Special Court in para no.7 of that judgment that, "the seized rice bags were purchased by the accused (plaintiff) through proper bills from Sri Gayatri Traders, Berhampur (wholesaler of rice), for which, the said seized rice bags belong to the accused (plaintiff) and when the bills/receipts filed and proved by the plaintiff are going to show that, he (plaintiff) had purchased 100 bags of rice on payment of Rs.32,700/- and he has paid Rs.1308/- towards sales tax and Rs.327/- towards tax to the Regulated Marketing Cooperative Society, Tikabali and he has also incurred expenditures of Rs.1,000/- for unloading of rice bags, then at this juncture, it cannot be at all held that, the plaintiff is not entitled for the differential amount, i.e., Rs.15,829/- after deduction of Rs.19,606/- from Rs.35,435/- along with his other losses suffered by him for the aforesaid illegal and unauthorized seizure of his rice bags by the defendants.

26. On this aspect, the propositions of law has already been clarified by the Hon'ble Courts and the Apex Court in the ratio of the following decisions:-

> (i) ***1999(4) Crimes 115 Orissa : Fakira Subudhi vrs. State of Orissa and another***—After acquittal of offence under Essential Commodities Act, the accused is entitled to get return the seized articles and if articles cannot be returned as spoiled or lost in the meantime, State can be directed to pay money value of articles.
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> (ii) ***AIR 1991 Orissa-197 : State of Orissa vrs. Ramachandra Das***—Goods seized during criminal proceeding—Proceedings ending in acquittal—Court passing order to return seized goods to owner—Goods not returned, having alleged to be misappropriated—State liable to reimburse cost of goods—It cannot claim immunity on basis of sovereign act.

(iii) ***AIR 1977 S.C.-1749 : Smt. Basava Kom Dyamogouda Patil vrs. State of Mysore and another***— Property lost or destroyed during pendency of trial—Court has power to order payment of value of property.

27. During the course of argument, the learned Additional Government Advocate for the State raised a ground about the non maintainability of the present suit vide M.S. No.05 of 1997 as per Order- 9, Rule-9 of the C.P.C., 1908 due to non restoration of the earlier suit filed by the plaintiff against the defendants, which was dismissed for non-compliance of the office order of the court.

28. It is very much clear from the provisions of law envisaged in Rule-8 and Rule-9 of Order-9 of the C.P.C. that, "where a suit is wholly or partly dismissed only under Rule-8, in that situation the plaintiff shall be precluded under law for bringing a fresh/new suit in respect of the same cause of action between the parties without restoring the dismissal suit by setting aside the dismissal order of the earlier/ previous suit."

29. Rule-8 of Order-9 of the C.P.C., 1908 applies, only when, the plaintiff does not appear, when the suit is called on for hearing, which means, if the earlier suit will have been dismissed at the stage of hearing as per Rule-8 of Order-9 of the C.P.C. then only the provisions envisaged under Order-9 of Rule-9 of the C.P.C. shall be made applicable for the bar of a second suit.

30. Here in this suit at hand, when the defendants have specifically stated in their written statements that, the previous suit between the parties was dismissed without coming to the hearing stage only for noncompliance of the office order, then, Order-9, Rule-9 of the C.P.C.,1908 shall not be a bar for the present suit. For which, the provisions of Order- 9, Rule-9 of the C.P.C. for making the suit at hand not maintainable have become inapplicable.

31. Here, in this suit at hand, the defendants are non-else, but, they (defendants) are the State and its officers.

32. As per the discussions and observations made above, the plaintiff is lawfully entitled for the amounts claimed by him from the State and its officers due to his acquittal from charge/offence under Section 7 of the Essential Commodities Act, 1955 in the criminal case vide 2(c) CC No.06 of 1990 as per Ext.1, because it has been held/observed by the Special Court in the judgment of 2(c) CC No.06 of 1990 that, the seized rice bags belong to the plaintiff and he (plaintiff) had lawfully purchased the said rice bags through valid documents/receipts/bills for his business purpose being a duly licensed person for rice business and the defendants were not authorized under law to seize the rice bags of the plaintiff, as he(plaintiff) had not violated any of the provisions of Orissa Rice and Paddy Control Orders, 1965.

33. The duties and obligations of the State in respect of the just claims of its citizens like this suit at hand filed by the plaintiff has already been clarified the Hon'ble Courts and Apex Court in the ratio of the following decisions:-

(i) AIR 1954 (Bombay) 50 (Vol.41, C.N.8) : Firm Kaluram Sitaram vrs. The Dominion of India—(d) Practice—State and citizen—Technical pleas—When State deals with a citizen, it should not ordinarily rely on technicalities, and if the State is satisfied that, the case of the citizen is a just one, even though legal defences may be open to it, it must act, as an honest person.(para-12)

(ii) AIR 1979(S.C.) 1144, (1979) 4 SCC-176 : Madras Port Trust vrs. Hymanshu International by its Proprietor vrs. Venkatadri(dead) by L.Rs.—It is high time that, Government and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating the legitimate claim of citizens and do what is fair and just to the citizens.

(iii) 2017(I) CLR-313 : State of Orissa and another vrs. Sri Dwarika Das Agarwalla—When State deals with a citizen, it should not ordinarily rely on technicalities—If State is satisfied that, the case of the citizens is a just one, even though legal defences may be open to it, it must act as an honest person. Because, State is a virtuous litigant.

(iv) 2022(II) CCC (S.C.)-6 & 2022(II) CLR (S.C.)-101: Sukh Dutt Ratra & Anr. vrs. State of Himachal Pradesh—State cannot shield itself behind ground of delay and latches—In such a situation, there cannot be a limitation to doing justice.

(v) 2022(II) CCC- (Jharkhand)-204 : Sharada Devi vrs. Central Coalfields Limited and Ors.—On technical grounds State should not deny to its citizens just dues.

34. As per the discussions and the observations made above, when it is held that, the amount claimed by the plaintiff from the defendants, i.e., from the State and its officers are his just claim, then at this juncture, by applying the principles of law, enunciated by the Hon'ble Courts and Apex Courts in the ratio of the decisions referred to supra, the defendants (State and its officers) cannot and shall not shield themselves from payment of the just claims of the plaintiff on the ground of delay in approaching the court by the plaintiff.

35. Because, the State and its officers, i.e., the defendants being virtuous litigants as per law, they should not ordinarily deal with their citizens like the plaintiff to debar him (plaintiff) from getting his legitimate dues by relying on the technicalities, i.e., on the ground of limitation and others.

36. When it is held above that, the amount awarded by the 1st appellate court in favour of the plaintiff, i.e., Rs.49,449/- as per its judgment and decree passed in M.A. No.02 of 2000 are not unjust and improper and when the defendants being the State and its officers are precluded under law from denying the just and proper claims of its citizens like plaintiff, then at this juncture, the question of interfering with the judgment and decree passed by the 1st appellate court in M.A. No.02 of 2000 in favour of the plaintiff and against the defendants through this 2nd appeal filed by the defendants does not arise.

37. So far as the payment of interest on the awarded amount of Rs.49,449/- at the rate of 12% interest per annum as directed by the 1st appellate court in its judgment and decree passed in M.A. No.02 of 2000 on the ground of delayed payment is concerned.

38. The law on that aspect has already been clarified by the Hon'ble Courts in the ratio of the following decision:-

> ***2023(4) Civil Court Cases -738 (P&H) : Finance Commissioner and Principal Secretary to Government of Haryana and Ors. vrs. Randhir Singh Yadav-CPC, 1908 Section 34—interest—Delayed payments—Grant of interest in case of money decree***—Only Bank rate of interest being given by the Nationalized Bank can be granted. Grant of interest at the rate of 18% per annum, reduced to 9% per annum.

39. So, by applying the principles of law enunciated in the ratio of the aforesaid decision, the grant of interest by the 1st Appellate Court on the awarded amount of Rs.49,449/- at the rate of 12% per annum from the date of filing of the suit, till the date of realization is reduced from 12% to 9% per annum by applying the principles of law enunciated by the Hon'ble Court in the ratio of the decisions reported in ***2023(4) Civil Court Cases-738 (P&H)***.

40. On analysis of the facts and law concerning the suit/appeals at hand as per the discussions and observations made above, though there is no justification under law for making interference with the awarded amount passed by the 1st appellate court in its judgment and decree passed in M.A. No.02 of 2000 but, there is justification under law for making interference with directed rate of interest to be paid by the defendants (appellant) to the respondent(plaintiff) on the awarded amount of Rs.49,445/- as directed by the 1st appellate court by applying the principles of law enunciated in the ratio of the above decision reported in ***2023(4) Civil Court Cases-738 (P&H)***.

41. So, for meeting the ends of justice and by applying the ratio of the above decision of the Hon'ble Courts reported in ***2023(4) Civil Court Cases-738(P&H)*** the rate of interest awarded by the 1st appellate court in favour of the plaintiff on the decretal amount is reduced from 12% to 9% per annum. For which, the appeal filed by the appellants (defendants) shall succeed in part, but not in full.

42. In the result, the appeal filed by the appellants is allowed in part on contest, but, without cost.

43. The judgment and decree dated 06.12.2001 and 21.12.2001 respectively passed by the 1st appellate court in M.A. No.02 of 2000 in respect of the amounts awarded in favour of the plaintiff and against the defendants are confirmed, but directed the rate of interest to be paid by the defendants to the plaintiff on the awarded amount in the same judgment and decree of the 1st appellate court in M.A. No.02 of 2000 is reduced from 12% to 9% per annum.

44. Therefore, the suit be end and the same filed by the plaintiff vide M.S. No.05 of 1997 is decreed in part on contest against the defendants but, without cost.

45. The respondents are directed to pay a sum of Rs.49,449/- with pendente lite and future interest thereon at the rate of 9% per annum to the plaintiff from the date of filing of the suit till the date of realization within a period of three months hence, failing which, the plaintiff is at liberty to realize the said amount from the defendants through due process as per law.

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